

Negotiating Deals During the Pandemic

By Louis Lehot

Broc Romanek sat down with Louis Lehot, the Founder of L2 Counsel and the video blog series—#askasiliconvalleylawyer—to discuss negotiating mergers and acquisition transactions during this pandemic.

Personal rapport, trust, and confidence are critical ingredients of successful mergers, acquisitions and investment transactions, and building these elements is key. For deals to get done, dealmakers need to inspire trust and confidence in one another and the working group. With quarantines in place and face-to-face meetings out of the question, following are answers to frequently asked questions on how to negotiate transactions in the new “normal” successfully.

Romanek: Will corporate development and business unit leaders on the buy-side be receptive to looking at potential acquisitions during the pendency of “shelter-in-place” orders?

Lehot: The answer is an unequivocal “yes.” Despite the lack of physical proximity to targets, corporate development, and business unit leaders continue to be responsible to their stakeholders for growing their businesses, both organically and inorganically, and for stopping the bleeding that might otherwise occur. On many occasions, M&A transactions will be timely and opportune.

New corporate partnerships may take shape. New technologies and innovations may be created and adopted. Clearly, M&A deals have continued and will continue to be struck during and after the pandemic. Their character may change,

however, as buyers look for businesses that can tap into the “new normal” environment.

Romanek: Besides the obvious challenges of not being able to meet in person, what are some of the difficulties in doing M&A deals remotely?

Lehot: The challenges of doing deals remotely are numerous:

- How to gather original documents, signature pages, and ensure that they are fully complete, with all current exhibits, schedules, and amendments
- How to physically inspect land, structures, and sites in the face of travel challenges
- How to meet groups of people and observe how they interact
- How to negotiate when you cannot do so in person
- How to guard against an increased propensity for fraud to be introduced by unscrupulous characters

Romanek: What are some of the technologies and other tools to counter-act the challenges of remote deals?

Lehot: Certainly, increased technology, communications, and collaboration tools are required to counter-act the challenges of doing deals remotely:

- DocuSign, HelloSign, and many of the digital tools for electronic document signing are plentiful and not new. Adopting a protocol and training the workforce on how to follow it, can help.
- Remote team members and specialist consultants who have proximity to land, structures,

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and sites are increasingly being engaged to inspect them to avoid the risk and expense of travel.

- Zoom, Webex, Google Hangouts, Go-To-Meeting, and Microsoft Teams are some of the many video and collaboration tools available for meetings concurrent with document sharing, as well as in negotiating deals.
- Dropbox, Box, OneDrive, GoogleDrive, NetDocs, Evernote, and many others are being used for document storage, sharing, and collaboration.

Asking more and better questions can be especially valuable in building confidence when the parties are separated by distance. This low-tech method is unfortunately often overlooked.

Romanek: What are some due diligence items that need special attention in light of the pandemic?

Lehot: Here are a few:

- **Operating performance.** Is the target business able to operate, and if so, under what restrictions?
- **Solvency.** In the best of times, executing an M&A transaction can take 90 days. Will the target have sufficient funds to maintain operations during the pendency of the deal? Is debt or equity financing available? Can section 363 or Chapter 11 of the bankruptcy code help keep the business afloat to get a deal done?
- **Credit lines.** As liquidity is fettered by customers stretching out payments, if not canceling or deferring purchases altogether, are modifications to the target's lines of working capital required? What communications have occurred with lenders?
- **Workforce.** What steps have been taken to protect, preserve, retain, and make

productive the existing workforce? Has it been right-sized? Were regulations followed in making terminations? How, when, and under what conditions can the workforce return to productivity? Is there a remote work policy in place, and does it make sense?

- **Government restrictions.** Is the target operating an "essential" business, which is mainly exempt from shelter-at-home orders, or is it non-essential? Are workers remote or onsite? If remote, what steps are being taken to observe wage and hour laws?
- **Government resources.** What government resources are available, and have they been fully tapped?
- **Real estate leases.** Is the target in breach of its lease? Has it paid rent? What are the conditions of forbearance of lease payments? Have rent reductions, deferrals, or force majeure provisions been sought or exercised?
- **Material contracts.** Are customer contracts being consummated and enforced? Are there "material adverse effect," "force majeure," "frustration of purpose," or termination clauses that could impair the target's business going forward? Does the target anticipate a failure to perform under a contract, either by the counterparty or itself?
- **Supply chain.** Is it secure? Has it been traced to its origin to understand that it remains operational? The analysis applied to material contracts is also germane, here. Are suppliers to be replaced suppliers on commercially reasonable terms or at all? Are changes required?
- **Insurance.** Does the target maintain adequate insurance, will it be renewable, and is it available to offset losses or claims made?
- **Litigation.** What is the impact of the pandemic on pending or threatened litigation? Is a settlement possible?

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- **Governance and compliance policies.** Now more than ever, IT systems governance and compliance policies are being stress-tested. Do they work? Is it enough? Is data being protected? If the company is tracking its employees' health, is it HIPAA compliant?

Romanek: How can we build the trust and confidence to do a deal without meeting in person?

Lehot: To build trust and personal rapport with clients and counterparties, M&A dealmakers typically spend a lot of time on the road, conducting face-to-face meetings, attending conferences and events, going out for meals, and watching or engaging in sports.

In the face of the “new normal” of working in solitude, dealmakers will need to work harder to build trust and confidence through their personal interactions over email, text, and calls, and increasingly use video calls to create the feeling of a personal experience.

During these interactions, dealmakers will need to make sure their words and deeds are:

- **True and honest.** This means showing up on time for calls and meetings. Keep the video function on where able, even if for a short time. Honor your commitments to deliver information and follow-up on a timely basis. Avoid making promises that have the potential of not being met.
- **Clearly communicating the message.** This means being transparent and authentic about your goals and making sure that your words and deeds are always consistent.
- **Building trust over time, gradually.** Babies learn to crawl before they walk and walk before they run. Similarly, your outreach to potential deal counterparties should be gradual and allow for extra time for potential issues to be fully vetted and considered. Breaking a process into smaller steps can help. Take things at a measured pace to avoid spooking others.

- **Consistent.** By being consistent, you become predictable, and by being predictable, you can be trusted.

- **Open.** This means that you are transparent and authentic, and that you listen and give clear and respectful feedback, to all of the parties. Giving mixed messages or telling different stories to different people can quickly inspire mistrust and fear.

- **Helpful.** Make sure your words and deeds are viewed as constructive, practical, and commercially minded, always. People trust people they consider to be beneficial.

- **Emotive.** People also trust people who show they care for others. Being open about your emotions can help inspire true connection, a building block of trust.

- **Not self-promoting.** This means recognizing the efforts of other team members instead of claiming credit for yourself. Nothing inspires mistrust like transparent self-promotion.

- **Consistent with your actual beliefs.** Acting with unity of purpose and belief, openly and transparently, helps to communicate your authenticity and inspire trust. Sacrificing your personal values can be viewed as sacrificing trust.

- **Admit mistakes.** Humility does not have to be self-effacing and when you own up to your missteps, you inspire trust.

Romanek: What are some tips for doing M&A deals that transcend the time and circumstances of the pandemic?

Lehot: Consider these:

- Call out and come up with a plan to address the real due diligence issues early in the game.
- Get buy-in from senior leaders on plans and communicate openly about known issues.

- Plan and strategize around the known issues and anticipate the unexpected.
- Use timeline and responsibility checklists.
- Manage processes with digital project management tools.
- Identify the deal breakers.
- Make sure relevant parties are fully invested and accountable.
- Keep your sights on the end goals.
- Always engage with reputable experts and bring on specialists to plug holes and fill gaps where needed.
- Anticipate social issues (e.g., leadership, headquarters, locations) and tread carefully through the politics.

Romanek: What are some tips on negotiating M&A deals, particularly when doing so remotely?

Lehot: Here are some tips:

- **Connect on a personal level.** Connecting on a human level is paramount in negotiation, and your attitude and energy at the outset will set the tone and drive outcomes. If you go in with guns blazing, you will likely shoot first and ask questions later. If, on the other hand, you go in with a win/win mindset, looking for ways to make the deal to the advantage of all parties, you are more likely to get a deal done. Given that in-person meetings are not possible in many places, doing video calls is the way to go (and make sure everyone turns the video ON).
- **Know who you are dealing with.** In the absence of face-to-face meetings, knowing who you are dealing with requires extra effort. This goes beyond doing a LinkedIn search and reviewing your counterparty's resume, it means spending time listening to where they want to go, not just where they have been.

The Internet can help give you obtain limited background history on a person but engaging a third-party background check firm to dig into a target and a target's management team is particularly important to detect fraud.

- **Cast a wide net with your list of issues, and negotiate more items, instead of fewer.** Each side should communicate its position fully and completely, and not just ask for the bare minimum. While many issues can be solved quickly, and are not contentious, they offer the chance for some confidence-building win/win outcomes.
- **Disclose known issues and be transparent.** Information-sharing and transparency creates credibility, which is a foundation of trust. Dropping in some bad news into the data room late in the process in the middle of a pandemic can be a deal-killer. Get out ahead of bad news. No surprises.
- **Intangible and social issues.** Integrate as many intangible and social issues into the negotiation process as possible. Even if a premise of a deal is obvious, communicating about its upside (and downside) from the outset can help build momentum. These issues can also help fill in the spaces between all of the legal, financial, accounting, tax and commercial aspects of a deal, and create momentum and positive energy. Particularly in the time of a pandemic, helping counterparties feel heard and understood can mean the difference between success and failure in negotiation.
- **Look beyond financial and short-term incentives.** Money is a key part of a transaction, but not the only part. Consideration in a deal is often measured only by cash exchanged at closing, but frequently the deal's most important benefits are recognized years later. If the money consideration is not closing the gap, look to non-financial and long-term incentives, safety, and security.
- **Balance positive momentum with friction points.** While sticking points must be solved, racking up "wins" of positive agreement can

create the positive momentum needed to push through and get to a yes. In a pandemic, there can be a default to punting until after the lockdown. Maintaining forward movement is important, and small wins can help keep it going.

- **Incremental and gradual.** Not all open points can be or should be solved at once. An incremental, gradual process will likely generate more momentum required to power through friction.
- **Avoid false deadlines.** There are occasions when the impending excitement about announcing a deal at an upcoming industry conference or sales event can help drive to getting a deal done faster. At other times, deadlines cause more problems than solutions. With all of the obstacles to getting deals done in a pandemic, a deadline—especially a manufactured one—may be counter-productive.

Romanek: If not already begun, what are some things you can do to help boost your odds of success, now?

Lehot: To effectively operate an M&A program, whether on the sellside or the buy-side, there are steps you can take to be ready:

- Put a Google alert on any pronouncements from the government regulator relevant to your industry, or to regulators that would be relevant to buying or selling your company.
- Put a Google alert on anything that pops up on the Internet regarding transaction counterparties, as the normal ways of information dissemination might not otherwise be transmitting.
- Make sure your company has adopted or tailored its compliance policies for the current circumstances, such as:
 - The enabling of digital execution and storage of documents, contracts, and commercial arrangements.

- Socially distanced interactions where legally permissible.
 - Instituting more video-calls to replace phone or face-to-face meetings, with care to do so securely.
 - Being mindful about avoiding circumstances where confidences could be abused and fraud potentially introduced (ask more and more questions).
- Be proactive in your communications with regulators to understand how to comply with scenarios that you could now foresee in light of the pandemic.

Romanek: To sum up, what are some evolving best practices for doing deals remotely?

Lehot: In the post-COVID world, we must expect the unexpected, and as a result, we can try harder:

- To use our emotional as well as intellectual intelligence, expect circumstances to evolve, and be open to adapting.
- To ask more questions. When something does not appear to be verifiable in the normal way, listen, ask more questions, and be creative.
- Consider whether a change is temporary or permanent, and if temporary, when it can be evaluated.
- Use existing collaboration tools and introduce new ones to facilitate a remote work environment. Asana, Zoho Projects, and many more tools exist to enable working together in different spaces.
- Plan for more time to get things done and expect delays.

Examples abound of buyers and investors exhibiting courageous decisionmaking and striking the most lucrative deals in times of crisis. Even in light of coronavirus and social

distancing, with a healthy dose of optimism, positivity, and creativity, deals can be identified, marketed, structured and financed

intelligently, so that you can preserve valuation, sustain market momentum, and execute in a timely manner.