

CONTENTS

Preface	v
Acknowledgments	vii
Section 1	
Introduction	1
Introduction	1
Objective of the Guide	1
Structure	2
Limitations of advice and health warning	2
Directory of useful links	3
Author and publisher	4
Section 2	
The Due Diligence Process	5
Why do due diligence?	5
Who does due diligence?	6
What does due diligence cover?	7
Relationship between buyer and seller	8
Accessing information	9
Reviewing information	11
Reporting to the buyer	15
Differences for an auction sale	17
Buyer's options following a due diligence investigation	19
Summary	20
Section 3	
Disclosure	23
What is disclosure?	23
Warranties and disclosure	23
Warranties and information gathering	23
Hints and tips for sellers in preparing the disclosure letter	24
Hints and tips for buyers in reviewing the disclosure letter	24
Buyer's knowledge	25
Full, complete and fair disclosure	25
Unwillingness to disclose	26
Timing of disclosure	26
Summary	26

Section 4	
Reviewing the Information	29
Introduction	29
Constitutional/structural information	29
Accounts	31
Borrowing/finance	31
Recent events	32
Compliance/litigation	32
Licences/regulations	33
Environment	33
Contractual arrangements	34
Anti-trust/competition	35
Employees	36
Pensions	37
Health/safety	38
Tax	38
General assets	38
Insurance	39
Intellectual property	39
Computer systems/data	40
Real property	41
Products/services	41
Data protection	42
Anti-bribery and corruption	42
Software-related issues	42
Summary	42
Section 5	
Specific Issues in Depth	45
Employees	45
Nature of transaction	45
TUPE	45
Consultants, contractors and agency workers	47
Employee share incentive scheme and pensions	47
Collective agreements	48
Immigration	48
Data protection	49
Fair processing information	49
Exceptions	51
Environment	51
Share or Asset Purchase	51
Contaminated land	51
Water pollution	52
Civil law	53
Waste	54
Asbestos	54
Permits	55

Bribery Act 2010	55
Background	55
Risks for a buyer	56
Risk indicators	57
Contractual protection	58
Post-completion	58
Software-related issues	58
Background	58
Ownership of intellectual property rights	59
Intellectual property licensed from third parties	59
Escrow arrangements	60
Maintenance and support	60
Conclusion	61
Section 6	
Post-completion Integration	63
Introduction	63
Culture and ethos	63
Change management	63
Post-completion audits	64
Warranties and indemnities	64
Ongoing governance health-checks	65
Conclusion	65
Section 7	
Sample Documents and Explanatory Notes	67
General explanatory notes	67
Sample Document 1 – Parties List	70
Comments on Sample Document 1 – Parties List	78
General comments	78
Sample Document 2 – Confidentiality Agreement	79
Comments on Sample Document 2 – Confidentiality Agreement	90
General comments	90
Specific comments	90
Sample Document 3 – Due Diligence Questionnaire (Share Purchase)	93
Comments on Sample Document 3 – Due Diligence Questionnaire (Share Purchase)	135
General comments	135
Specific comments	135
Sample Document 4 – Due Diligence Questionnaire (Asset Purchase)	144
Comments on Sample Document 4 – Due Diligence Questionnaire (Asset Purchase)	183
General comments	183
Specific comments	183

Sample Document 5 – Data Room Rules	190
Comments on Sample Document 5 – Data Room Rules	202
General comments	202
Specific comments	203
Sample Document 6 – Virtual Data Room Rules	207
Comments on Sample Document 6 – Virtual Data Room Rules	217
General comments	217
Specific comments	218
Sample Document 7 – Disclosure Letter	221
Comments on Sample Document 7 – Disclosure Letter	226
General comments	226
Specific comments	226
Sample Document 8 – Disclosure Bundle Index	231
Comments on Sample Document 8 – Disclosure Bundle Index	236
General comments	236
Sample Document 9 – Legal Due Diligence Report	237
Comments on Sample Document 9 – Legal Due Diligence Report	278
General comments	278
Specific comments	278
Index	281

SECTION 1

INTRODUCTION

INTRODUCTION

1.1 The concept of due diligence originated in the US Securities Act 1933. This included a defence which could be used by brokers or dealers when accused of inadequate disclosure to investors of material information about shares being brokered. Effectively, as long as the brokers or dealers conducted a 'due diligence' investigation into the company whose equity they were selling, and disclosed to the investor what they found, they would not be held liable for non-disclosure of information that failed to be covered in the process of that investigation. It did not take long before it became standard practice to conduct due diligence investigations, initially in relation to public offerings, but over time with private mergers and acquisitions as well.

1.2 The concept of 'due diligence' was therefore born. Today a working definition of due diligence would be: the process of investigation through which a potential purchaser gains a complete understanding of the target business or its assets for acquisition, evaluating both the strengths and the weaknesses of the business and reaching conclusions as to whether to proceed with a purchase, reduce the price or restructure the transaction.

1.3 The difficult economic conditions in recent years have lifted due diligence to higher prominence. Somewhat ironically, perhaps in response to their own failings, the banks now place much greater significance on due diligence. This is not just in the context of corporate lending, but in their general business banking criteria. Businesses also are taking a much more vigilant approach to all their significant contracts and are evaluating suppliers on the stability of their corporate structure as well as on price. Due diligence is no longer the preserve of large-scale corporate transactions. It is a living breathing part of daily business life. There is no better time to understand its potential as a powerful business tool both in gaining competitive advantage and in minimising business risk.

OBJECTIVE OF THE GUIDE

1.4 The objective of this Guide is to provide business owners, entrepreneurs, investors, business angels, early stage and general practice