ONE to ONE
CORPORATE FINANCE

ERRORS DURING THE SALE OF A COMPANY 3

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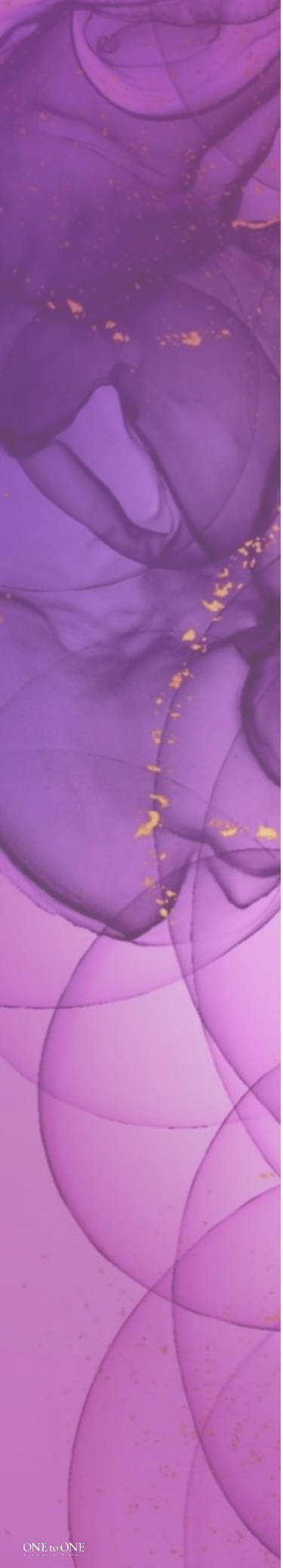

INTRODUCTION

As we have already said in the previous parts of this monograph on the errors in the sale of a company, the sale is a decisive act in the life of an entrepreneur, a long and complex process. The closing is the final step in this process, and it is very easy for fatigue, stress, and irritability to surface at this time.

In the closing, the uncertainty of preparation and the tension of negotiation will manifest themselves. At this time, it is crucial not to waver or give in to these very human emotions. It is easy to give in to the temptation to relax, and fatigue may cause you to give in on a point that you have struggled to fix in the previous phases.

To make sure you achieve all the goals you set out to achieve when you decided to put your business up for sale, you will need to be firm but flexible. You can't afford to fall two steps short of the finish line after running a real marathon.

A sale's success rarely comes from using a master formula. Success is achieved by managing all aspects of the preparation, negotiation, and closing of the deal with common sense, knowledge, experience, and creativity. This is something you will have seen throughout the whole process.

In Errors during the sale of a company. Part 3: The closing, we want to help you avoid the typical mistakes of this phase. A multitude of mistakes can be made that damage all the previous work done, from managing emotions to information that should be included and in which documents.

Make sure you achieve the goals you set for yourself when you decided to sell your business brilliantly.

He who always has an end in view, makes all things help him to achieve it.

- Robert Browning

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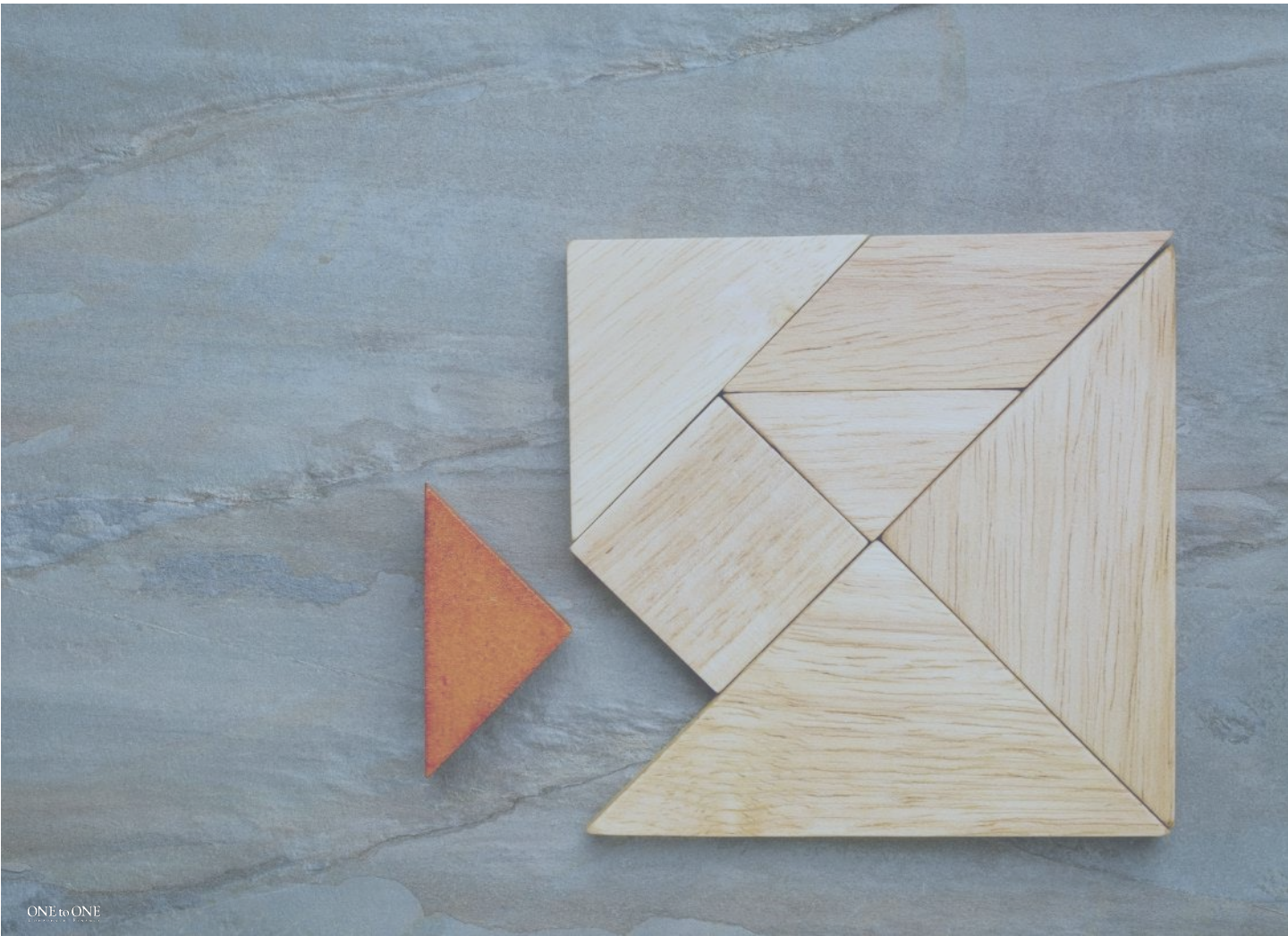
1 THE ERROR OF SHOWING YOURSELF AS INDISPENSABLE



THE ERROR OF GIVING THE IMPRESSION THAT WITHOUT YOU, NOTHING WORKS

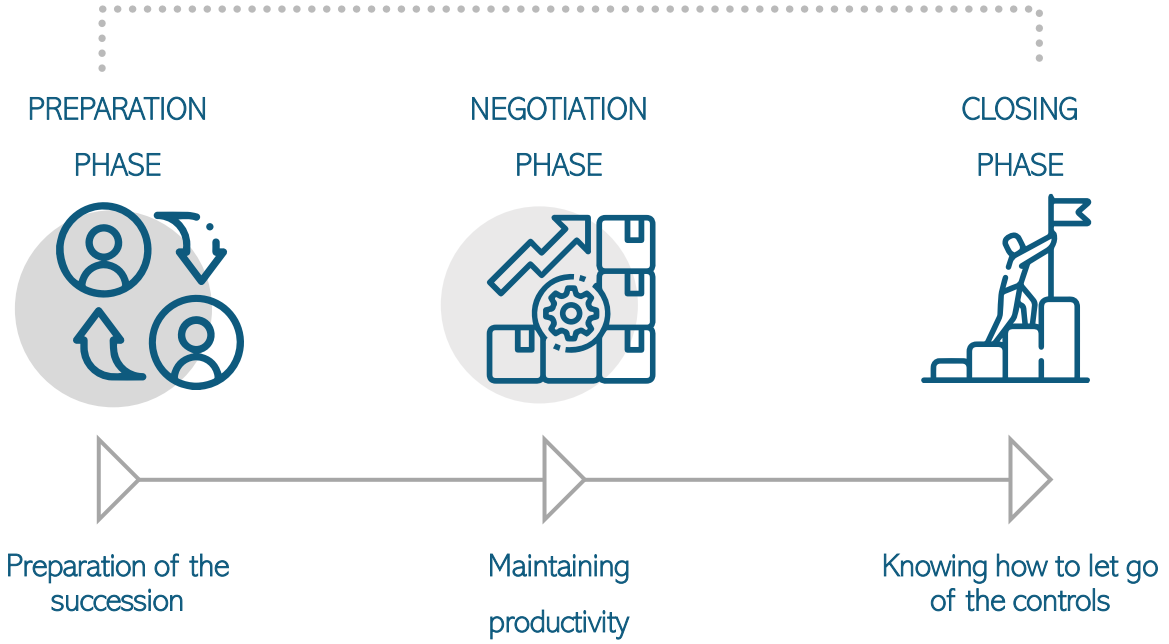
As mentioned above, your role during the sales process is very important, and at each stage you should be attentive to a different aspect of this role.

In the closing phase, it is essential to take care of the place that the buyers perceive you occupy in the company. At this point in the process, showing yourself as indispensable to the operation of the company is a risk to the closing of the deal.

Maintaining the balance between the roles you must assume throughout the sale is not easy.

In the preparation phase, we mentioned that you had to prepare your management and the succession. During the negotiation, you had to combine this preparation with maintaining productivity and improving profit margins.

Well, now that the closing has arrived, it is time to let go of the controls to demonstrate that the company is fully operational and profitable without you.



When you are the founder or the president of the company, it is very easy to be tempted to show that you are the decision-maker on the relevant issues. With this attitude, you run the risk of transmitting so much passion that you may end up being perceived as indispensable for the company to achieve the results it seeks to achieve.

We all like to feel important, but if your idea is to divest yourself of the company, making yourself indispensable is a big mistake. If you do so, the **buyer will demand that you stay on as an indispensable condition.**

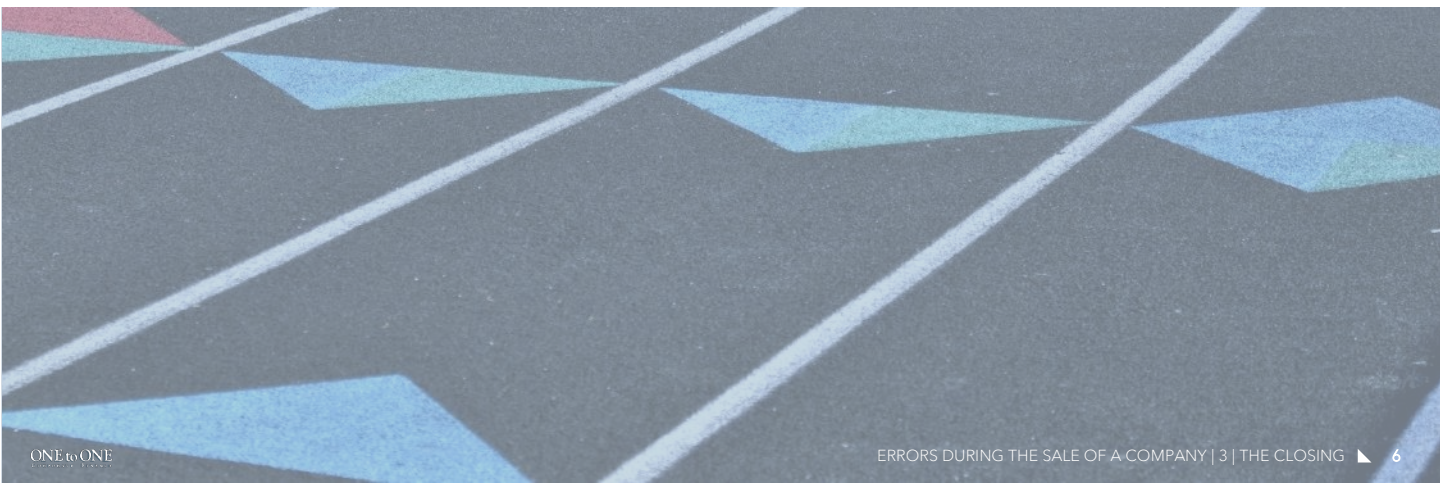
A buyer is not looking for physical assets, but for a well-run company with great future potential. If this value rests on your shoulders, the company will be worth much less without you and the buyer will demand a longer transition period, which is often complicated and uncomfortable for both parties.

In practice, this perception can alter the deal and even undermine the sale price, as we have seen in some cases:

> *We advised on the sale of a company in which our client insisted so much on the permanence of his son in the company after the sale that the buyer perceived it as key and turned it into a bargaining chip in his favour, trying to lower the price in exchange.*

As mentioned above, you must demonstrate to the buyer that you have built a good management team. You must give them responsibility for their areas, give them as much autonomy as possible and delegate power and authority to them. In this way you will be able to explain that the company functions perfectly well without you.

If you can, find a successor, someone to take over when you are gone. In this way the company will not only be more attractive to potential buyers, but also more sustainable in general. In any case, the more you disperse power, the more valuable the company will be.



2 ERRORS IN THE MANAGEMENT OF CONFI-DENTIALITY

KNOWING WHAT TO DISCLOSE AND WHEN

Confidentiality is one of the first and biggest concerns of an entrepreneur who has decided to sell his company, and rightly so. Demanding confidentiality in the sale is key to the success of the operation.

Confidentiality is essential in the process of selling a business and must be managed on an ongoing basis. If word gets out that your company is for sale, it could negatively affect sales, your relationship with employees and stakeholders.

You are best advised on how to manage confidentiality by an advisor who specialises in the sale and purchase of businesses. An experienced advisor knows how to sell your company and maintain strict confidentiality at the same time.

2.1 | NDA: THE GUARANTEE OF CONFIDENTIALITY

As mentioned above, buyers are willing to pay more for a going concern than for a start-up. A strong customer base, a healthy sales and profit history and trained and skilled staff are always more attractive than the task of having to cold start a company's engines after a purchase. All of these aspects must be nurtured to the very last moment.

The vast majority of buyers will want their employees to stay, but some members of staff may be afraid of change and start looking for another job, if they hear the news of the sale of the company early. Also, in the face of uncertainty, they may show less commitment and lose focus on customer service, productivity or any work related to the performance of their duties.

The same can happen with **suppliers**, who may delay deliveries or change payment terms as a result of the news of the sale. **Competitors** may use the information as a sales tool against you.

All of this can have a major impact on the company's performance, and therefore on its sales value. Leaking information can result in you receiving a lower price for the sale of the company.

To avoid all of the above, all prospective buyers must sign a Non Disclosure Agreement (NDA) before they are given the name and location of the business or a copy of the Information Memorandum with information on the operation of the company and its finances.

Some people doubt the enforceability of an NDA but, in practice, it is a gesture of goodwill that usually eliminates anyone who is not a serious buyer. A potential buyer's refusal to sign will give you an important clue as to the intentions of the person on the other side of the negotiating table.

2.2 | BALANCING THE DEGREE OF CONFIDENTIALITY: WHAT TO DISCLOSE AND WHEN TO DISCLOSE IT

As in everything in life, during the process of selling a company, achieving a balance in the management of confidentiality is also the key to success.

We must see what we can obtain depending on the degree of confidentiality with which we handle the sale. If the seller wants a high level of confidentiality, the number of potential buyers reached is reduced, which will slow down the sales process. On the other hand, if the seller is looking for faster results, he must broaden his selection of potential buyers, which makes it more difficult to control the confidentiality factor.

Over-zealousness in maintaining confidentiality can be a problem. There are times when excessive discretion on the part of the entrepreneur can be detrimental to the transaction. Fear of the sale of the company becoming known may lead the owner to veto his advisors from contacting potential and clear buyers. This may result in missed sales opportunities.

Maintaining a high degree of confidentiality presents a major challenge. If the news leaks out in the middle of the transaction, there may be employees who work against the sale because they do not like the buyer, or because they are afraid of the changes the buyer may introduce. This is a serious problem, because normally, near the end of the due diligence, the buyer usually wants to interview at least some of the employees. It is important to control these interviews to maintain the level of confidentiality.

Since keeping the sale secret during a lengthy due diligence is almost impossible, it is best to be prepared to inform employees, customers and suppliers immediately in case the news leaks out.

One way to deal with the interview contingency is to explain that the buyer wants to meet with employees to recognise and reward performance. It is the case that the new owner may want to offer bonuses to increase staff retention during the transition if you have not put in place an incentive plan to retain key executives and employees.

It is a good idea not to advertise to the general public that your business is for sale. This can affect your sales if customers worry that you will not be around to service their accounts in the future.

And if, for some reason, the deal does not go through, customers and suppliers may unfairly label your business as "damaged goods", a business that no one wants to buy, with the reputational and sales consequences that can have. This can be unfair, because it may be you, the seller, who decided not to sell the business at some point in the process, but the damage would already be done and the perception that something is wrong with your business will prevail.

Although you cannot completely control this issue, at some point word may spread that your company is for sale (especially if you intend to target other companies in your industry as potential buyers). Therefore, the biggest mistake you can make in this area is not controlling the message. Decide how, to whom and when to communicate the news.

Specialist advisors will assess your specific situation and help you control that message. A good adviser will always approach the sale of your business with discretion and manage the delicate balance of confidentiality and information flow. They will not identify the name of your company or give out any other key details that may enable your business. They will only provide identifying information once they have conducted a basic qualification of a prospective buyer and obtained a signed confidentiality agreement from the buyer.

2.3 | DO NOT USE VIRTUAL DATA ROOM

If it is necessary to share confidential information and documentation, there are specialised methods and technologies to achieve the highest possible confidentiality.

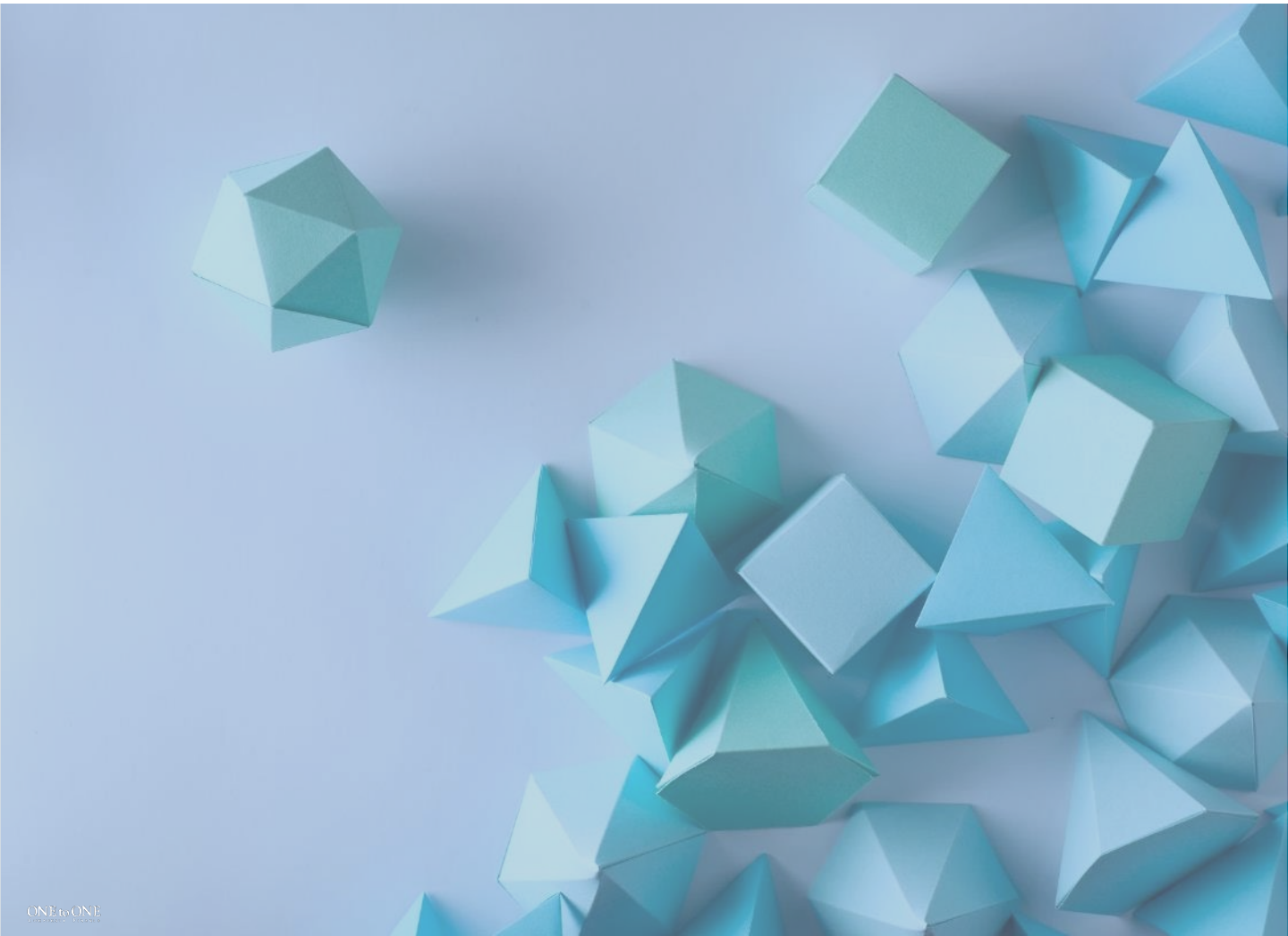
If the deal has come close to closing, providing this information to the buyer is a must. When it comes to in-depth information about the company, we are at a point where confidentiality is vital.

A Virtual Data Room is a virtual space where the seller uploads all the necessary documentation about the company so that the buyer can access it and move the process forward.

This exchange of information is extremely delicate and should only take place when there is a solid and trusting relationship between both parties, which means that there is already a willingness to invest and close a deal.

The VDR is designed to protect the information, which is delivered via online software that prevents the printing of the documentation contained therein, preventing the information from travelling unchecked.

3 ERRORS IN ACCEPTING THE WRONG OFFER



KNOWING WHICH OFFER TO ACCEPT AND AT WHAT PRICE

There is a suitable buyer and a suitable offer for every type of company for sale. Knowing how to make the right choice makes a big difference, which is reflected in the price you get for the sale and the conditions of the sale, not to mention the risks you take if you fail to close the deal.

3.1 | RUSHING TO ACCEPT THE FIRST OFFER

Unless there are emotional motives involved, the objective of any salesperson should be to maximise the selling price of his or her company. From this perspective, assuming that the buyer who knocked on the door first is your best buyer is very optimistic.

We had a case where the first offer was received in a written Letter of Intent(LOI) only five days after the teaser was published.

The seller was ecstatic. The LOI offered 90% of the asking price, more than he expected. In addition, the Letter of Intent acknowledged a potential liability that the seller was concerned about and was therefore included in the offer price. Unsurprisingly, the Letter of Intent required the seller to indemnify the buyer for that liability in the sales agreement. The exclusivity clause specified ten days to confirm the overall performance of the business and 90 days to develop the sales agreement.

Our advice was to wait until other offers were received. But the seller, anxious to close the deal, signed the letter of intent. At the end of the 10-day period, the buyer confirmed the offer price in writing, as required by the letter of intent. The deal seemed to flow smoothly until the unusual liability caused the due diligence to be extended. The exclusion period was extended to 120 days by mutual agreement. However, a week before the end of the 120-day period, the buyer withdrew without explanation.

Time is the enemy of all deals. The seller offered a price reduction to resurrect the deal, but the buyer had lost interest for some reason that was never made clear. The seller had absorbed huge transaction costs, not to mention the emotional trauma.

Unless you have to sell the business quickly for financial or personal reasons, you should not rush into a sale without exploring all your options to determine if you are getting fair value for your business. Often this temptation arises out of anxiety or fear that other offers will not come in.

Accepting the first offer may not be a wise decision. It may not necessarily be the best offer you can get. In a competitive process, it is advisable to consider a reasonable deadline for bids and wait for it to end.

You should also evaluate the buyer before deciding on their offer. When you meet with a buyer, you should know your own position, of course. But it is equally important that you know their position and anticipate how they will react to yours.

To make this assessment, there are a number of questions you can ask: What does the buyer intend to do by buying your company? If you can't answer that question with hard facts, probe further. Is the buyer under pressure to increase revenues and profitability?

3.2 | QUESTIONS TO ASK TO RECOGNISE THE BUYER WHO WILL MAKE THE RIGHT OFFER

Many sellers are not able to see their company through the eyes of the buyer, so they need an experienced specialist advisor to ask the questions that help qualify potential buyers. Some of the questions advisors often ask prospective buyers in the context of closing the sale include the following:

- Have you bought companies in the past, and which ones?
- What were the sources of financing for those transactions?
- When would you like to close a transaction, and why that particular date?
- What are your sources of funds for this transaction?

- Is there financing in place, and what collateral have you provided for the financing?
- What are the criteria for your purchase decision?

- Are there any factors preventing the closing of the transaction?
- What other companies are you considering?

These questions help to determine the buyer's M&A experience, the urgency of closing a transaction and financial capacity issues. A specialist advisor will know which answers to these questions are acceptable and will advise you accordingly, so that you can decide on one offer or another.

3.3 | FALLING IN LOVE WITH A HIGH OFFER

One has to be very careful about what we traditionally consider a high bid. In the sale of companies, this type of high bid sometimes takes the form of the inclusion of an earn-out clause in the sale and purchase agreement.

As explained above, an earn-out agreement offers the selling company or its shareholders the possibility of recovering an additional payment after the closing, depending on the company's financial performance or the achievement of certain milestones. In other words, the transaction price to be paid will be divided into a fixed and a variable part. The latter will depend on the performance of the company after the purchase for an agreed period of time prior to the sale.

This means that part of the payment is linked to an earn-out clause, which does not guarantee that the full amount agreed will be received, no matter how high the offer.

The inclusion of an earn-out clause in an acquisition agreement can be useful to bridge the valuation gap between a seller and a buyer. However, earn-out clauses often lead to disputes and even litigation unless they are drafted with care and attention, bearing in mind what are realistic financial milestones to be reached before the earn-out is paid.

In setting an offer, buyers tend to prefer profit or EBITDA metrics, while sellers prefer to set the price by looking at metrics that are less likely to be manipulated, such as gross revenues.

In general, metrics that are easy to measure and verify are beneficial to the seller.

It is important to understand that compensation clauses are fully negotiable, and that the likelihood of payment depends largely on how well the clause is drafted.

Therefore, the best advice, which your advisors will guide you on, is to have high but reasonable aspirations: you should be open to **accepting the most advantageous offer for your present and future personal interests rather than the highest one**.

Therefore, these are the main terms to keep in mind when negotiating a high offer that includes an earn-out clause:

1 | Expenditure

What overheads and extraordinary liabilities will be excluded from the calculation if milestones are based on profit or EBITDA?

2 | Earn-out calendar

What is the earn-out schedule, over one year or over several years?

3 | Milestones

What payments are required as milestones are reached?

4 | Profits

Are profits paid in a lump sum or on a sliding scale?

5 | Payment limits

Is there a limit on earnings payments?

6 | Safeguards

What protections does the seller have in place to ensure that the buyer will make reasonable efforts to manage the business in a way that does not artificially diminish remuneration (e.g. does the buyer commit to adequately finance the business after closing)?

7 | Obligations

What happens if the buyer subsequently sells out, does the buyer then assume the benefit obligation or are the benefit payments accelerated?

8 | Arbitration

How will disputes be resolved? Arbitration is usually more desirable for the seller.

9 | Compensations

Can the buyer offset claims for compensation against the earn-out?

10 | Inspections

What information, audit and inspection rights will the seller have?

4 ERRORS IN STRUCTURING THE SALE

THE WHOLE OR THE PARTS IN THE SALE

When it comes time to receive offers, many owners get excited and don't spend much time thinking about how to structure the sale. There are **three basic ways** to sell your business:

- Sell the company's assets through an **asset purchase agreement.**
- Selling **shares** or **other equity interests** (including interests in limited liability companies or partnerships).
- Conducting the sale by carrying out a company **merger process.**

Although the acronym M&A stands for Mergers & Acquisitions, mergers are not very common in smaller private companies, especially among what are known as SMEs.

Most SME sales take the form of asset sales. Mergers tend to occur in larger, more complex companies, where the transfer of many assets is laborious and the tax implications of the structure are enormous.

A merger is a clean way to transfer a company, although structuring a complex merger requires sophisticated M&A advisors. Therefore, in the small and medium-sized enterprise market, some transactions are completed as asset sales, and others are completed as share or participation sales.

Asset sales tend to benefit buyers, while equity sales favour sellers. The reason sellers prefer share sales is because the liabilities of the company go along with the shares, but buyers can choose not to assume the liabilities in an asset sale (exceptions are always possible).

In addition, in a share sale, the seller can enjoy capital gains tax on the sale of the shares, which does not disadvantage the buyer per se, although buyers like asset sales because they can mark the value of the assets in their accounts after closing.

There are other issues to consider when deciding between asset sales and equity sales, including issues relating to the transfer of contracts, licences and certain assets that have registered titles. Asset sales present greater challenges in terms of the transfer of these elements. Technically, in a sale of shares, they are not transferred at all. Only the shares change hands from the seller to the buyer (i.e. the assets and contracts remain directly owned by the company whose shares are transferred).

5 ERRORS IN THE LETTER OF INTENT

MAKING SURE YOU ACHIEVE YOUR GOALS

A key point in the closing phase is the signing of the Letter of Intent (LOI).

The LOI is a document in which the structure of the transaction, the sales price, payment terms and other essential terms and conditions must be put in writing.

Although the buyer prefers to wait until after due diligence to set the terms and conditions and wants the seller to be out of the market as long as possible, the Letter of Intent should be established between the parties prior to due diligence.

The seller has maximum influence over the buyer just before signing the letter of intent, especially when there are several interested potential buyers. Immediately after the Letter of Intent is signed, the bargaining power shifts to the buyer.

The Letter of Intent will determine how the transaction will be structured, how much, when, and how you will be paid.

The Letter of Intent will contain a wide range of other terms and conditions that are important to the deal. As a seller, you should prefer the Letter of Intent to contain more detail, rather than less.

5.1 | KEY CLAUSES OF THE LETTER OF INTENT

The clauses that can be included in a Letter of Intent are too numerous to discuss in full here, but some of the more controversial and common ones are:

1 | Structure of the operation

The Letter of Intent should indicate whether the acquisition is a sale of shares or assets. There are often tensions between the seller and the buyer on this issue because the income tax consequences and risks differ for the buyer and seller in each structure.

2 | Scope and timing of due diligence

Some letters of intent specify the date by which the seller must provide information. Failure to provide the information in time may prolong the due diligence process or the financing contingency period.

3 | Position of the seller in the company after the sale

The Letter of Intentshould state whether or not the seller will remain with the company after the closing. If you plan to stay, the clause should specify for how long, in what role, whether you will be an employee or a consultant, and with what salary and benefits.

4 | Period of exclusivity

The exclusivity period is the time granted to the buyer for due diligence (legal, tax, financial, labour, etc.). In the LOI it should be made explicit whether it will be short or long. Normally a period of around 3 months is given. This period limits the time that a potential buyer has exclusivity over the purchase of your company, so that if this period passes without an agreement, you will be free to negotiate with other buyers.

5 | Bail bonds

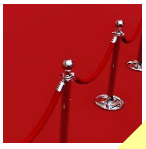
Don't let the buyer get away with saying that the agreement of sale "will contain the usual earnest money". If possible, demand that the LOI specify what earnest money, how long the money will be held and how the amount of the earnest money will be determined.

6 | Price reduction by the buyer

A clause should be included stating that if the buyer reduces the price, the seller can terminate the exclusion period immediately. Depending on the quality of your income statement, it may be better to set the purchase price in a formula to prevent the deal from collapsing if there are any nasty surprises in the due diligence.

7 | Non-competition agreement

The buyer will probably insist that you sign a non-compete agreement with his company, and not to approach customers or solicit employees. The Letter of Intentshould specify a reasonable time period and geographic area for the agreement.



8 | Restrictions on operations

The buyer will want to restrict investments and other important transactions during the due diligence period. Make sure the restrictions are reasonable and do not conflict with actions you already have planned.

9 | Retention of key employees and customers

The buyer may condition the closing on the retention of key employees or customers. In some cases, the buyer may require a certain structure in the acquisition to avoid termination of contracts and to reclaim its performance record.

Before signing the letter of intent, which removes your company from the market for sale, conduct your own research into the buyer's financial capacity to complete the transaction. This is a piece of advice we have repeated several times in this series of e-books, but it is essential analysis to avoid making a mistake in buyer selection.

When the economy is in the doldrums and lending standards are tight, the number of transactions that fail to close due to lack of buyer financing increases.

In many cases, it is better for the seller to accept a slightly lower purchase price from a buyer who is financially able than to accept a higher price from a buyer who is financially stretched. And you will be able to determine this after having carried out this research.

6 ERRORS IN THE DUE DILIGENCE PROCESS

TIME TO LAY YOUR CARDS ON THE TABLE

Due diligence is an unavoidable and fundamental step in the process of selling a company and not preparing for it is one of the worst mistakes you can make.

6.1 | WHAT IS DUE DILIGENCE?

Due diligence is a process through which buyers evaluate a company based on historical facts and figures.

However, as mentioned above, it is the future growth potential, risks, and potential return on investment that are of most interest to the buyer. This requires intensive analysis and projections on their part and can be an arduous and time-consuming process for the seller.

The growth potential of the company should be emphasised during the discussions.

As a seller, you have a dual purpose in due diligence:

- Actively **ensure** that the buyer is capable of **acquiring and running** your company.
- Help the buyer **research your company**.

It is in your best interest to help the buyer to finish his enquiry as soon as possible. Therefore, respond quickly to all the buyer's requests, because delays not only lengthen the transaction, but also kill deals. If there is too much delay, it can damage trust, as the buyer thinks that information is being withheld or may be damaging.

As far as possible, have signed contracts with customers and have accessible all the information that buyers will require.

6.2 | MISTAKES TO AVOID DURING DUE DILIGENCE

The due diligence process is a source of a great deal of stress. The intense scrutiny and time involved turns into uncertainty and stress for all parties involved.

As a seller you should avoid making the following mistakes:

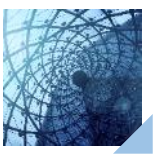
1 | Make this phase personal

This situation can occur when the seller perceives the conclusions of the due diligence process as a censure of his own management of the company.

On one occasion, faced with a tax contingency of 1 million euros, the seller insisted vehemently on the elimination of this contingency from the report.

The buyer took advantage of this circumstance to negotiate a reduction of half a million euros in exchange for the elimination of this contingency.

It was an absurd exchange, contingencies are only paid if there is finally a tax report. And the fact that the contingency does not appear in the report does not eliminate the possibility that it will eventually occur.



2 | Changing the financial structure of the company in the context of the sale

Working capital and financial debt are communicating vessels.

You have to look at the company as a whole and not in parts. You cannot change the financial structure of the company at will when you are going to carry out a corporate operation.

Keep in mind that financial debt is everything for which you pay interest, both in the long term and in the short term.

Working capital financing (credit facilities, discount lines, confirming, factoring, etc.) is also financial debt.

3 | Perceiving the escrow account as a price reduction

Escrow account payments are those in which the money remains on deposit until the transaction triggering the payment is successfully completed.

The payment is not made directly from one party to another, but through a third party. This third party agent holds the money in custody and delivers it to the recipient when the previously agreed conditions have been met.

It is important not to make the mistake of believing that the inclusion of this guarantee means a reduction in the price.

On one occasion we advised on a sale transaction in which the buyer required a 15% retention and the seller a 10% retention.

The retention would be placed in an escrow account and a repayment over 4 years was negotiated as security for contingencies. In this case the 5% difference amounted to 1.5 million euros to be repaid over 4 years.

The buyer negotiated a cut of 400,000 euros in exchange for lowering the retention to 10%. In practice this meant that the seller continued to be personally liable for any contingencies that might arise, which is not a good deal.

4 | Showing a false excess of cash

A big mistake to prevent is to **fall into the temptation of trying to make the company show excess cash** (in order to present a good image to the buyer and thus increase the price of the sale) by using, shall we say, unsuitable practices.

In many cases, the company being sold decides to anticipate the collection of revenues and delay payments to suppliers (extending the payment period) in order to give an unrealistic picture of its cash flow. Don't make this mistake: it is **important to continue to monitor receipts and payments efficiently**, respecting the average periods. This does provide a good image for your company, which will benefit sales in the long run.

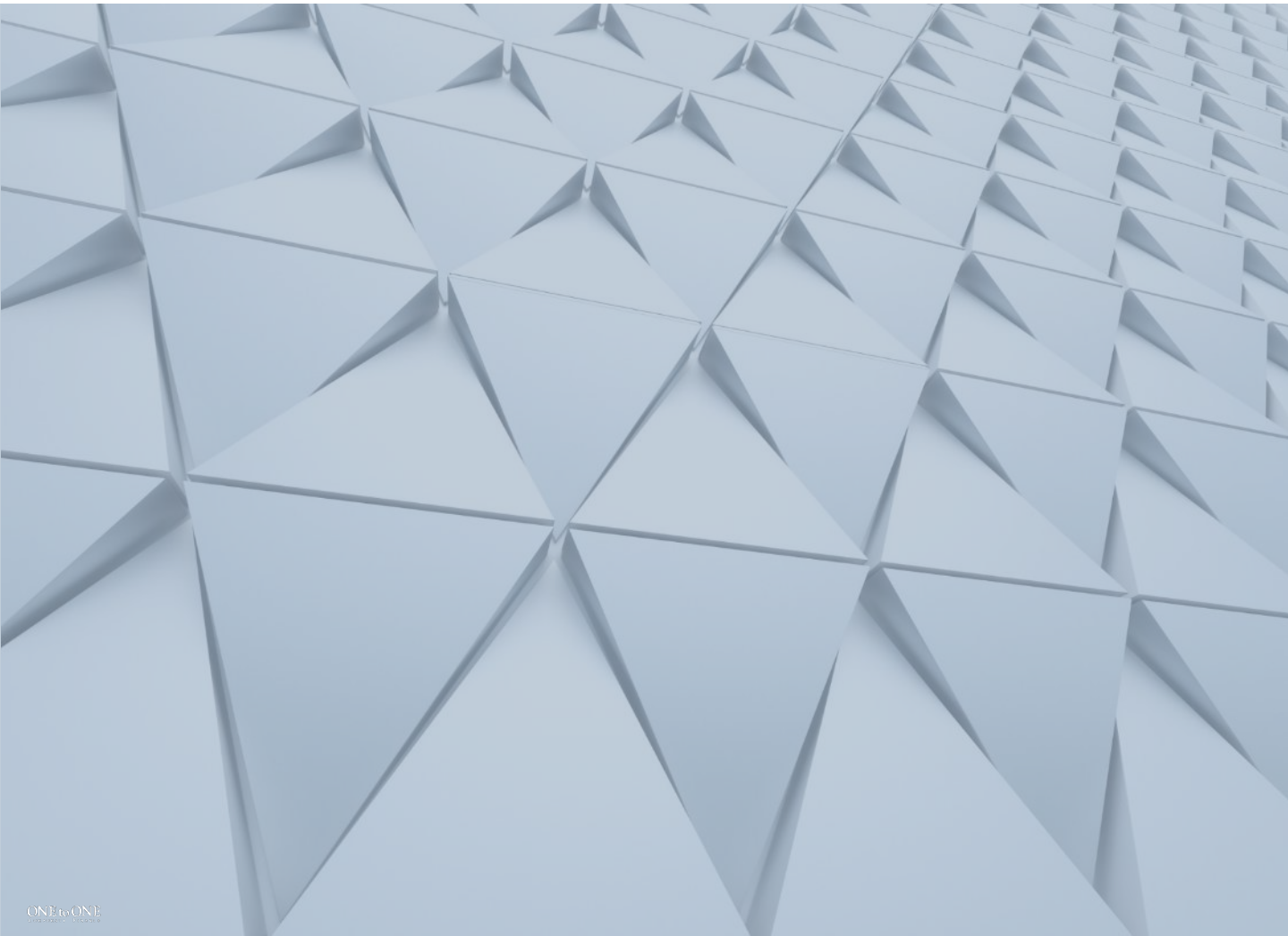
There is often some conceptual confusion with cash and working capital during the due diligence process. The company needs a minimum amount to operate.

During the financial due diligence, this amount is estimated through a monthly working capital analysis, to take into account seasonalities and not only the year-end. With this monthly cash requirement (current assets and current liabilities) a fair amount is calculated (average, median, no peaks, one year, 2 years, etc.).

This is the estimated amount that the seller must leave in the company to ensure its operation. Anything in excess of this amount at the closing date of the transaction may be taken by the seller after the sale.

On the other hand, if the cash on hand at the time of closing is less than this fair amount, the seller must contribute it to the company's cash, which is usually by way of a price reduction.

7 ERRORS IN THE CONTRACT OR SPA



PUTTING IT ALL IN WRITING

Once the due diligence has been completed, where the buyer has been able to analyse the true state of the company for sale, the last phase of the company sale process arrives.

This is the moment to formalise the agreement, the price and all the terms and conditions of the sale and purchase through a contract, formalised in a public deed. The sale and purchase agreement is traditionally known as the SPA (Sell & Purchase Agreement).

7.1 | NOT HAVING THE RIGHT LAWYER TO REVIEW THE CONTRACT

The cardinal mistake in drafting a sales contract is to entrust it to a non-specialist lawyer or, worse, not to hire a lawyer at all.

What you need to be very clear about is that an SPA must be reviewed and verified by a **commercial lawyer specialising in M&A**.

Some sellers may be tempted to entrust the drafting or review of the contract to their trusted lawyer who handles family matters, or even to lawyers from the company's management company. These people may be well-meaning and competent professionals in their fields, but they are unfamiliar with the multitude of concepts involved in share purchase agreements and their derivatives.

The savings of hiring this highly specialised professional do not outweigh the risk of ruining a good deal one step away from closure or, worse, potential legal contingencies. Unfortunately, we have seen this mistake made more than once.

We had a client who refused to engage a lawyer specialising in conveyancing. As a result, the contract included basic errors in the terms and conditions of the company that were included. In addition, the seller agreed to terms that a specialist lawyer would never have allowed to appear in an SPA. Once the sale was closed, the buyer realised that the reality of the company was not as stated in the contract and sued the seller, which resulted in the seller having to pay a large amount of compensation, after having faced an expensive and bitter legal process.

Most often, it is the buyer, together with his legal advisors, who is responsible for drawing up the first version of the contract. As the seller, you will have to review it, which is not an easy task.

Keep in mind that the sale and purchase agreement cannot be simple: as we have seen, the sale of a company is enormously complex, integrating a plurality of assets and liabilities, relationships and contracts with others, which is why many entrepreneurs are frightened by the number of pages contained in the first version of the contract, not to mention the arduous task of reviewing and verifying it word for word.

One line in the contract can make the difference between a good and a bad deal. Ideally, good lawyers with proven experience in business sale contracts should be involved at this stage.

7.2 | OMITTING CRITICAL INFORMATION IN THE CONTRACT

You should ensure, together with your advisors, that the contract correctly captures the key information required to protect the transaction and your interests:

1 | Description of the transaction

This section should contain all the general details of the transaction: the matters to be dealt with in the contract, the parties involved, a statement of their intentions and a definition of the most recurring terms that will appear in the contract.

In the case of a **sale of assets**, the assets to be included in the transaction and the obligations to be transferred should be detailed. Do not make the mistake of omitting assets that are not included in the sale: property, vehicles, garage space or even your home.

For the sale of **shares or holdings**, you must define whether you are selling all or part of them.

2 | Conditions of the agreement

You should reflect in this part everything you have agreed in all the previous negotiation, especially everything related to the price: conditions, payment methods, foreseeable or not deferred payments, earn-out clause for variable payments, payment currency and circumstances that will produce adjustments in the price. Also what to do with surplus cash.

3 | Demonstrations and guarantees

In this section the seller will guarantee that certain aspects of the company are accurate, correct and truthful. This is a legal and trustworthy guarantee for the buyer, which will benefit you when you receive payment.

It is a big mistake not to detail this information: in case of inaccuracy, incorrectness or falsity of the information, the buyer of the company can file a lawsuit and claim compensation.

4 | Limits and liability

Make sure that the legal liabilities are well defined and limited in terms of amounts and periods to be claimed: with the tax authorities, with the social security or with third parties.

5 | Conditions

Specify in this section any special conditions: whether the closing is conditional on certain milestones, or whether your ability to compete with the buyer or hire other employees for other businesses is restricted. Save yourself future problems by ensuring that this part of the contract is properly negotiated and drafted.

To close the sale in the best possible way, you need to **take care of every single detail until the very last moment.**

Above all, make sure that the conditions you have agreed and negotiated during all the previous stages are reflected in the binding document that is the SPA. Otherwise, you run the risk of not successfully completing a deal to which you have devoted so much time and effort in the previous phases.

8 ERRORS DUE TO BEING CARRIED AWAY BY EMOTIONS

NOT FALLING INTO THE TRAP OF MAKING IT PERSONAL

With all the different factors and personalities that are involved in a sales process, it is sometimes necessary to take a pragmatic view. In this sense it must be kept in mind that the closing of a sale is a human interaction in which both parties feel that they are putting important parts of their assets and professional prestige at risk.

If you want to be successful in negotiation, you cannot ignore the fact that emotions can be intense and can flare up at the least expected moment.

Demonstrating empathy with the situation and a collaborative approach is always welcome and well received. A negotiation is often a compromise, a give-and-take process. If you dig in too early, or go too far, you may jeopardise the success of the operation.

We have seen agreements fail because one side has pushed its advantages too far by negotiating too hard.

It is easy for a deal to turn sour because one party feels cheated. You may have to work with the new owner for some time after the sale. The key is to focus on the big picture and work together.

Fight to win the big battles, but don't worry about winning every little point.

8.1 | LETTING EMOTIONS GET THE BETTER OF YOU DURING THE NEGOTIATION

Nothing kills a deal faster than a seller who is unwilling to work with a buyer.

The sale of your business depends on your willingness to make a deal. Think ahead, with your ultimate goal in mind. **The higher the price you ask, the more flexible you need to be with the terms of the deal.**

Avoid getting carried away with the emotions of this arduous process, as you can make silly mistakes that can be very difficult to make amends for.

During a meeting between the owner and the buyer during the negotiation of the purchase of a company, the owner got carried away and, in a display of sincerity, said that he did not think that one of his companies would maintain the margin in the following year, which was not true.

By the time he wanted to make amends and explain that he meant something else, it was too late. The investor, whenever he could, reminded him of this by saying "If even the owner says so...", as an argument for not improving his offer.

In this, as in all other aspects, it is vital to listen to the advisor. The entrepreneur generally sells his company only once, whereas the advisor has handled hundreds of M&A transactions, and that is why you hire an advisor, to trust his experience and to let him advise you.

The trap of emotions also manifests itself in the temptation to be seduced by the buyer: to fall into the trap of believing that the "good feeling" is developing in the initial course of negotiations. This situation, which is human, is particularly dangerous when the buyer subtly starts to send negative messages about the seller's advisor, with the advisor in some cases being left out of the negotiations and the "novice" seller at the mercy of the "experienced" buyer.

Some buyers may try to seduce you with these "siren songs" so that you give up the advisor you have hired, who is looking after your interests. They may try to take financial advantage of your inexperience and even your good faith. Always remember that negotiations require knowledge, rigour, and skill. If you have no experience as a business sales negotiator and choose to listen to the "siren voices", you will probably have to pay for their training during the sales process itself, and in the most expensive way.

9 ERRORS IN THE COLLECTION OF THE SALE

THE GUARANTEE OF GETTING WHAT YOU DESERVE

The payment of the sale is one of the most sensitive points. This is where expectations can clash with reality. It is a delicate part of the process, so it is a mistake to focus too intensely on one aspect, rather than treating it as another aspect of the negotiation with the buyer.

One of the most common mistakes we have seen made is to try to negotiate only the price rather than the whole transaction at once. To avoid unpleasant surprises or unrealistic expectations, a number of mistakes should be avoided.

9.1 | PROVIDING FOR AN OPAQUE AND UNVERIFIABLE EARN-OUT CLAUSE

As explained above, the total amount receivable is sometimes split between a fixed and a variable part, which is defined by an earn-out clause, where the variable part will be linked to the performance of the company after the purchase over a certain period of time specified in the purchase contract.

So, if you agree to earn-outs that depend on the success of the company, do not make the mistake of not specifying in the earn-out clause that you will have the right to check and confirm the buyer's plan to operate the company.

Also make sure that the earn-out formula is clearly specified and that you have the right to examine the financial information related to the earn-out.

Not to do so is to leave the door open that the results can be manipulated, and that the buyer will not pay the ear-out share,, or will pay a lower percentage than agreed. As with everything in life, hope for the best, but prepare for the worst.

9.2 | WORKING CAPITAL

Another mistake that can also be very costly when it comes to collecting the transaction is not paying enough attention to the price adjustment mechanisms and making mistakes in the calculation, often without taking into account the multiple that can be applied to it.

Price adjustments can relate to the value of inventories, accounts receivable, accounts payable and other elements of working capital on the day of closing.

There are also what we call other costs, which include items such as legal fees, escrow fees, financial advisor's fees, and pro rata expenses.

It is very important that the settlement sheet shows exactly how much cash will be transferred to your account or given to you in a certified cheque. Normally, the buyer's attorney will prepare a draft of the settlement sheet and all members of the table will review it.

The buyer and seller should approve it to avoid unpleasant surprises at closing.

9.3 | PRETEND TO ACCEPT ONLY 100% CASH OFFERS ON SIGNATURE.

Pretending to accept only 100% cash offers at signing Cash sales are unrealistic in today's business sales market.

They can also be detrimental to sellers from a tax perspective. Rather than handing over a large amount of cash at closing, today's buyers are more likely to need concessions in the form of seller financing, deferred payments or assistance in obtaining third party financing.

The advantage to you, as a seller, is that spreading the sales proceeds over a period of several years may allow you to avoid higher tax brackets.

CONCLUSIONS

The closing is the culmination of the sale, the moment when the efforts you have made during the previous phases - preparation and negotiation - will materialise. It is the moment to reap the fruits of your patience and hard work.

With the closing you will close several stages. You will close the hard sales process that began with the difficult decision to sell, but you will also close an important stage of your life: the one you have dedicated with care to your company. For the company, it is also the end of a stage: new horizons open up before it.

If you have been diligent and have avoided all the mistakes that can be made in this type of transaction, this farewell moment will not be sad, far from it.

If you have been careful up to the last stage, you will have put a golden clasp to your business career to dedicate yourself with **new energy and economic resources** to the next stage of your life. You will materialise the effort of your entire career at the best price.

Avoiding all possible mistakes, you will also ensure that your company is in good hands, those of a capable and ambitious buyer, with the illusion of pushing the company towards new and prosperous horizons.

We hope that our experience will help you in this challenging adventure. Don't make the mistakes that we have seen sellers make who have fallen into the trap of facing this complex process without any support or advice.

At ONEtoONE we are at your disposal to help you reach the finish line as a winner, making the sale of your company the victory of your life.

ONEtoONE CORPORATE FINANCE

ONEtoONE Corporate Finance Group is a global investment bank, focused on small and medium-sized companies. We specialise in mergers and acquisitions, company valuations, investor search and financial advisory services.

Founded by executives with extensive investment banking experience, ONEtoONE has a global team of professionals working locally, and in teams, worldwide in over 25 countries, to provide the best combination of services to our clients.

To date, ONEtoONE Corporate Finance has advised on more than 1,900 mandates for companies across all sectors.

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