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DISPUTES ARISING FROM M&A TRANSACTIONS

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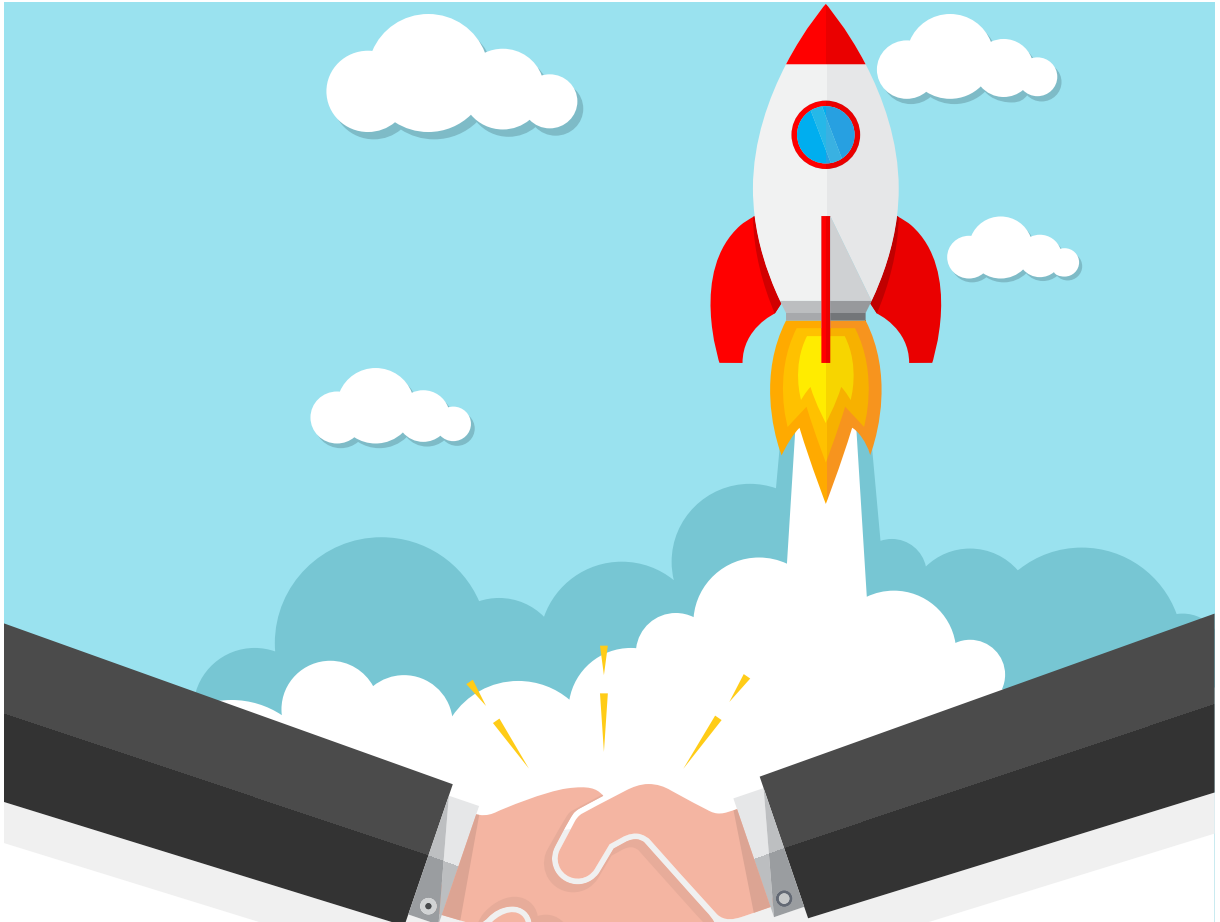
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HOT TOPIC

DISPUTES ARISING FROM M&A TRANSACTIONS



PANEL EXPERTS

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Ffion Flockhart is a dispute resolution lawyer and qualified solicitor-advocate based in London. With an insurance law background, she advises clients across a number of industries on the management of key financial risks as well as on the resolution of disputes. She is known in particular for her policy wording work for large corporates and financial institutions, as well as her work on matters involving directors and officers (D&Os) liability, transaction liability and cyber risk.

CD: Could you provide an overview of M&A-related disputes over the past 12 to 18 months? What would you consider to be the dominant trends?

Theau-Laurent: In recent years, there has been a continued progression in the number of M&A-related disputes, specifically driven by sustained M&A activity in the context of growing economic and political uncertainty. Other factors, such as third-party funding and the increasingly regular inclusion of arbitration clauses in contracts, has further contributed to this growth. Conversely, higher quality information and the increased sophistication of parties should, in theory, have limited the occurrence of claims. Statistics show that disputes have arisen from deals of varying sizes, yet the bulk remains related to 'mid-cap' transactions with claims ranging from £10m to £100m. The majority of M&A disputes are still resolved through arbitration, as they frequently involve parties from different jurisdictions.

Berard: Many disputes still relate to the exaggerated financial performance and prospects of the target company. This includes the manipulation of the target's accounting policies and assumptions to manipulate or distort the financial results presented to the acquirer – for example, granting unusual discounts or payment conditions to influence turnover, generating non-recurring income

or expenses, making incorrect inventory or WIP valuations, and so on. In the last 18 months, we have seen a greater number of fraud-related allegations, sometimes with parallel regulatory and criminal proceedings.

Trevan: We are seeing an increasing number of disputes about deal pricing. This is not particularly surprising given the current market environment. Over the past 12-18 months, we have seen an already competitive sellers' market get even more competitive. This has driven an increase in deal complexity, including more opaque pricing terms. At the same time, in the private equity space, we are seeing PE houses increasingly look to realise value by arranging marriages of multiple entities, with disputes now arising about the interpretation of the more complicated terms of these deals. We are also seeing an increase in questions – which will inevitably in time lead to disputes – over the allocation of risk in relation to regulator intervention. This is a particular area to watch in the telecoms and tech sectors.

Flockhart: I think it is fair to say that, over the years in the UK, private M&A transactions have provided fertile ground for high-value, high-profile disputes. The past 12 to 18 months have been no exception and you only need to look at the reported cases to see that M&A-related disputes – covering not only breach of warranty, indemnity and price

adjustment issues, but also claims involving tax covenants, fraud and other matters – have taken up a good deal of court time. All of these issues have been well-represented, but I would say the main trends have been a higher incidence of breach of warranty claims and fraud allegations than previously. We can only speculate why this is the case, but a possible underlying factor is elevated asset prices putting pressure on buyers to unlock value after the deal, or resulting in buyers' remorse.

Halper: In the US, at least three primary trends emerged. First, developments in Delaware appraisal law have underscored companies' ability to successfully resist dissenting shareholders seeking appraisal. For instance, Delaware courts have declined to use deal price as the best evidence of fair value, instead favouring discounted cash flow analyses or unaffected stock price to determine fair value often below the merger consideration. Second, disclosure-only settlements in M&A lawsuits continued to decline in Delaware, extending a trend initiated by *In re Trulia, Inc. Stockholder Litigation*. There, the Court of Chancery held that disclosure-only settlements would be disfavoured unless supplemental disclosures are 'plainly material'. Jurisdictions outside Delaware are split on whether to follow *Trulia's* approach. Finally, M&A-related class actions showed new signs of life in conjunction with a migration of M&A cases out of Delaware because

of cases such as *Trulia*. In 2017, there were 165 lawsuits, nearly twice the number filed in 2016.

CD: What types of M&A disputes have been most prevalent? Are there any recurring themes – such as indemnity provisions, earn-outs and shareholder disputes – which have driven M&A conflicts?

Berard: We continue to see many post-closing disputes. Disputes about completion accounts are typical – they relate mainly to the drawing up of the accounts and the calculation of adjustments. As regards earn-outs, the parties typically dispute the application of the agreed accounting policies, the interplay of agreed principles and consistency with past practice, the right calculation of EBITDA or whether parties have manipulated the relevant metric. We also see disputes relating to deferred closing issues, usually relating to non-fulfilment of condition precedents, as well as limitation clauses, and sellers' breaches of representations, warranties and guarantees. In a nutshell, the disputes usually boil down to historic issues in the business being uncovered following the buyer's acquisition, and the parties disagreeing over the interpretation of a provision in the SPA.

Trevan: There is a strong market incentive for sellers to look for ways to retrospectively rewrite

their deals in a way that effectively increases the price. This has manifested itself in many ways, but two specific trends we are seeing are increases in disputes over pricing mechanics and over warranty and indemnity provisions – although in most cases these disputes ultimately end up in a commercial resolution rather than litigation. Other specific trends we are seeing include a growing number of disputes over rights of first refusal and earn-out provisions, the latter particularly by founders of acquired companies challenging the performance of their new bosses. We have also seen a spike in disputes over pre-emption clauses in shareholder agreements in private equity transactions.

Flockhart: We have seen a number of breach of warranty and indemnity claims in the past year, some of them with a fraud angle. But if you look at the reported cases in the English courts, the full range of M&A disputes can be seen. The main trends or recurring themes that I have seen are a higher incidence of breach of warranty and fraud allegations. On the breach of warranty side particularly, the increasing use of warranty and indemnity insurance may also play a role here. The purpose of this product, which is becoming increasingly prevalent, is to transfer the financial risk associated with breach of warranty claims from

the seller into the insurance market. It could just be that a claim under an insurance policy is perceived as an easier way to secure a recovery for breach of warranty than a claim under the SPA, which is how this type of insurance is intended to work.

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Freshfields Bruckhaus Deringer LLP*

Halper: A recurring theme in recent US M&A litigation concerns the impact and attempts to apply the Delaware Supreme Court’s decision in *Corwin v. KKR Financial Holdings LLC*. In that case, the court held that where a transaction “not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders”, the deferential business judgment standard of review will apply. *Corwin*’s defendant-friendly approach in the post-closing context will continue to shape stockholder

litigation in the years to come. Delaware plaintiffs seeking to avoid having their claims dismissed at the early pleading stages of litigation will likely refocus their litigation strategy by bringing other types of cases, perhaps predicated on Delaware General Corporation Law (DGCL) Section 220 books and records demands. In addition, the Delaware courts continue to define *Corwin*'s boundaries, such as assessing when a stockholder vote is fully informed such that it triggers *Corwin*.

Theau-Laurent: M&A disputes may arise from a variety of matters, which broadly fall under two categories. The first one relates to price adjustment mechanisms, which can be further broken down between short-term and long-term mechanisms. A typical example of the latter would be an 'earn-out clause' providing for an additional consideration to be paid based on the future performance of the acquired entity or assets, and, of the former, the calculation of a 'working capital adjustment' between the signing and closing of the deal. The second category relates to the factual premise upon which the terms of transactions were based, and includes disputes arising from breaches of representations and warranties and fraud. Economic uncertainty has given rise to further claims pertaining to price

adjustment mechanisms, and particularly to the calculation of earn-outs.

CD: Have any recent high-profile M&A disputes grabbed your attention? What were the key issues to emerge from these cases?

Trevan: US developments continue to interest us. In the 2016 *Trulia* decision, Delaware courts indicated they would no longer rubberstamp

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*Anthony Theau-Laurent,
Accuracy*

settlements releasing companies from liability and providing fee awards to plaintiffs' attorneys in return for disclosures of questionable shareholder value. Since then, facing a less attractive Delaware landscape, shareholders have explored other options. First, they are bringing cases in federal rather than state court, by adding a US securities

law claim to standard breach of duty allegations. Second, they are bringing cases in states other than Delaware to test their receptiveness. And third, they are bringing fewer cases but focusing on those that involve more egregious conduct and imminent harm to shareholders. By contrast, on this side of the pond, shareholder disputes have grabbed headlines less often than might have been predicted given increasing shareholder activism. But quiet can be deceptive. Although the UK remains a more benign environment than the US – due to the relative ease with which shareholders can obtain redress outside the courts by, for example, removing directors – we do not think the quiet here is necessarily a sign that problems are not brewing. We think the stage may be set for growth in shareholder disputes in the medium term, as shareholders become better educated about their rights and more comfortable exploring mechanisms to bring group claims.

Flockhart: Two English M&A disputes went all the way to the Supreme Court recently: *Cavendish Square Holding BV v Talal El Makdessi* and *Wood v Capita Insurance Services Ltd*. The Cavendish case concerned a so-called ‘defaulting shareholder clause’, which is a term in an SPA whereby, post-completion, any seller whose employment with the company who engaged in a competing business would lose his right to an unpaid instalment of consideration and would be required to sell his shares to the buyer at a substantial discount. The

seller argued that this clause was unenforceable but the Supreme Court disagreed. The *Wood* case concerned the meaning of an indemnity, and the circumstances in which it was triggered. Both of these cases are hugely important for the development of the law, as the *Cavendish* case is now the leading authority on so-called ‘penalty clauses’ and the *Wood* case is regarded as a key authority on contractual interpretation.

Theau-Laurent: The recent High Court decision in the *Zayo Group International Ltd v Ainger and others* is of particular interest. Zayo had acquired Ego Holdings Limited and its subsidiaries from the company’s management in 2014, but then claimed that the latter had breached certain warranties. The court held that the notice had not been validly served to one of the sellers who had moved without informing Zayo and struck out all of Zayo’s claims by reference to a ‘musketeeer clause’ in the SPA. Perhaps more interestingly, the judge also noted that the notices were defective because the claims were calculated incorrectly and so were not reasonable estimates of loss, as required by the SPA. Zayo had indeed based the claims on sums paid out by a subsidiary of the target, rather than the diminution in value of the shares bought. This highlights not only the need for parties to consider the fringe consequences of SPA terms, but also to seek expert advice before submitting claims.

Halper: *In re Tesla Motors, Inc. Stockholder Litigation* is a high-profile example of an interesting line of cases in which Delaware courts held that minority stockholders can, in certain circumstances, exercise corporate control. There, Tesla stockholders alleged that the board and chairman Elon Musk breached their fiduciary duties by approving Tesla's acquisition of SolarCity, a company chaired by Mr Musk, who was also its largest shareholder. Refusing to dismiss the complaint, the Court of Chancery found that Mr Musk could be a controlling shareholder notwithstanding he was only a 22.1 percent owner. The court argued that the focus of the controller inquiry is on the de facto power of a significant – but less than majority – shareholder, which, when coupled with other factors, gives that shareholder the ability to dominate the corporate decision-making process. The 'other factors' include circumstantial evidence, including deal terms raising concerns that the transaction is unfair or that the board was supine, Mr Musk's past behaviour suggesting his dominance of the board, and public statements made by Mr Musk before and after the announcement of the transaction that were supportive of a deal.

Berard: One recent case of note is the high-profile claim initiated by Hewlett-Packard (HP) regarding allegations of financial impropriety and misrepresentation in connection with HP's \$11bn acquisition of UK software group Autonomy. This

case is one the largest civil cases ever brought in the UK against a British national – Autonomy founder Michael Lynch – and is expected to go to trial next year. Fraud allegations are more and more prevalent in M&A disputes. Another case involved Citi in proceedings commenced by Terra Firma claiming over £2bn in damages and alleging that Citi fraudulently induced Terra Firma to purchase the London-based music group EMI at an inflated price by misrepresenting that another company was competitively bidding. This eight-year long case ended when Terra Firma withdrew all allegations of fraud against Citi and three senior officers in the first week of trial, also agreeing to pay Citi's legal costs. In terms of arbitration, we now have some insights through discovery requests made in Delaware into the arbitration award recently obtained by telecoms company Veon – part of Russian oligarch Mikhail Fridman's Alfa Group – against Orascom TMT Investments relating to the US\$6.6bn acquisition of OTMTI's shares in Wind Telecom in 2011. The disputes turned on OTMTI's alleged breach of its obligations to indemnify Veon for a share of the liabilities incurred in connection with Italian tax audits.

CD: What are the advantages and disadvantages of arbitration as a means of resolving M&A disputes? How does it lend itself to multi-party or multi-contract situations, for example?

Flockhart: A key advantage of arbitration is that it enables parties to resolve their disputes in private. Rights of appeal are also usually very limited, so parties know that a tribunal's award should bring finality. On the other side of the ledger, arbitration can prove more expensive than litigation due to the additional tribunal costs, particularly if there is a panel of three arbitrators, and – in contractual disputes – there is greater scope to interpret provisions more 'purposively' with reference to the commercial context. This can make the outcome more difficult to predict, although that may not be a bad thing if the actual words used do not operate in your favour. As for multi-party or multi-contract situations, whereas in litigation it is relatively straightforward to resolve connected disputes in the same proceedings, that is not the case in arbitration. As a result, arbitration is generally less efficient in such situations, where it may be necessary to run connected arbitrations in parallel with a resulting risk of inconsistent outcomes.

Halper: Arbitration has historically been viewed as a more efficient and economical alternative to litigation. Practitioners have conflicting views as to whether that remains true. Certain courts, including, in particular, the Court of Chancery, offer an extremely sophisticated bench of judges with

specialised expertise in corporate litigation, including M&A disputes. The Delaware Court of Chancery is also known for moving cases expeditiously. Those attributes are by no means guaranteed in arbitration absent a bespoke arbitration clause in the governing

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Clifford Chance LLP*

contract. Multi-party and multi-contract situations are more complex, and are therefore better suited for litigation – assuming a sophisticated venue such as Delaware.

Berard: Arbitration remains the preferred method for resolving disputes arising out of M&A transactions. By nature, most M&A transactions are cross-border, therefore the relative ease with which arbitration awards – as opposed to national court judgments – can be enforced internationally is a real plus. The confidentiality of the arbitration process under most institutional rules can also be a factor,

particularly when dealing with sensitive commercial transactions or allegations of fraud, which can lead to significant reputational damage.

Theau-Laurent: With the exception of disputes arising from price adjustments to closing accounts, which are often subject to ad hoc expert proceedings provided for in the SPA, other types of M&A disputes tend to be well suited for arbitration, as demonstrated by the systematic inclusion of arbitration clauses in SPAs. Arbitration remains an efficient and binding mechanism to resolve disputes, with awards being both easily enforced internationally and confidential. Multi-party or multi-contract situations may nonetheless give rise to challenges by reference to, for instance, the equal representation of parties when constituting the arbitral tribunal or when some parties have not signed the arbitration agreement.

Treva: Arbitration has sometimes had an unfair reputation as being ill-suited to the sort of complex disputes that arise in relation to sale and purchase agreements, although it is more common in shareholder agreements. As a contract-based mechanism, it can have disadvantages in the context of multi-party disputes and third-party orders. However, arbitration is becoming more prominent

in commercial arrangements in some sectors, such as energy. Two possible reasons for this come to mind. First, the real risk of a dispute these days is less the legal issues at stake and more the potential reputational hit associated with bad press. The greater scope for privacy and confidentiality in arbitration is important in this context. Second, with increased deal failure, parties are increasingly

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*Jason M. Halper,
Cadwalader, Wickersham & Taft LLP*

looking for ways to increase deal certainty. One way of doing this is specific performance, and a recent survey we conducted suggests that arbitrators can sometimes be more flexible than the courts in this area.

CD: In your experience, are there any steps companies can take to mitigate the chances of an M&A dispute occurring further down the line? How important is a

full consideration of contractual issues at the earliest stage?

Berard: Despite the best intentions on both sides, where an acquisition does not live up to expectations, the deal will invariably come under scrutiny from the dissatisfied purchaser. In my view, there are two key mitigating actions. The first is proper financial, forensic, legal and tax due diligence. The second is unambiguous and precise drafting in the SPA. Parties will inevitably operate under enormous time pressure to close the deal, but they should still take the time to conduct in-depth due diligence, and to get their documentation right in terms of risk allocation, disclosure, representations and warranties. Anything which is left for future clarification or depends on the parties' good will or good faith is likely to engender future disputes.

Theau-Laurent: There are two key steps that need to be given appropriate consideration in order to avoid M&A disputes. The first corresponds to the due diligence process, during which legal, commercial, operational, environmental and financial risks are identified. Thorough due diligence is critical for the buyer to determine the purchase price consideration and identify the relevant representations and warranties. Given the diversity of disciplines involved, coordination of the different work streams is crucial to ensure

that all risks identified are appropriately accounted for. The second step corresponds to the actual drafting of the SPA, and in particular the clauses that address the representations and warranties and potential price adjustment considerations. Loosely worded SPAs are often the cause of M&A disputes. Sufficient attention has to be given to the definition of accounting terms and principles, with detailed examples of calculations and further references to general ledgers, and in some cases to the right measure of performance after the transaction.

Trevan: In the current climate of high opportunity, high uncertainty and high publicity, we would encourage companies to spend more time planning for dispute avoidance rather than spending time down the line on dispute resolution. One trend that we are increasingly seeing is litigators being brought in pre-signing to do a litigation review of mission-critical deal terms. Stress-testing of complex terms requiring mathematical calculations – such as pricing mechanics or earn-out provisions – may also be worthwhile. We would strongly encourage parties to work through numeric examples to avoid mismatches between literal interpretations of the text and how the numbers are intended to work.

Halper: At the negotiation and drafting stage, it is essential to consider areas of potential disputes and draft the agreement accordingly, albeit in a commercially reasonable manner. Provisions such



as earn-outs that require an ongoing relationship between the parties post-closing are particularly fertile areas for conflict. In the current regulatory environment, specifying in detail the parties' obligations with respect to obtaining necessary approvals can avoid later disagreements. Attention also should be given to dispute-related contractual provisions, including arbitration clauses, choice of law provisions, forum selection clauses and indemnification provisions. Deal teams should be wary of using boilerplate language for what otherwise may appear to be an undisputed provision of the transaction document. In addition, transactional lawyers should consider involving a litigator to proactively consider and avert potential problems. Litigators can help ensure that disclosures are sufficiently robust and identify potential problems based on past experience. Prevention at the outset can pay large dividends down the road.

Flockhart: Getting the contractual drafting right is clearly critical, by which I mean that the wording should be clear and the parties should know – as far as possible – exactly what the practical implications are of what they are signing up to. On the buyer side, there is a tendency nowadays to do less due diligence, which can result in important issues not

being identified. It is often when undiscovered issues come out of the woodwork that disputes arise, so heavier or more targeted due diligence is an option worth considering, notwithstanding the additional expense it may entail.

CD: What general advice can you offer to parties on preparing for an M&A-related dispute? Are there any critical issues that parties need to consider?

Halper: Parties should consider incorporating public relations and media planning as an integral part of their overall litigation strategy. Ensuring that litigation issues in dispute have been properly framed before the court of public opinion can significantly impact the result – particularly in pre-closing disputes involving corporate control, where the market may dictate the outcome – as well as the parties' overall reputation. Another important issue to consider is the role of the attorney-client privilege in the M&A context. Parties should pay close attention to the law that might govern privilege disputes. For instance, New York's narrow approach to common interest privilege stands in contrast to Delaware, which allows parties to share attorney-client privileged information on any matter of common interest. This concern is amplified for companies with significant operations outside the US, where privilege protections are less extensive, if they exist at all.

Trevan: Nine times out of 10 when we speak to parties at a later stage of a dispute, they are clear they saw the warning signs far earlier than they did anything about them. Therefore, perhaps the most important thing is to look for the earliest opportunity to head a dispute off at the pass. Wherever possible, parties should think about the dispute at the drafting stage, stress-testing the terms of their agreement not just with disputes lawyers but also with other types of risk advisers who can offer a perspective on the types of problems likely to arise. Deal lawyers should also give careful consideration not only to the clauses most likely to cause conflict, but to the clauses that specify how it can be resolved – such as ADR, pre-action or negotiation clauses. Warranty and indemnity insurance and similar mechanisms to offload risk arising from a deal are also becoming increasingly common, more sophisticated and more straightforward.

Theau-Laurent: The involvement of expert witnesses, with some experience of advising on transactions, as early as possible in the process, is critical. This is indeed key to interpret the intentions of the parties by reference to the findings of the due diligence and the terms of the SPA, and to adopt the correct measure of loss. Given the increasing volume of data produced by companies, data preservation, processing and validation is increasingly key to ensure that parties' positions are adequately supported and documented. The early identification

of key management personnel, who have knowledge of the relevant facts and are capable of acting as credible fact witnesses, is also of paramount importance. Finally, it is worth remembering that disputes do not occur in a vacuum, and parties should seek to set their cases against the context of both market and macroeconomic conditions.

Flockhart: For breach of warranty claims in particular, most SPAs require claims to be notified to the seller within a period of months after completion. They also provide that the notice must furnish the seller with a certain level of information, such as specifying which particular warranties are alleged to have been breached, and that court or arbitration proceedings are to be brought within a limited period following notification. The purpose of such terms is to give the seller certainty that a claim may be brought, and so that the seller understands the basis of the anticipated claim. However, these requirements do put pressure on buyers to get the initial notice right, which is not always straightforward, and to formulate the claim quickly. So buyers thinking of bringing breach of warranty claims should take particular care to understand the claims notification and limitation provisions, and be prepared to act quickly. Otherwise, it is important to know the strengths and weaknesses of your case early on, so you can identify the dispute resolution that is likely to deliver the best outcome for you.

Berard: From the potential claimant's perspective, the buyer should, immediately following completion, put in place appropriate mechanisms to allow prompt identification of issues that might give rise to claims under the SPA and weigh the pros and cons, including costs, of pursuing these claims. From the respondent's perspective, the seller will usually no longer have access to financial documentation and other key records of the target, therefore early document disclosure requests will be key as soon as proceedings are afoot.

CD: How do you envisage disputes in the M&A sector playing out over the next 12 to 18 months? What trends and developments do you expect to see?

Trevan: In today's unpredictable global context, we expect a similarly unpredictable disputes landscape. Brexit, sanctions, digitisation and political retrenchment are just some of the geopolitical factors that will make future-proofing deals even harder than it is in times of relative stability. In this context, one area to watch is disputes about terms that divide liability for the same assets between buyers and sellers, such as asset swaps. In a swiftly shifting landscape, it may be difficult to work out who is contractually – or even factually – responsible

for causing a particular unforeseen development affecting value. There is also potential for an increasing number of group shareholder actions. Another area to watch is disputes coming out of

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Norton Rose Fulbright LLP*

increasingly complex portfolio deals in the private equity space. For several years now, PE houses have sought to realise value by combining entities with very different business profiles. The personalities of the players in these types of deals means there is inherently scope for disputes to arise as they mature. Another area to watch is tech – not just the tech sector, but the tech aspects of non-tech deals. This includes cyber security and data risk. Acquirers are increasingly seeking to understand the cyber security, data standards and related practices of targets, assessing the risks, and thinking about indemnities, remedies and price adjustments

to mitigate or reallocate them. This is relatively uncharted territory, and the resulting disputes will be worth watching out for.

Theau-Laurent: Continued global volatility and economic uncertainty will not only lead to 'large-cap' cross-border acquisition opportunities, but also an increasing number of unexpected outcomes, which will likely give rise to disputes related to earn-outs. The trend for increased uptake of arbitration clauses, which are now systematically included, should see a growing number of M&A disputes being arbitrated. It will be interesting to see whether the trend for disclosure of increasing volumes of data, including personal data, will be dampened by the parties' requirement to comply with the legal data protection obligations enshrined in the EU's General Data Protection Regulation (GDPR). One could expect to witness numerous instances of non-compliance, although it remains to be seen how regulators and arbitrators will respond to such breaches. Regardless, there is likely to be an increasing use and acceptance of technology, such as machine-learning algorithms, to process data disclosed during the M&A dispute process.

Flockhart: Despite very well documented geopolitical and economic uncertainty, 2016 was a very busy year for private M&A deals based on published statistics. Though worldwide deal volumes were lower in 2017, they held up well in the UK and

some business sectors were very busy indeed. As it often takes one to two years post-deal for disputes to emerge, partly as a result of contractual limitation periods, all this points to a steady flow of claims in the next 12-18 months. I would also not be at all surprised to see cyber exposures become the next area of focus. Disputes of this nature may centre around breaches of warranty or indemnity claims – to the extent specific warranties or indemnities relating to cyber risk or data security are given in an SPA – or around price adjustments. Recent high-profile data breaches at listed companies, for example, have demonstrated that cyber issues can have a significant impact on a company's market valuation.

Berard: I expect tech and IP to play a crucial role in the next 12-18 months. The relentless change in the tech sector drives a lot of M&A activity, whether that is tech businesses acquiring assets or financial investors seeking to invest in high-growth businesses. Disputes relating to change of control, non-competes, exclusivity and licensed-in rights are likely to grow. Typically, disputes will arise from the value of the underlying assets such as IP, goodwill or long-term contracts, and from the accounting treatment of revenue streams such as sales of software and subscription services, which are harder to measure than those of businesses that deliver traditional goods and services. Another trend which I expect to see over the next year is the increasing

use of ADR, in particular mediation. Already, many disputes never make it all the way to the courts or arbitral tribunals. I expect mediation to be used more and more – not least as it is closer to the spirit of negotiations on which M&A transactions are based.

Halper: Since *In re Trulia* and *Corwin*, the volume of M&A litigation being filed in Delaware has declined in favour of other jurisdictions – in particular, M&A lawsuits in federal courts have significantly increased in 2017, and this trend is likely to continue. Many of these cases filed in federal court involve what would have been fiduciary duty claims in Delaware repackaged as Section 10(b) and 14(a) claims under the Securities Exchange Act of 1934. Plaintiffs reframe their claims to avoid forum selection bylaws requiring that internal corporate claims – such as breach of fiduciary claims – be brought in Delaware. We are also likely to see additional *Trulia*-related disputes in jurisdictions outside Delaware, as more courts grapple with whether or not to adopt *Trulia*'s standard when deciding to approve disclosure-only settlements. [CD](#)