

Legal Due Diligence

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תכנית הכשרת משקיעים אנג'לים - מפגש 4

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- Partner, International Corporate and Hi-Tech.
- Joined the firm in 2007 after completing LLM at Fordham University Law School, New York in Corporate, Banking and Finance Law.
- Adjunct Lecturer, Hi Tech, Reichman University, College of Management Academic School.
- Recommended Lawyer, Hi Tech, Legal500.
- Sharon concentrates his practice in the area of corporate and securities law, with an emphasis on venture capital financing, public and private offerings, cross-border transactions, and M&A transactions.
- Sharon represents technology and international clients across a range of industries and fields, including software, cyber, fintech, social media, mobile apps, and telecommunications.
- Sharon works closely with serial entrepreneurs and investors for many years and assisting star-up companies with early stage start up corporate finance and incorporation (including founder agreements and founder's vesting agreements, convertible notes, angel and VC financing rounds, and with other general corporate matters and commercial needs.

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Goldfarb Gross Seligman & Co., Israel's largest law firm, is among the elite group of firms that deliver top-tier legal services at international standards. Tracing our history back over 90 years, we offer clients extensive experience in various fields of law.

Human Capital The firm is comprised of over 500 attorneys, including more than 200 partners. With expertise in a wide spectrum of legal services, we provide sophisticated legal solutions utilizing an innovative, multidisciplinary approach that integrates experts from a variety of fields into a seamless team.

Professional Approach At the heart of our professional philosophy is the belief that every client is unique, with its own issues and considerations. We provide personalized service tailored to each client's particular needs, combined with the advantages that a large 'one-stop-shop' law firm with a global reach can offer.

PRACTICE AREAS



HI TECH CLIENT BASE

- **Venture Capital Funds:**
Representing leading venture capital funds across various sectors.
- **Multinational Companies:**
Assisting top multinational companies in acquiring Israeli Start-Ups and formation of R&D centers in Israel.
- **Startups:**
Representing hundreds of innovative startups, helping them grow and succeed in their industries.

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CAPITAL CLIENT
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Review of Due Diligence



Before We Begin, a Few Questions:

- ❑ Why even bother with this headache?
- ❑ Can due diligence kill a deal? Change key terms in it? (Of course!)
- ❑ What types of DD (Due Diligence) are there? (Legal DD, Financial DD, Business DD)?
- ❑ Are all types of DD the same?

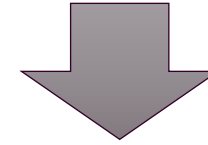


Standard Transaction Process

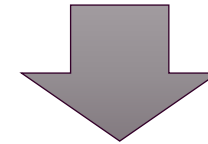


DD Sequence of Action

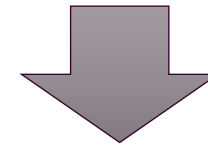
DD Request list – sent by the Investor/ Purchaser (The side having the Due Diligence review)



Data Room Build-up – Responsibility of the Company (recipient of investment/ seller)



Supplemental Request lists - sent by the Investor/ Purchaser



Back & Forth drafts of the Disclosure Schedule – both sides

Due Diligence Request List

Samples:

-Israeli Company

-Delaware Company

Emphasis on how to approach a Due- Diligence Process

- ❑ *The DD process has two important merits:*
 - ❑ *Exposure and Disclosure by the Company of its entire affairs – it shows the Acquirer/ Investor exactly what he buys and guarantees (or almost guarantees) that no surprises (in a form of lawsuit or any other) will pop-up in the future, after it is already too late.*
 - ❑ *A good opportunity to “Clean-up” certain issues of the Company’s day to day legal operating and compliance with applicable laws.*
 - ❑ *For Example – clarifying errors that may have occurred in connection to the Company’s capital – prevents the chance of any litigation in the future.*
 - ❑ *This is, in a way, a combined effort by both parties to the transaction.*

“Errors” that might rise during DD process

- ☐ Certain discrepancies between the Cap Table, Option Ledger and Share Register.
- ☐ Lack of documentation in connection to capital (or any other field)-documentation is always important.
- ☐ Non-compliance with regulations (Registrar of Companies , etc.).
- ☐ Tax ruling issues – especially in connection with Options.
- ☐ Lack of required IP assignment (Employees, Founders).
- ☐ Corporate resolutions (Shareholders, Board, Certain classes or committees) that have been resolved not in accordance with the Company’s AoA and/or applicable laws.
- ☐ Important outbound licenses given by the Company (IP Issues).
- ☐ Agreements with problematic ways of termination.
- ☐ Agreements with a problematic “change of control” covenant.
- ☐ Did the company receive government grants? Is it obligated by it in any way?
- ☐ Employment issues – non-compliance with the law.
- ☐ “Tail periods” in agreements – the agreement is terminated but certain convents still grant the other party certain rights.
- ☐ Problematic commercial provisions in agreements .
- ☐ Unexecuted documents or missing exhibits to documents

Part I – Diligence Process (2/3)

Investor/Buyer Side

- Goals of DD – Go/No Go? Lower Price? Mitigate Exposure?
- Initial DD Request List
- Data Room
- Index
- Supplemental Request List – Follow-up questions/requests for documents
- DD Report
 - Investor vs. Buyer
 - Local VC vs. Foreign VC
 - Full Blown DD Report vs. Executive Summary or Red Flags E-mail
- Disclosure Schedules/Representations and Warranties

Part I – Diligence Process (3/3)

Company/Target Side

- Preparing a Data Room
- DD Request List
- Answers to Supplemental Request List + Additional Documents to DR
- Disclosure Schedules/Representations and Warranties

General Corporate – Capitalization

- Authorized/Issued Share Capital
- Company Minutes Book – Past Major Events, M&A activities, Company Structure, Management
- Subscription/Investment/Transfer Agreement
- Certificate/Company Register/Registrar of Companies
- Share Transfers – Agreements, Deed, RoFO
- Corporate Governance – Appointment/Resignation of Directors, Approval of Transactions, Signatures to Consents (board/shareholders)
- Related Party Transactions (Funders Agreement, Repurchase Agreement)
- Articles, Shareholder Agreements, Veto Rights, Required Consents (to Approve the Transaction)
- Filings with the Israeli Companies Registrar

Part II – Diligence Review (1/5)

Part II – Diligence Review (2/5)

Tax

- General Tax Review (including Transaction Structure)
- Options:
 - Option Plan – Approved by the ITA / Appointment of 102 Trustee
 - Cap table / Option table
 - Board Approval / Shareholders Approval (if needed)
 - Option Agreements
 - Section 102, Section 3(i), ISO, NSO
 - Vesting – Dates, Change of Control, Acceleration

Part II – Diligence Review (3/5)

IP

- General IP Review (Trademarks/Patents)
- IP Contributors (PIIA, NDA, Employment/Consultant Agreements)
- Third-party Ownership Interest in Company Inventions
- Governmental Approvals/Grant – (IMOD, IIA, Ministry of Communication, Registrar of Companies)
- Privacy
- Export/Encryption
- Open Source

Part II – Diligence Review (4/5)

Employment Matters

- Compliance with Labor Laws
- Non-Compete Non-Solicitation Obligations
- Change of Control/Golden Parachute
- Monitoring Electronic Communication
- Bonuses
- Section 14
- Consultants/Gidron Clause

Part III – Ancillaries

Type of Documents

- Board/Shareholders Resolutions
- Shareholders Register
- Compliance Certificate
- Share Certificate
- Legal Opinion
- Indemnification Agreement
- Management Rights Letter
- Director/Observer Appointment Letter
- Side Letter
- Joinder
- e-Binder



Questions?

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Thank you!

Sharon Kadosh, Partner

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