

message from partner in charge

Good business practices are the focus of this update. From joining the European-American Chamber of Commerce to foster economic development on both sides of the Atlantic Ocean, or making sure no ambiguity is left in hastily finalized buyer-seller agreements, we try to include information helpful to your business.

We also hope you'll join us as Pepper sponsors and presents *The Deal's* Private Capital Symposium on May 14, 2008, at Essex House in New York City. The fifth annual symposium is for dealmakers involved in the private capital cycle. The event will offer expert insight, ideas and contacts to help you position your business to benefit from the tectonic shift in the private capital investing landscape.

Please see the back page of this update for registration information.

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European-American Chamber Of Commerce Opening in New York

The New York City Chapter of the European-American Chamber of Commerce (EACC) is forming this year. Created in 2006, the EACC focuses on developing and cultivating strong economic relationships between the European Union and the United States.

The continuing globalization of the world's economy presents growing Eurocentric challenges that have relevance to U.S. businesses. Membership in the EACC New York chapter opens the door to meaningful discussion related to European consumer protection legislation, European energy policy and transatlantic cooperation in financial services.

"The goal of the EACC is to stimulate business relations between the European Union and New York City. Through high-impact networking sessions, trade missions and interaction with first-class speakers who hold a global view of the key economic challenges facing the European Union and the U.S., chamber members will be on the inside track of EU/U.S. issues," said **James D. Rosener**, partner in charge of Pepper's New York office. Mr. Rosener is the president of EACC's New York chapter and heads Pepper's International Practice Group.

The EACC provides up-to-date information on the European and New York City economies and global business environment. Networking opportunities facilitate the transfer of technologies and business ideas. Through trade missions, scheduled panel discussions, industry specific seminars and speaker presentations, the EACC promotes and connects businesses and individuals.

For more information regarding EACC partnerships, memberships and sponsorships, contact Mr. Rosener at 212.808.2717 or by e-mailing rosenerj@pepperlaw.com.

Clarity and Certainty in Buyer-Seller Agreements

This article first appeared in The Deal on February 25, 2008. It is reprinted here with permission.

Previously, the practice of leaving ambiguities in a buyer-seller contract — either by design, to permit later interpretive latitude, or as a byproduct of the speed and complexity of the negotiation process — was generally accepted as fact.

Each party was focused on safeguarding its interests in the deal. The seller sought to insert language to help ensure completion of the deal, and the buyer inserted language that outlined the obligations to close, to ensure that changes in facts, events and circumstances between signing and closing did not cause a change of heart. Often this tension resulted in an agreement that was difficult to interpret if things went awry.

Sometimes, due to time pressures and the desire to keep additional rounds of revision to a minimum, negotiating parties may leave intact contract language that should be improved upon, even to the point of leaving provisions that actually contradict one another.

Such ambiguity may now come at a heavy cost. In light of a recent decision by the Delaware Chancery Court concerning an agreement between an affiliate of Cerberus Partners L.P. and United Rentals, negotiators are on heightened alert that ambiguous language in an agreement is not a way forward, especially when a clear understanding has not been reached.

The original agreement between these two parties contained a section giving United Rentals (UR) the ability to force the buyer to close on its \$7 billion buyout offer by compelling the buyer to enforce both its debt and equity commitment letters. But, it also contained a section saying that UR's sole remedy in the event of a termination was to collect a \$100 million fee. When the purchaser tried to back out of the deal, United Rentals sued to force the closing. Because of the ambiguities in the contract, the case went to trial and the court found in favor of the defendants.

The case turned on something called the “forthright negotiator” principle, which requires examination of the intentions of the negotiating parties. In this case, this principle was used to determine whether or not the parties actually

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intended to provide a specific performance remedy. The court's opinion states, “The forthright negotiator principle provides that, in cases where the extrinsic evidence does not lead to a single, commonly held understanding of a contract's meaning, a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party.”

In this new legal climate, and with credit markets in a weakened position, the demand for both clarity and certainty in deal making is greatly increased.

From the buyer's perspective, the pursuit of clarity in an agreement becomes the means to capping risk; if the buyer wants an option, this should be plainly stipulated in the agreement. From the seller's perspective, if the uncertainty of the credit markets and the general climate of the deal market creates significant risk to completion, the consequences and remedies of the seller ought to be spelled out, understood by all interested persons and weighed in comparison to other offers, if any.

Sellers, especially corporate sellers of business units, have an increased interest in the certainty of the deal. Especially in a distressed environment, corporate sellers would rather give up on price in exchange for having a buyer that has the cash available, without financing needs.

The new importance placed on matters of clarity should result in greater willingness on both sides to make changes to the contract that increase clarity. Under the forthright negotiator principle, where ambiguity indicates possible trouble, it is better to err on the side of making maximum constructive changes rather than taking shortcuts to expedite the deal. In other words, when you know what the other party is thinking and intends in an agreement, tricks or disingenuous post hoc interpretations will not work to your advantage.

Nevertheless, the increased scrutiny under which deals are being placed, and the resulting heightened attention paid to these issues, do present to private equity firms with the reputation and financial wherewithal for completing deals a distinct advantage in the marketplace — lower prices and less competition.

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Peppercast: Renewable Energy Developers, Investors Gain Tax Certainty

As concerns for the nation's energy supply rise, the federal government periodically provides various incentives to encourage the use of renewable energy sources. Listen to a podcast with **Todd B. Reinstein**, partner with Pepper Hamilton's Tax Practice Group in our Washington D.C. office, as he describes quality energy resources and the effect of Section 45 and Revenue Procedure 2007-65 on investors of renewable energy.

If you are interested in the latest updates in the world of tax, you can request to receive an electronic copy of our monthly *Tax Update* newsletter by e-mailing podcasts@pepperlaw.com.

Listen today by visiting the tax section of Pepper's podcenter at www.pepperpodcasts.com.

Upcoming Events

The Capital Roundtable: Energy-Sector Services & Products — How Middle Market Private Equity Is Riding an Unexpected Expansion

MasterClass: April 23, 2008
Featuring Pepper partners
Mitchell S. Ames and James D. Rosener

Visit www.capitalroundtable.com for more information about these events and to register.

Financial Research Associates

“Private Equity A - Z”

April 29-30, 2008
The Harmonie Club
New York, New York

Pepper partners **Steven D. Bortnick** and **Julia D. Corelli** will be presenting on the “Legal Issues & Regulations Overview” panel.

For more information, visit <http://www.frallc.com/>.

The Deal's Private Capital Symposium

Pepper Hamilton is a gold sponsor of the Symposium and will present a panel discussion, “Doing Deals in the Middle Market.”

May 14, 2008
Essex House
New York, New York

For more information or to register, visit www.thedeal.com/marketing/events/pcsymposium2008/index.html.

The European American Chamber of Commerce New York

“The Consequences of the Current Euro and U.S. Dollar Exchange Rate on the M&A Industry in Europe and the U.S.”

May 29, 2008
8:00 a.m. - 10:30 a.m.
The Harvard Business School Club of New York, Inc.
350 Fifth Avenue, Suite 604
New York, New York 10118

Participation: \$50

Speakers include **Johannes de Beaufort Wijnholds**, Executive Director at the European Central Bank and Pepper partner **James D. Rosener**.

For more information or to register, contact rosenerj@pepperlaw.com.

American Conference Institute's 2nd Annual Drug & Medical Device on Trial Conference

Pepper partner **Kenneth J. King**'s topic will cover the direct exam of the company regulatory professional responsible for FDA submissions.

June 24-25, 2008
Helmsley Park Lane Hotel
New York, New York

For more information, visit www.americanconference.com.

Pepper Hamilton LLP

Attorneys at Law

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