Quantuma

Forensic SPA reviews

Disputes arising out of share purchase agreements (SPAs)

Post-M&A disputes can often stem not only from parties' non-performance on obligations but from interpretation differences fueled by vague and/or over-detailed provisions of share purchase agreements (SPAs). Anything left for future clarification or depending on parties' good faith is likely to trigger disputes, including attempts to re-price the deal.

When disputes occur, not only are they costly and time consuming but, most importantly, pose a significant risk of value leakage, on both sell-side and buy-side. That's why taking action to prevent or reduce the risk of a threat at the outset can have significant benefits down the road. Typical areas of contention in SPAs relate to completion accounts or locked-box mechanisms, earn-outs, representations & warranties (R&W) and non-compete clauses.

Common issues in SPAs

As international financial experts regularly working on M&A disputes, we've seen many issues in the drafting of SPAs. These include:

Loose wording of key financial metrics that are not terms defined by generally accepted accounting principles (GAAP) – such as EBITDA, net debt or net working capital – leading to interpretive differences.

Ambiguous wording of R&W on target's compliance with GAAP – leading to allegations of insufficient disclosure, misrepresentation, negligence or even manipulation.

Boilerplate language on applicable accounting principles, without examples of calculations and source references, leading to interpretation disagreements, especially when parties come from different jurisdictions.

Failing to account for the inherent interplay of agreed principles and consistency with the target's past practice when accounting for certain transactions, including ineffective hierarchy of accounting principles.

Warranting that management accounts were produced on the same basis as statutory accounts (that are prepared to comply with relevant GAAP) – when that is almost never the case.

Structuring earn-outs based on measures highly prone to subjective judgments, which are easy to manipulate without appropriate protection.

Failing to address the fact that **extraordinary, non-recurring, one-off items** as adjustments to selected profit-based metrics (such as EBITDA) can be a bottomless pit if not defined properly.

Missing definition of an ordinary course of business for the target.

Making your SPA less prone to disputes

Before completion, we can conduct a thorough review of your SPA and identify areas of concern. We can:

- review mission-critical financial terms in the SPA and assess their dispute susceptibility;
- stress-test the more complex terms requiring mathematical calculations – such as earn-out formulas – based on different scenarios of future business development;
- conduct a walk-through of numeric examples in relation to selected financial metrics to avoid mismatches between literal interpretations and how the numbers are intended to work; and
- identify the accounting principles likely to be problematic in light of the target's past practice and the relevant provisions of the SPA.

Get in touch

Adam Markiewicz

+48 725 775 725

adam.markiewicz@quantuma.com

Olga Kalicinska

+48 502 049 085

olga.kalicinska@quantuma.com