

COVID-19 Coronavirus Business Impact Broadcast Series

Terminating Deals: A European Perspective

MAY 15, 2020

On May 15, 2020, Dechert's Private Equity group presented "Terminating Deals: A European Perspective," an episode of the firm's COVID-19 Coronavirus Business Impact Broadcast Series. The episode was hosted by Chris Field (moderator), an M&A partner in the firm's London office; Sean Geraghty, an M&A partner in the firm's London office; and François Hellot, an M&A partner in the firm's Paris office.

The presenters considered the issues behind deal disputes currently taking place in Europe, with particular emphasis on the implications of invoking (or seeking to invoke) material adverse change conditions, interim operating covenants and tactical litigation for both public and private M&A transactions.



HIGHLIGHTS FROM THE EPISODE

Material Adverse Change ("MAC") Conditions. Although French public M&A deals do not typically contain a MAC condition, the inclusion of such a condition is a matter for negotiation between the parties. By contrast, all takeovers of UK companies include a MAC condition, but the ability to invoke the condition is heavily proscribed by the UK Panel on Takeovers and Mergers. In one live case, the Panel is currently considering whether events triggered by the COVID-19 pandemic could amount to a material adverse change; a positive decision would have significant ramifications for future UK takeovers.

Interim Operating Covenants. In private deals, and where the purchase agreement permits, buyers may argue that a breach of interim operating covenants caused by the COVID-19 pandemic gives rise to termination rights. Buyers have historically raised these disputes to negotiate a price reduction rather than get out of the deal, but the uncertainty caused by the COVID-19 pandemic means that a price reduction may not be helpful.

Tactical Litigation. In circumstances where a breach of the purchase agreement does not give rise to a termination right for the buyer, but only the right to claim damages for any loss it suffers, litigation can still be used as a strategy to buy time and therefore optionality to see how economic events unfold. The time taken to resolve a dispute may benefit the buyer, not least as the trading risk during that period remains with the seller. Such tactical litigation is starting to be used to extend the closing period of deals, and justifications for initiating such legal proceedings are continuing to evolve.