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Between conference, board and court rooms: pre-closing deal renegotiations and litigation

París, 3 February 2023

Speakers



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Topics we intend to cover

1. Sellers' breach: termination or renegotiation of deal terms due to:
 - Non-compliance with interim covenants;
 - Non-disclosure of material information; and/or
 - Breach of R&Ws.
2. Buyer's breach: non-satisfaction (by the long-stop date) of merger control, FDI and financing condition precedents due to a failure of Buyer to diligently pursue the filings and financing negotiations. Claims in respect to the break-up fee.
3. "No fault" terminations (e.g., "hardship," non-satisfaction of a condition precedent without a hell-or-high-water, etc.)
4. Deal litigation and renegotiations and some of the specific issues raised by them

Background

- Seller and Buyer have executed an SPA in respect to Target.
- The overall market is evolving quickly in ways that may make the deal worse for the Buyer and better for the Seller.
- The SPA includes broad interim covenants and R&Ws to be repeated on closing but no MAE clause.
- Closing is conditional upon Buyer obtaining financing (financing-out) and merger and FDI clearances, subject to a (short) long-stop date. Buyer has agreed to pay a (substantial) reverse break-up fee in case the condition precedents are not satisfied.

Takeways

- Corporate lawyers should always remember our contracts may end up in front of a judge. Keep drafting simple and understandable for a lay person.
- Expect the unexpected when drafting the SPA.
- Deal litigation is for lawyers like the Himalayas are for a mountaineer. These kinds of matters are some of the most perilous and exceptional challenges. Grey hair matters.
 - For litigators – not a posteriori, very fast moving, with live business issues.
 - For deal lawyers, hostile environment, in which anything you say can be used against you. But can't just throw up your hands and hand things over to the litigators – need to stay involved and manage the deal, coordinate, etc. remembering that the litigators aren't on their usual home terrain either.
- Involve the litigators very early
- Importance of closing the ranks.

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