

Financial Advisory Services

Cooperation with Non-Lawyer Firms

Session 6.3

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FICPI

Preliminary – and quite important – comment:

We have never worked (i) jointly or (ii) thanks to a referral / cross-referral with a pure IP firm*!

This being said, it is thus all the more interesting to analyze what we do, at which moment, for which purpose, in order to identify opportunities and eventually utterly change this unsatisfying observation!

*: for the avoidance of doubt, in the enclosed document:

- *« IP firm » stands for a purely-specialized IP firm*
- *« Legal counsel » stands for law firms that work on the legal structuring of deals, on legal procedures during a due diligence, or as advisor on a legal litigation case. These firms might be global law firms, thus they might encompass an IP practice.*

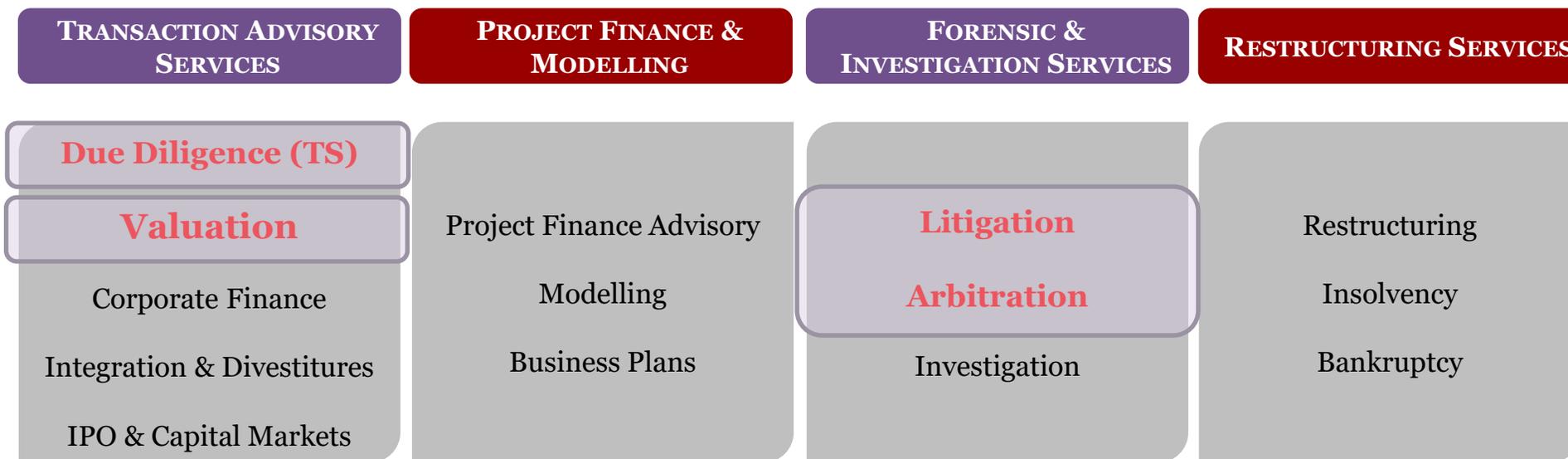
Who are we?

We are **Financial Advisory Services** experts, within an **Audit, Tax & Advisory** firm

Financial Advisory Services (« FAS ») represents usually 5% to 10% of global players in audit, tax & advisory. For example, as to Mazars:

- Mazars: **18,000** professionals throughout **79 countries**
- Mazars Financial Advisory Services: **1,000** professionals throughout the World

The usual range of services of FAS may be displayed as follows:



 IP issues might be involved

Financial & Tax due diligence

What do we do in a nutshell?

We provide the client with **financial data** to help decision making during critical phases of its operations.

We help the client assess the **financial rationale** of a project, a purchase price, a warranty or a contract (in a financial and tax standpoint).

During the negotiations, we work with the client's **legal counsels** to **secure the financial terms** of the share purchase agreement (SPA) and the price adjustment mechanisms. We support the client in its thinking about the transaction structuring.

When?

Usually just **before the LOI** (Letter of Intent) **until the APA/SPA** (asset or share purchase agreement).

Working mainly on the basis of an **electronic data-room** opened during a rather short amount of time, and Q&A sessions.

Who is also involved?

We usually work with **Tax experts** and **Legal counsels** (deal structuring, commercial contracts analysis, ownership of assets, litigation risks analysis).

Sometimes **IT** experts, **Labour** experts and/or **Environmental** experts are involved. We also interact with M&A advisors (boutiques or banks).

How are experts involved?

M&A advisors are usually the first involved experts, followed shortly after by legal counsels (where there are procedures to be followed in making contacts between acquiring and selling parties). These advisors might (not always) give piece of advice as to the selection of certain experts, such as Tax and/or Financial experts. Request for bids are nonetheless often required.

Financial & Tax due diligence

Food for thought

As to IP, the client may have the feeling that the legal counsel does the job. The scope of work of a legal Due Diligence (DD) usually includes the checking of the ownership of assets (including intangibles where significant), the remaining duration of main rights, the declared litigations (that might include claims on intangibles). A legal counsel internally hosting an IP practice may of course be on a favourable position.

The client may be warned on certain issues by legal experts but also financial or tax ones (eg ownership of the code for software editors, or atypical internal brand licence fee contracts etc.): trigger for a post-deal analysis?

- ⇒ There might be room for a pure IP expert, but the timing is tight in a deal ; maybe a 'Flash IP due diligence', and a more thorough analysis after it?**
- ⇒ But would such an IP due diligence be different from the above scope of work usually included in Legal DD?**

Litigation / Arbitration

What do we do in a nutshell?

We deal with **investigations** and **dispute** resolution assignments and **facilitate positive resolutions**. We may act as party-appointed or single joint expert or expert advisor in a host of litigation, arbitration (incl. ICC, ICSID, LCIA etc.)

We provide advice and expert reports on **financial and accountancy** matters, incl. determining and documenting relevant **facts and events**, analyzing and concluding upon the **impact** of the financial information and providing **assistance** with negotiations.

When?

During a rather long period of time where parties discuss, investigate, document their positions, assess their prejudice etc.

Who is also involved?

We usually work with **Legal counsels**. Sometimes, in the course of the dispute/arbitration, a specific expertise is required. For example, we have worked with an expert in mining and interpreting underground drilling results. The judge and/or arbitrator may decide that the case needs such expertise.

How are experts involved?

Legal counsels are usually the first experts to be on board, since the claiming party first has to assess whether he has a case. If so, he might then need a financial expert (eg to assess the prejudice, or the application of a clause). The financial expert might be the first one to be involved in specific situations – before a disagreement - (completion accounts audit for price adjustment, royalty revenue base audit etc.), however these situations barely involve IP issues.

Litigation / Arbitration

Food for thought

As to IP, we already experienced a dispute based on the use of a registered name (however it swiftly led on negotiations rather than full IP expertise...)

IP experts shall be involved slightly before financial experts so that financial appraisal of prejudice, if any, may be launched only where such a risk appears probable (but the reality of a case is sometimes more complex, with comings & goings...).

Valuation & Modelling

What do we do in a nutshell?

We perform valuations of **business, equity/stock**, BU of a group, **assets** (incl. Intangibles), financial instruments & management packages... in many contexts: **accountings** (impairment test of business or of brands, purchase price allocation, etc.), **tax** (share or asset deal, internal restructuring, transfer price, share-based payments), **shareholders concerns** (SHA, fairness opinion), **litigation and dispute** (prejudice), **project finance structuring** (IRR of infrastructure project for each investor)

When?

Sometimes before an external deal or intra-group restructuring, in order to document a contemplated price and/or areas of sensitivity.

Very often after a deal, for tax or accountings purpose.

Who is also involved?

We work with **Tax experts** when tax issues are at stake. Sometimes we use already available reports (for example from real estate appraisers). Where Legal DD raised intangible issues, we ask for communication of these elements.

How are experts involved?

Financial valuation experts are usually selected through a request for bids process; in a deal context, having performed the financial DD might be an advantage to process the purchase price allocation (PPA). Tax experts are usually the usual firm preferred counsel and/or the tax expert having assisted the client on the deal.

Valuation & Modelling

Food for thought

As to IP, the required valuation procedures are about economic value, with IAS38, IAS36 and IFRS3R accountings standards (and similar USGAAP standards) that do not require a level of accuracy such as a value patent per patent etc.

Materiality thresholds are based on global consolidated accounts. Furthermore, it has to be reminded that a PPA is about allocating a given price to assets that eventually are 'communicating vessels', which somewhat mitigates the stakes.

Legal protection is often a limitation / caveat of our reports (based on declarative approach on this, except where the legal DD is explicit on certain findings).

Nonetheless we have experienced situations where IP expert might prove of great value for the client, especially just after an acquisition (reorganization of a portfolio etc.).

Main issue is the contact within the client who cannot just be the finance guy (however, in a PPA context, we usually also have access to marketing and R&D directors, so that something might be tried).

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