

# The Process of Selling a Brokerage

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

## THE PROCESS OF SELLING A BROKERAGE

### Introduction

A business owner needs to be aware that the sale of a business is a complex process. It is a process that requires detailed, advanced planning and careful, ongoing management. Very often, sellers believe that their work in selling the business is essentially complete when the broad strokes of a deal have been hammered out with a potential buyer. All too often, sellers become frustrated with the time it subsequently takes to complete the sale simply because they were never advised of the extent and complexity of the sale process nor the number of issues that will have to be addressed and decided upon. What should a broker expect, therefore, when he sets out to sell his business?

### A Sale of Company Shares

Brokerages in Ireland invariably take the form of limited liability companies having a share capital. The assets of the business - the employees, the property interests, the client base, the goodwill, the contracts with life offices and appointments from lenders, etc. - are all held by the company. If a broker intends to sell his broking business, it is the company's shares rather than the company's assets that are sold.

The principle of *caveat emptor* – let the buyer beware – is an underlying principle in the buying and selling of company shares. This is because, unlike in many other areas of law, Irish statute law does not impose itself upon, or imply any safeguarding or limiting terms into a share sale agreement. In the absence of agreement between the seller and purchaser to the contrary, therefore, the purchaser alone will (save in very limited circumstances outside the parameters of this article) be entirely responsible for the past and future liabilities of the company and the seller will have divested himself entirely of all responsibilities to the company. Because of this, the purchaser of a company will invariably attempt to agree that the burden of the liabilities of the company shifts to a greater extent back on to the seller. The seller will obviously resist any such attempts. It is the negotiation of the extent of the parties' respective responsibilities to and for the company that most often gives rise to delays in the sale of companies.

Before attempting to negotiate the extent of his responsibilities for the affairs and liabilities of a company the purchaser will want to carry out an investigation into what those liabilities and responsibilities are. The investigatory process is called due diligence.

## Due Diligence

The due diligence process involves a detailed investigation into the legal and financial status and affairs of the target company. The aim of the purchaser's exercise here is to satisfy himself as to the state of the company, of its affairs and liabilities. This investigation may continue until the purchaser is satisfied with all the replies to his enquiries. The result of the process will inform the purchaser of whether and for what price he wishes to purchase the brokerage.

Due diligence is usually initiated by sending long lists of written questions – the due diligence questionnaires - to the seller. Depending on the replies, further questions and clarifications may subsequently be sought. The same questions continually arise when a brokerage is being sold and so the seller should be briefed at the earliest time by his advisers on the nature and extent of the queries.

The primary issues that arise for brokerages are the status of authorisations from the Regulator, whether the client database is complete and up-to-date, the number of employees and their contractual terms, the nature of any property interests the company has and the terms of any third-party contracts the company may have entered into. The seller should begin bringing together and updating his records in relation to these matters at the earliest opportunity because many purchasers will insist upon receiving comprehensive replies, often backed up with documentary evidence, prior to permitting any legal documents being drafted.

## Legal Documentation – (1) Share Purchase Agreement

Once the parties are satisfied that the sale transaction should be progressed further (and this may happen during or at the end of the due diligence process, depending on the attitude of the purchaser) the purchaser's legal advisers will draft a share purchase agreement to reflect the agreement of the parties. In drafting a typical share purchase agreement the purchaser's legal advisers will seek to include a number of protection-from-liability mechanisms in favour of the purchaser. These protections may take the form of *indemnities*, where the seller will be asked to compensate the purchaser in respect of any losses the purchaser incurs in the future and which are attributable to the operation of the business prior to the sale. The protections may also or instead take the form of *warranties*, where the seller is asked to give legally binding assurances to the purchaser that certain matters relating to the company are in order or in a particular state. If the warranty given is

subsequently found to be incorrect, a claim for breach of warranty may result in a successful claim for damages.

In response to the requests for warranties and indemnities the seller's advisers will often recommend limitations on the seller's liabilities. These limitations may take the form of long-stop dates for the taking of claims against the seller or of caps on the amounts of claims that can be made against the seller. The purchaser will, obviously, seek to resist these limitations of liability.

The seller should be able to significantly speed up the negotiations on the subject of protection mechanisms if he can be guided by his advisers to agree the general nature of the mechanisms and limitations with the purchaser in advance of any legal drafting taking place.

## Legal Documentation – (2) Deed of Tax Indemnity

Depending on the size of the brokerage being sold and on the length of time the brokerage has previously traded, the purchaser's advisers may consider it necessary to deal with indemnities relating to taxation in a separate document called a deed of tax indemnity. This document contains clauses requiring the seller to compensate the purchaser and the company for tax liabilities which the company incurs and which relate to the trading period prior to the date of purchase of the company.

## Legal Documentation – (3) Disclosure Letter

The third significant legal document that is created for the sale of a company is the seller's disclosure letter. In this document the seller *discloses against the warranties* given in the share purchase agreement. Written disclosures are made in the disclosure letter because the written warranties in the share purchase agreement are usually in the form of very general statements of fact. The effect of a disclosure in respect of a particular matter is to prevent the purchaser successfully claiming for breach of a warranty in relation to that matter to the extent of the disclosure. For example, a warranty in the share purchase agreement may contain the general statement of fact that there is no litigation pending against the company. The purchaser will have requested this warranty as part of his attempt to quantify the potential liabilities of the company that he is about to purchase. If the purchaser accepts this warranty but subsequently discovers post-purchase that there is a valid, outstanding claim against the company, he could make a claim for breach of warranty and seek damages in the amount of the company's losses that result from the outstanding claim. By disclosing the existence of the outstanding claim in the disclosure letter, however, the seller will have stymied any such claim by the purchaser. Once the claim had been disclosed by

the seller, the purchaser needs then to decide whether and on what terms he still wishes to purchase the company.

## Stamp Duty

A sale of shares in an Irish company attracts stamp duty. The purchaser must pay stamp duty of an amount equal to one per cent of the market value (the consideration/purchase price actually paid is irrelevant in the calculation of stamp duty) at the time of the sale of the shares being transferred. This low percentile is a major attraction of the sale of shares, particularly when any sale of assets, as opposed to shares, can attract stamp duty at nine per cent of market value. The payment of stamp duty must be made to the Revenue Commissioner within 30 days of the transfer.

These are just some of the issues to be considered by the broker when he is contemplating the sale of his business.

**Date:** November 2008

**Author:** Keith Smyth

## CONTACT US

### Our Offices

#### **Dublin**

33 Sir John Rogerson's Quay,  
Dublin 2,  
Ireland.  
Tel: +353 1 667 0022  
Fax.: +353 1 667 0042

#### **Cork**

8 Webworks Cork,  
Eglinton Street,  
Cork, Ireland.  
Tel: +353 21 425 0630  
Fax: +353 21 425 0632

#### **Boston**

26th Floor,  
225 Franklin Street,  
Boston, MA 02110,  
United States of America.  
Tel: +1 617 217 2866  
Fax: +1 617 217 2566

#### **New York**

415 Madison Avenue  
15th Floor  
New York, NY 10007  
United States  
Tel: +1 646.673.8523  
Fax: + 1 646.683.8524

#### **Tokyo**

12th Floor,  
Yurakucho Itocia Building  
2-7-1 Yurakucho, Chiyoda-ku  
Tokyo 100-0006, Japan  
Tel: +813 6860 4885  
Fax: +813 6860 4501

e-mail: [enquiries@dilloneustace.ie](mailto:enquiries@dilloneustace.ie)  
website: [www.dilloneustace.ie](http://www.dilloneustace.ie)

### Contact Points

*For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.*

#### **Keith Smyth:**

**e-mail: [keith.smyth@dilloneustace.ie](mailto:keith.smyth@dilloneustace.ie)**

**Tel : +353 1 667 0022**

**Fax: + 353 1 667 0042**

#### DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

#### Copyright Notice:

© 2008 Dillon Eustace. All rights reserved.  
This article was first published in Issue 22 (Autumn 2008) of The Professional Insurance Broker, the office magazine of the Professional Insurance Brokers Association.

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.  
[www.dilloneustace.ie](http://www.dilloneustace.ie)

In alliance with Arendt & Medernach