IR GLOBAL | ACC Association of Corporate Counsel

The Art of Deal Making: Using External Expertise Effectively

IR Global members collaborate with the Association of Corporate Counsel (ACC) to offer jurisdiction-specific advice on using external expertise effectively. In the following pages, you will hear from professionals in the legal, accountancy and financial sectors who are key to ensuring that an M&A deal is successful providing all parties seek the right advice.

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IR Global – The Future of Professional Services

IR Global was founded in 2010 and has since grown to become the largest practice area exclusive network of advisors in the world. This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, featured in Legal 500 and in publications such as The Financial Times, Lawyer 360 and Practical Law, among many others.

The group's founding philosophy is based on bringing the best of the advisory community into a sharing economy; a system that is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

Multi-Disciplinary
We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

Niche Expertise
In today's marketplace, both local knowledge and specific practice area/sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

Vetting Process
Criteria is based on both quality of the firm and the character of the individuals within. It's key that all of our members share a common vision towards mutual success.

Personal Contact
The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

Co-Operative Leadership
In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups that focus on network development, quality controls and increasing client value.

Ethical Approach
It is our responsibility to utilise our business network and influence to instigate positive social change. IR Global founded Sinchi, a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities/tribes around the world.

Strategic Partners
Strength comes via our extended network. If we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR Global or someone else.

For further information, please contact:

Rachel Finch

Business Development Strategist

rachel@irglobal.com

FOREWORD BY EDITOR, ANDREW CHILVERS

The Art of Deal Making: Using an M&A strategy to power business growth

For ambitious companies eager to expand into overseas markets, often the conventional route of organic business development is simply not fast enough. The other option to invest in or buy a business outright is far quicker but often fraught with unforeseen dangers. And even the biggest, most experienced players can get it badly wrong if they go into an M&A with their eyes wide shut.

If you search for good and bad M&As online the Daimler-Benz merger/acquisition with Chrysler back in 1998 is generally at the top of most search engines on how NOT to undertake a big international merger. Despite carrying out all the necessary financial and legal measures to ensure a relatively smooth deal, the merger quickly unravelled because of cultural and organisational differences. Something that neither side had foreseen when both parties had first sat down at the negotiating table.

These days the failed merger of the two car manufacturers is held up as a classic example of the failure of two distinctly different corporate cultures. Daimler-Benz was typically German; reliably conservative, efficient, and safe, while Chrysler was typically American; known to be daring, diverse and creative. Daimler-Benz was hierarchical and authoritarian with a distinct chain of command, while Chrysler was egalitarian and advocated a dynamic team approach. One company put its value in tradition and quality, while the other with innovative designs and competitive pricing.

Indeed, when you cast your eye over the two companies its mind boggling that either car maker could ever have seriously considered an M&A. Neither sets of managers trusted each other and as the two sides started on the long road of organisational integration, key employees resigned, particularly at Chrysler after Daimler started to dictate working processes. What was the cost? An estimated $38 billion.

Unbelievably, the failure rate of M&As – domestic and international – is estimated to be about 70% or more, according to the Harvard Business Review report. This remarkably high number would have most companies probably concluding that organic business development was the better option for growth after all. No organisation would knowingly want to spend so much time and effort simply to fail – and fail badly.

It's worth noting that integrating two companies, along with their staff, distinct corporate and national cultures, IT infrastructure, and financial and legal regulations is something that needs meticulous planning. Without a clear strategy from the very start of the merger process, it's probably doomed to failure. There needs to be transparency between stakeholder groups and both parties need to have the soundest financial and legal advice from professionals who have deep understanding of national and international M&As.

But before everyone shuts up shop and admits their merger blueprint is destined for the waste paper bin, it's worth looking at this in a little more detail. Above all, be positive.

The majority of M&A failures are publicly traded deals, where losses are eye watering and journalists are eager for a good story. Again, any search on Google will highlight countless high-profile merger failures, but it's far more difficult to unearth the thousands of smaller and mid-market privately run businesses that undertake successful deals, which largely go unreported. These smaller, strategic acquisitions tend to have far greater long-term success.

M&As at the smaller end of the market are never going to be risk free, but they're often a successful tool for powering growth for a business within and across borders. All business initiatives involve risks to reap rewards, but careful planning and using the right professionals for the right part of the transaction will help to minimise risk and ensure the deal is a success.

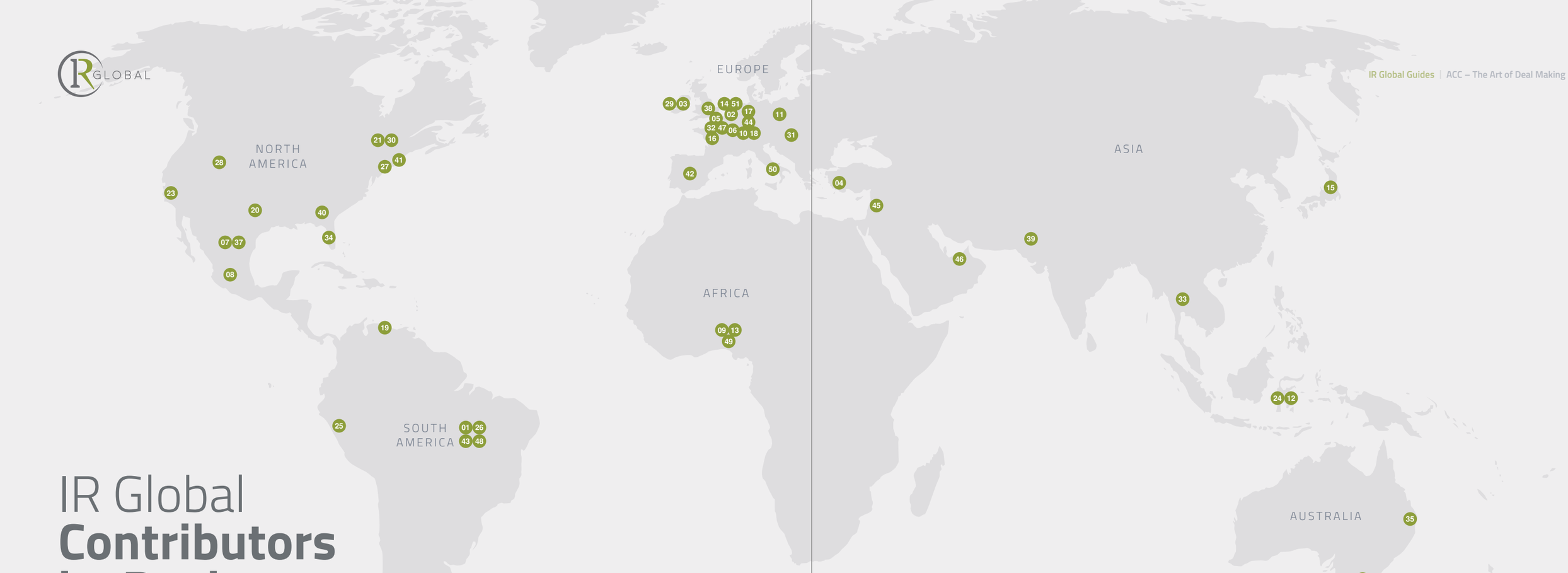
M&As are regulated in countries across the globe – as you'll see in the following pages, all countries have detailed financial and legal regulations regarding mergers. Tapping into the professionals who understand these issues is vitally important and will help ambitious companes take advantage of business opportunities globally. Some of the advantages of M&As include:

- Tax breaks
- An opening in a new market
- Easier access to skilled labour
- Diversifying a company's portfolio
- Better access to a larger market, and not forgetting that
- Merging is cheaper than setting up in a new jurisdiction.

Despite the Covid-19 pandemic, and despite a slowdown in M&A activity globally, all the indications are that corporate strategists remain determined to use M&As as a means to grow their businesses and access new markets going forward.

In these pages, you'll find a wealth of information from professionals in the legal, accountancy and financial sectors who are key to ensuring that an M&A deal is successful, providing all parties seek the right advice. From warranties and indemnities to IP due diligence and deal financing, IR Global's deal making experts answer questions that ambitious CEOs and business development managers need to understand if M&As are to play a key in their future growth and success.

Andrew Chilvers
andrew@irglobal.com



IR Global **Contributors by Region**

M&A Law

Employment

IP

Real Estate

Disputes

M&A Advisory

Tax

Disputes

The IR Global Disputes groups was formed to revolutionise the way cross-border disputes are resolved and to provide high quality, affordable and experienced legal counsel who work together as one seamless legal adviser. This helps you resolve your dispute quickly, efficiently and effectively. We provide a full cross-border disputes service with niche sector expertise offering ADR, mediation, arbitration and litigation services. Additionally, we offer specialist knowledge in product liability, white collar crime and investigations.

01. Harry Payton
US - Florida, Payton & Associates, LLC
PAGE 84

04. Jim E. Bullock
US - Texas, Johnston Clem Gifford PLLC
PAGE 88

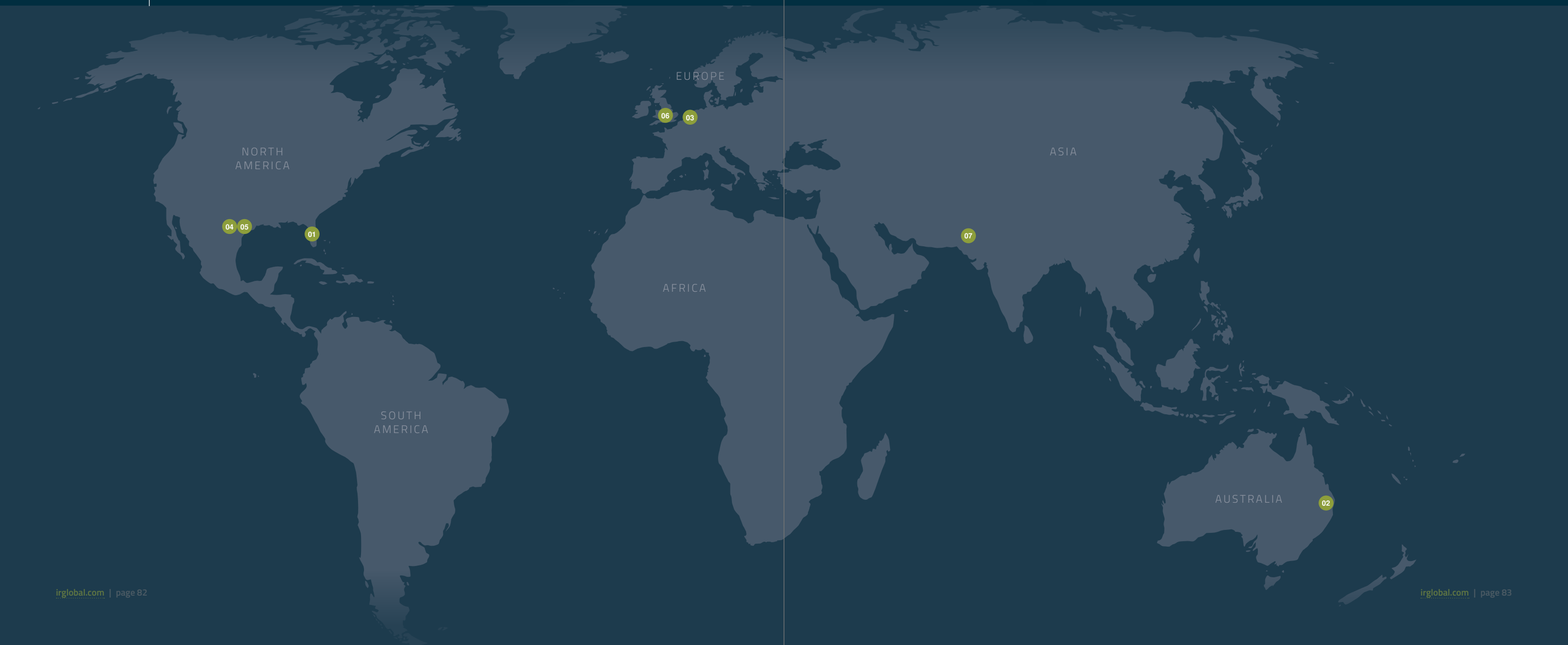
07. Saifullah Khan
Pakistan, S.U.Khan Associates Corporate & Legal Consultants
PAGE 94

02. James Conomos
Australia, James Conomos Lawyers
PAGE 84

05. Robert W. Gifford
US - Texas, Johnston Clem Gifford PLLC
PAGE 90

03. John Wolfs
Netherlands, Wolfs Advocaten
PAGE 86

06. Shilpen Savani
England, gunnercooke llp
PAGE 92



S.U.Khan Associates
Corporate & Legal Consultants

PAKISTAN

Saifullah Khan

Managing Partner, S.U.Khan Associates Corporate & Legal Consultants

+92 51 2344740
saifullah.khan@sukhan.com.pk
sukhan.com.pk
irglobal.com/advisor/saifullah-khan

Mr. Saifullah Khan, an international trade lawyer, has 20 years' experience in international trade policy and law advisory, having served a number of foreign and Paksitani clients. He has advised the Government of Pakistan in amending trade defense laws and rules and has an extensive global advisory portfolio in International Trade Management System, International Trade Agreements and para-tariff and non-tariff barriers issues. His other practice areas include data protection, e-commerce and IT laws and competion law. He is Member of the Islamabad Bar Council and is Advocate High Court. He is also Fellow Member of the Institute of Cost & Management Accountants of Pakistan, Fellow Member of the Pakistan Institute of Public Finance Accountants, Member Institute of Certified Public Accountants of Pakistan, Certified Internal Auditor (USA), Member of Chartered Institute of Arbitrators UK, and participant of executive trade policy program at John F. Kennedy School, Harvard University, USA.

S.U.Khan Associates (SUK) provides a distinctive range of services to its local and foreign clients. SUK offers expert services to companies in the public and private sectors. The firm offers innovative solutions to problems relating to international trade, anti-trust law, data protection, e-commerce and IT laws, international trade development, foreign investment, international trade agreements, international trade management, etc. SUK provides services to top Pakistani and foreign companies. The experience and professional qualifications of team members have made SUK one of the most successful professional consultants in Pakistan.

QUESTION ONE

What are the most common post-closing disputes in your jurisdiction? (e.g. breaches of representations and warranties, price adjustment issues, tax covenants or fraud.) Do you have any relevant case law to highlight this?

In the post-closing phase, contractual representations and warranties represent a major cause of dispute. It is our practice to sell on the basis of a long list of representations, warranties and specific indemnities with the purpose of allocating the risks between the transacting parties, taking into account the level of disclosure in the due diligence process. It has also become regular practice to analyse those risks in detail immediately after closing and to evaluate potential claims on that basis. Another important type of dispute that arises after closing concerns the adjustment of the purchase price.

Most common are adjustment mechanisms that seek to account for value changes of the target company between signing and closing. But sometimes adjustments focus on future developments, for example, if the parties are not able to agree on the value of the target, they may provide for some form of earn-out mechanism. This would enable the seller to try to hold the new owner responsible for decisions potentially causing an earn-out shortfall. More frequent are arguments about the calculation of earn-out parameters (for instance, EBITDA or similar indicators of a company's performance). In these cases disputes may revolve around the scope and meaning of the price adjustment provision, the application and interpretation of accounting principles and related considerations. Another example is breaches of post-closing covenants. Sellers will often agree, for some period of time after closing, to refrain from taking certain actions that could harm the business. These may include agreements not to compete with the business, not to solicit or hire employees of the business, not to interfere with customer or supplier relationships, and not to disclose or use any confidential information or trade secrets of the business.

QUESTION TWO

How would you help in-house counsel shape an M&A agreement to minimise any of the potential disputes mentioned above or aid enforcement proceedings?

A well-drafted M&A agreement is key to a successful transaction. The agreement represents the culmination of vital commercial and pricing negotiations. The parties aim to create an agreement that clarifies the responsibilities and duties of each side. However, these agreements are often imperfect and open to interpretation and exploitation. Drafting a balanced and workable M&A agreement can be challenging, but rewarding. Parties must ensure that the language included in the agreement is direct. The easiest way to avoid disputes is to be as clear as possible in the language of the agreement.

An M&A agreement if drafted carefully and with attention to minute details can help minimise the occurrence of disputes. The in-house counsel may consider the following matters while shaping an M&A agreement:

- Language used to identify the time-periods, measurement criteria and exceptions should strive to utilise industry- or company-specific historical reporting periods and terminology
- Define terms when the possibility of ambiguity exists
- Specifically state limitations on the buyer's operation of target exhibits and sample calculations
- Example calculations and worksheet attachments should be utilised, whenever possible
- Use of calculation templates with detailed instructions will help to eliminate creative alternatives
- Consider excluding certain financial statement line items from the estimation and subsequent true-up contractual exhibits
- Incorporate a detailed, descriptive calculation as an example, along with step-by-step instructions
- State accounting policies to be applied
- Quick-Close Rehearsals: Prepare seller for and rehearse a "quick-close," limiting traditional hard close procedures to those accounts posing the greatest risk.

QUESTION THREE

If a post-closing dispute does occur, what best practices should in-house counsel follow to minimise cost/reputational damage?

In the case of a post-closing dispute, foremost importance needs to be given to implied covenant of good faith and fair dealing. Where the agreement does not address any matter expressly and affords parties some discretion in performance of duties, neither party must take actions designed to defeat other party's realisation of fruits of the agreement.

Next, all efforts be made to reconcile the differences whether they relate to price adjustments or otherwise. Negotiation and proper engagement with the other party is key to having a successful dispute resolution. While negotiating, the approach must be to have a level playing field for both parties, negotiations would only be successful when both the parties have achieved their respective goals.

As a matter of best practice, a list of all differences should be prepared before entering into formal negotiations and classify them according to what might be accepted, what might not be or what might be mediated etc.

Preparation of a timeline for negotiation may also be framed, including next steps. The next steps, in the case of unsettled disputes, could be referring the matter for arbitration, appointing/selecting an arbitrator, taking the matter to the court of appropriate jurisdiction and making of public announcement of the dispute.

The in-house counsel needs to apprise the stakeholders (board or shareholders) of all possible options and an estimate of the likelihood of settlement or otherwise of each matter of dispute.

Top Tips – Top Ways To Fully Utilise A Disputes Lawyer During The Deal Process

- **Engagement of commercial, accounting, technical personnel**: When a disputes lawyer is engaged, the company's commercial/accounting/technical team must consult with them, so they are fully conversant with the company's circumstances, which will help them defend the company during the litigation cycle.
- **Due diligence:** The lawyer may also be engaged during due diligence, which will help him understand the company's compliance and risk ecosystem, and to draft appropriate clauses in the agreement.
- **Dispute resolution process details in the agreement:** The lawyer asks that agreement must include sufficient details about the mechanics of the dispute resolution process, which allows the parties to focus on resolving the disputed matters.
- **Drafting arbitration clauses:** Due importance be accorded to plan and draft the arbitration clause(s) in the agreement. Matters that may need consideration are defining a single forum for all disputes, ensuring enforceability of the arbitration agreement/award, timelines, confidentiality and related costs.

Contacts

UK Head Office

IR Global
The Piggery
Woodhouse Farm
Catherine de Barnes Lane
Catherine de Barnes B92 0DJ

Telephone: +44 (0)1675 443396

www.irglobal.com
info@irglobal.com

Key Contacts

Rachel Finch
Business Development Strategist
rachel@irglobal.com

Andrew Chilvers
Editor
andrew@irglobal.com

Contributors

M&A Law

Adriano Chaves & Martim Machado
CGM Advogados
irglobal.com/advisor/adriano-chaves
irglobal.com/advisor/martim-machado

Shai Kuttner
Synergy Business Lawyers
irglobal.com/advisor/shai-kuttner

Patrick O'Shea & Gar Smyth
Wallace Corporate Counsel LLP
irglobal.com/advisor/patrick-oshea
irglobal.com/advisor/gar-smyth

Altug Guzeldere
Guzeldere & Balkan Law Firm
irglobal.com/advisor/altug-guzeldere

Michiel Pouillon
QUORUM
irglobal.com/advisor/michiel-pouillon

Urs Breitsprecher
CAPELLE Rechtsanwälte
irglobal.com/advisor/urs-breitsprecher-new

Adrienne Braumiller & Bob Brewer
Braumiller Law Group, PLLC
irglobal.com/advisor/adrienne-braumiller
irglobal.com/advisor/bob-brewer

John R. Colter-Carswell
Colter Carswell & Asociados, S.C.
irglobal.com/advisor/john-r-colter-carswell

Simeon Okoduwa & Gabriel Onojason
Alliance Law Firm
alliancelf.com/our_people/simeon-okoduwa
alliancelf.com/our_people/gabriel-onojason

Balthasar Wicki
Wicki Partners AG
irglobal.com/advisor/balthasar-wicki

Robert Lewandowski
DLP Dr Lewandowski & Partners
irglobal.com/advisor/robert-lewandowski

Rio Lassatrio
LHBM Counsel
irglobal.com/advisor/rio-lassatrio

Employment

Titi Awe
Stalwart Legal
irglobal.com/advisor/titi-awe

Rachida el Johari
SAGIURE LEGAL
irglobal.com/advisor/rachida-el-johari

Makoto Ohsugi & Ayuko Nemoto
Sonderhoff & Einsel
irglobal.com/advisor/makoto-ohsugi
irglobal.com/advisor/ayuko-nemento

Lionel Paraire
Galion Société d'Avocats
irglobal.com/advisor/lionel-paraire

Dr. Gerd Müller-Volbehr
ACURIS Rechtsanwälte
irglobal.com/advisor/dr-gerd-muller-volbehr

Monika Naef
DUFOUR Advokatur
irglobal.com/advisor/monika-naef

Francisco A. Casanova
Ponte Andrade & Casanova
irglobal.com/advisor/francisco-a-casanova-s

Jessica Brown Wilson
FisherBroyles, LLP
irglobal.com/advisor/jessica-brown-wilson

IP

Elizabeth S. Dipchand & Dan Pollack
Dipchand LLP
irglobal.com/advisor/elizabeth-dipchand
irglobal.com/advisor/dan-pollack

Mark Millward & Eliza Low
mdp Law
mdplaw.com.au

Brian Buss & Doug Bania
Nevium
irglobal.com/advisor/brian-buss
irglobal.com/advisor/doug-bania

Risti Wulansari
K&K Advocates
kk-advocates.com

Alejandro Castro
Union Andina
irglobal.com/advisor/alejandro-castro-angulo

Karin Klempp Franco
Barcellos Tucunduva Advogados
btlaw.com.br

Real Estate

Michael Lefkowitz & Richard Sussman
Rosenberg & Estis, P.C.
irglobal.com/advisor/michael-e-lefkowitz
irglobal.com/advisor/richard-l-sussman

Torben Welch
Messner Reeves LLP
irglobal.com/advisor/torben-welch

Hugh Clohessy
Clohessy & Co Solicitors
irglobal.com/advisor/hugh-clohessy

Jayson Schwarz
Schwarz Law LLP
irglobal.com/advisor/jayson-schwarz

Andrea Vasilova
VASIL & Partners
irglobal.com/advisor/andrea-vasilova

Koen De Puydt
Seeds of Law
irglobal.com/advisor/koen-de-puydt

Robert Schuler
Blumenthal Richter & Sumet
irglobal.com/advisor/robert-h-schuler

Disputes

Harry Payton
Payton & Associates, LLC
irglobal.com/advisor/harry-a-payton

James Conomos
James Conomos Lawyers
irglobal.com/advisor/james-conomos

John Wolfs
Wolfs Advocaten
irglobal.com/advisor/john-wolfs

Jim E. Bullock & Robert W. Gifford
Johnston Clem Gifford PLLC
johnstonclem.com

Shilpen Savani
gunnercooke llp
irglobal.com/advisor/shilpen-savani

Saifullah Khan
S.U.Khan Associates Corporate & Legal Consultants
irglobal.com/advisor/saifullah-khan

M&A Advisory

Viraj Bhogle
KNAV CPA
knavcpa.com

Florence J Black & Dave Sheppard
MedWorld Advisors
irglobal.com/advisor/florence-black
irglobal.com/advisor/dave-sheppard

Jean-François Alandry
You Are Capital
irglobal.com/advisor/jean-francois-alandry

Jonathan Mazon & Diego Enrico Peñas
Junqueira le Advogados
irglobal.com/advisor/jonathan-mazon

Matthias Meitner
VALUESQUE
irglobal.com/advisor/matthias-meitner

Wissam Abousleiman
Abousleiman & Co
irglobal.com/advisor/wissam-abousleiman

Tax

Alfred Strolla
STROLLA
irglobal.com/advisor/alfred-strolla

Stefan Geluyckens
Antaxius Advocaten
irglobal.com/advisor/stefan-geluyckens

Lavinia Junqueira & Cauê Rodrigues
Junqueira le Advogados
irglobal.com/advisor/lavinia-junqueira

Jude Odinkonigbo & Uche Val Obi, SAN
Alliance Law Firm
alliancelf.com/our_people/dr-jude-j-odinkonigbo
irglobal.com/advisor/uche-val-obi

Alessandro Madau
MM & Associati FinaRota
irglobal.com/advisor/alessandro-madau

Robin de Raad
Zirkzee Group
irglobal.com/advisor/robin-de-raad