THE MERGERS AND ACQUISITIONS LITIGATION REVIEW

Editor
Roger A Cooper

THE LAWREVIEWS

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PREFACE

This new volume on M&A litigation for the Law Reviews series is intended to be as much a resource for litigators handling M&A disputes as it is for the deal lawyers, general counsel and dealmakers aiming to assess and manage the potential litigation risks in connection with a transaction. The multi-jurisdictional approach taken here, as in other volumes in the Law Reviews series, reflects the profoundly global nature of business and corporate transactions, and gathers a diverse body of law from around the world to provide a broad overlay of the global litigation terrain. The aim here is not to be comprehensive, either in the countries included or the depth of topics covered, but to provide more of a sample of key jurisdictions in the Americas, Europe and Asia, and a high-level overview and analysis of the main litigation issues and trends in those jurisdictions.

Together, the chapters show a high level of consistency across jurisdictions in the types of common disputes and the kinds of claims that may be pursued, but also significant differences in procedural and substantive law affecting the legal merits of such claims, and the frequency and means of their pursuit.

Shareholder actions for breaches of fiduciary duties provides a good example. The law in many countries imposes fiduciary duties on board members in the context of mergers or acquisitions, and many jurisdictions therefore provide for litigation to enforce those duties. Similarly common is some type of 'business judgement' protection for certain board decisions, which in one form or another prohibits parties and a court from second-guessing those decisions. The frequency with which such actions are brought, however, varies substantially from country to country. That is due to a variety of different factors, from the number of publicly listed companies in a country, to differences in the substantive law, to whether such claims may be brought as class actions, as permitted in the United States, and whether fees may be awarded to class action plaintiffs' lawyers. The class action procedural mechanism and the availability of attorney fee awards in particular are significant factors driving the disproportionate volume of shareholder litigation in the United States, as they provide strong incentives to the plaintiffs' bar that does not exist in many other countries.

In contrast, counterparty claims, arising out of disputes over the parties' transaction agreement, appear to be far more common across the countries in this edition and, in many countries, to be the dominant type of M&A litigation activity. While there is some meaningful overlap in the types of provisions and disputes that commonly arise, the chapters also display the significant variation in disputes, reflecting in part differences in business practices both within and across jurisdictions. As with class actions, one significant procedural component for counterparty claims is arbitration, which has become an increasingly common procedure for resolving post-closing disputes, particularly involving cross-border transactions. This appears

to be because, among other reasons, arbitration is confidential (unlike court proceedings), and thought to be cheaper, faster and more efficient.

Around the globe, the covid-19 pandemic has had a profound impact on M&A activity and litigation in 2020. Significantly, the pandemic and its myriad consequences have put strain on some common contractual provisions in transaction agreements, and in a number of instances have led parties to test key provisions in litigation, such as material adverse change or material adverse effect clauses. All of this has led, in a number of jurisdictions, especially the United States, to a wave of covid-related M&A litigations. Unfortunately, in the United States, a decision on the merits is not expected in any of these cases before this publication goes to press.

Finally, I would like to thank the many contributors to *The Mergers and Acquisitions Litigation Review.* Their biographies can be found in Appendix 1 and display the impressive depth of experience and expertise they bring to this edition. Should you have any comments, questions or suggestions, do not hesitate to contact me or any of contributors directly. We expect this to be the first of many successful editions of this volume, and look to expand and improve in each successive iteration.

Roger A Cooper
Cleary Gottlieb Steen & Hamilton LLP
New York
October 2020

Appendix 1

ABOUT THE AUTHORS

ROGER A COOPER

Cleary Gottlieb Steen & Hamilton LLP

Roger Cooper is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in New York.

Mr Cooper's practice focuses on complex civil litigation, with an emphasis on shareholder, class action and derivative disputes arising out of securities, M&A, corporate governance and antitrust issues.

Mr Cooper has been recognised as a leading lawyer by *Chambers USA*, *Benchmark Litigation* and *The Legal 500 US* and has written for numerous publications, including *New York Law Journal*, *US Law Week*, *Derivatives*, *White Collar Crime* and the treatises *Commercial Litigation in Federal Courts*, and *Commercial Litigation in New York State Courts*. He is also a frequent contributor to the *Harvard Law School Forum on Corporate Governance* and the *Columbia Law School Blue Sky Blog*.

Mr Cooper joined the firm in 2003 and became a partner in 2011. He received a JD from Columbia University School of Law, a PhD in political philosophy from Duke University and an undergraduate degree from the University of Wisconsin. He also served as a law clerk to the Honourable B Avant Edenfield of the US District Court for the Southern District of Georgia.

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Chapter 10

SWITZERLAND

Harold Frey, Andreas Rötheli, Xavier Favre-Bulle and Gian Riz à Porta[1]

I OVERVIEW

In Switzerland, the most common M&A disputes are among transacting parties to a private share purchase agreement. While differences may arise in all phases of a transaction, they most frequently occur in practice after the transaction has been closed. In many of these cases, the point of contention relates to contractual representations and warranties. It has become standard practice in Switzerland to sell on the basis of a long list of representations, warranties and specific indemnities with the purpose of allocating the risks between the transacting parties, taking into account the level of disclosure in the due diligence process. Another important type of dispute arising after closing concerns the adjustment of the purchase price. Most common are adjustment mechanisms that seek to account for value changes of the target company between signing and closing. Sometimes, however, adjustments focus on future developments (for example with some form of earn-out mechanism). More recently, partly due to the present covid-19 pandemic and related developments, disputes have arisen even before the transaction has closed. Such disputes may concern situations where a buyer wishes to withdraw from a transaction, for example, because a condition precedent has not been met, acquisition financing becomes unavailable (or available only at less attractive terms) or simply because they have had second thoughts.

Over the past few years, Switzerland has also seen a number of shareholder litigations involving public companies. While these litigations are less frequent in Switzerland, they would typically attract considerable public attention, as in the case of the attempted takeover of Sika AG by the Compagnie de Saint-Gobain and the proxy fight regarding Schmolz + Bickenbach AG.

These disputes brought by shareholders typically involve challenge actions against shareholder and certain board resolutions, sometimes combined with liability claims against officers, directors or other persons involved in the (contemplated) transaction.

The vast majority of M&A transaction agreements in Switzerland today provide for arbitration as a general dispute resolution mechanism. Arbitration is widely perceived as a commercially effective means to resolve M&A disputes and is given preference over state court proceedings. Conversely, shareholder disputes are typically litigated before state courts.

1 Harold Frey, Andreas Rötheli and Xavier Favre-Bulle are partners and Gian Riz à Porta is an associate at Lenz & Staehelin.

II LEGAL AND REGULATORY BACKGROUND

M&A transactions in Switzerland are governed by general corporate law and the law on contracts for the sale of goods under the Swiss Code of Obligations (CO), as well as the Swiss Merger Act (MA).

In general, M&A-disputes are brought before civil courts or arbitral tribunals, depending on the kind of dispute. In the case of public tender offers, the Swiss Takeover Board (TOB) is competent to rule on alleged violations of public takeover rules. The TOB's decisions may be challenged before the Swiss Financial Markets Supervisory Authority and subsequently the Swiss Federal Administrative Court as court of last instance.

III SHAREHOLDER CLAIMS

i Common claims and procedure

Under Swiss law, common shareholder claims include challenge actions against shareholder and certain board resolutions, liability claims against, inter alia, directors and officers, as well as claims for review and determination of adequate compensation. These claims are generally available whether the target is a private or publicly traded company and irrespective of whether a negotiated transaction or a hostile takeover attempt is at issue.

Challenge actions by individual shareholders against shareholder (and certain board) resolutions require a claimant shareholder to show that the resolution in question violates the company's articles of association, corporate law or provisions of the MA (challenges against board resolutions are available only in the latter case). Furthermore, successfully setting aside a shareholder or board resolution requires the claimant to show that the attacked resolution affects his or her legal position and that he or she did not approve the resolution. The right to challenge is forfeited within two months of the adoption of the resolution (in the case of a challenge under corporate law) or of its publication (in the case of challenges under the MA), respectively. Challenge actions must be brought against the company.

Shareholders' liability claims against directors, officers, founders, auditors or any person involved in a merger, demerger, capital increase or conversion or transfer of assets, or the review thereof, require the claimant to show that the respondent breached a legal duty under corporate law or the MA. The claimant must further show he or she suffered damage, as well as an adequate causal nexus between the breach of duty committed by the respondent and this damage. Whether the claimant shareholder must also show fault (i.e., respondent's intent or negligence in committing the breach of duty) or the respondent must show that he or she was not at fault to escape liability depends on the type of claim at issue and is controversial.

Claims for the review and determination of adequate compensation in the context of a merger, demerger or conversion of legal form require the claimant shareholder to show that his or her shares or membership rights are not adequately safeguarded or that the compensation offered is not adequate. Such claims must also be filed within two months of the publication of the merger, demerger or conversion of legal form, after which the respective claims will be forfeited.

Obtaining and submitting evidence in M&A disputes under Swiss procedural law is predominantly the responsibility of the parties to the dispute. Swiss law does not know a discovery procedure and grants only limited disclosure within the framework of the court's taking of evidence. Conversely, Swiss law does not place any limits on the types of

evidence parties may submit, though some state courts are usually more inclined to rely on documentary evidence and rather reluctant to hear many witnesses, while arbitral tribunals regularly hear witness and expert evidence.

Any claim must fulfil the basic procedural requirements of an action (legal interest in the action, jurisdiction, no lis pendens of the same action, no res iudicata, capacity to sue and be sued, payment of the advance on costs, etc.) and courts and arbitral tribunals do not proceed with a case unless these requirements are fulfilled. Rather, the court would issue a decision of non-entry into the merits of the matter and dismissal on procedural grounds.

ii Remedies

Under Swiss law, the remedies available to shareholders include in particular monetary damages, rectification and declaratory relief. Shareholders may also apply for interim (injunctive) relief.

As for any damage calculation under Swiss law, damage is defined as the difference between the aggrieved party's actual assets and that party's hypothetical assets absent the breach of duty that caused damage or loss. To obtain an award of damages, the aggrieved party must substantiate and prove the damage or loss with a high level of detail. While state courts tend to apply very strict standards regarding the burden of substantiation and proof, arbitral tribunals are often more generous and flexible with respect to the application of certain valuation methods, for example, for the calculation of future loss of profits. Where a damage quantification is not reasonably possible under the circumstances, the claimant may request that the court estimate damages, though such requests will only be successful if the claimant can show he or she has exhausted all available means to substantiate and prove the damage. A damages claim may in principle be for compensatory, consequential or incidental damages. Swiss law does not allow claims for punitive damages.

In particular with respect to challenge actions against shareholder or board resolutions, shareholder remedies also include rectification. Successful challenge actions lead to a judgment cancelling the attacked resolution with erga-omnes effect. Under the MA, upon application by a claimant shareholder, a Swiss court may also determine adequate compensation in the context of a merger, demerger or conversion of legal form, thus modifying deal terms.

Actions for declaratory relief usually require the claimant to show specific interest in the declaration sought. In order to establish such interest, the claimant must show legal uncertainty and that the continued existence of such uncertainty would impose an unreasonable burden on him or her. Actions for declaratory relief are subsidiary claims in relation to claims for damages or specific performance, meaning the claimant must show that the declaration is the only available remedy.

Shareholders may also request interim relief against a contemplated M&A transaction. A court may grant such relief based on a prima facie showing that the rights of the claimant have been violated or are about to be violated and that this violation would result in irreparable harm to the claimant. The court would further assess whether the relief sought by the claimant is proportionate on a balance of equities vis-à-vis the harm potentially caused to the respondent if the relief is granted. If successful, seeking interim relief would lead to the court preventing or enjoining the M&A transaction. In cases of utmost urgency, a court may also grant such relief *ex parte*, subject to confirmation in inter partes proceedings.

Lastly, shareholders or other interested parties may file objections (which need not be reasoned) with the commercial register, requesting that any applications filed by the company

must not be entered into the register. This remedy has often been criticised for its potential of abuse. It will be abolished as per the end of 2020 in the course of a reform of the Commercial Register Ordinance.

iii Defences

Whether a director or officer is in breach of his or her duties is determined pursuant to the specific duties in the context of an M&A transaction set forth in the MA as well as the general duty of care and loyalty under corporate law (the duty to apply due diligence and to safeguard the interests of the company in good faith). The standard is an objective one: a Swiss court will assess whether the director or officer applied the level of care a reasonable third party in the same position would be expected to apply in a similar situation. The first defence raised by a director or officer will therefore usually be that he or she did not breach the duty of care.

Moreover, the Swiss Federal Supreme Court has recognised a business judgment rule, pursuant to which Swiss courts exercise restraint when reviewing business decisions from an *ex post* perspective, provided the decision results from a proper decision-making process free of conflicts of interest and based on sufficient information. Subject to these requirements, a Swiss court may only assess whether the decision was reasonable – not whether it was correct in substance.

A further defence available to directors or officers are release resolutions by the annual general shareholders' meeting. Such resolutions are a standard agenda item at annual general shareholders' meetings in Switzerland. They provide directors and officers with a legal defence against liability claims brought by the company or consenting shareholders to the extent the claim is based on facts known to the shareholders when adopting the release resolution. The release resolution also limits non-consenting shareholders rights in that their right to bring liability actions will be forfeited six months after adoption of the resolution.

A shareholder resolution approving a merger or demerger contract or a conversion plan is generally deemed to have the same effect regarding the transaction in question as a release resolution. Hence, such resolutions equally provide directors and officers with a defence against liability claims brought by the company or consenting shareholders, again provided the facts underlying the liability claims had been properly disclosed to the shareholders when adopting the resolution.

iv Advisers and third parties

In principle, claims against advisers and other third parties may only be brought by a party in a contractual relationship with those parties, namely, the company assisted by such advisers or third parties. To the extent that advisers are involved in a merger, demerger or conversion of legal form as required by the MA, they may also become liable to the shareholders for damages caused by intentional or negligent breaches of duty. Auditors involved in auditing the annual and consolidated financial statements, the founding of the company, capital increases or reductions of capital are subject to similar liability.

v Class and collective actions

Swiss procedural law does not provide for class actions. A shareholder may thus only pursue claims on his or her own behalf. Limited opportunities for collective proceedings exist by way of joinders of parties according to the Swiss Code of Civil Procedure (CCP), provided the parties' claims are based on similar factual circumstances or legal grounds. Joinders, however, are not particularly well suited for proceedings involving large groups of claimants, as they lack

many of the features and advantages of class actions such as mandatory joint representation. In addition, the CCP does not provide for mandatory and exclusive jurisdiction for all claims based on the same facts.

vi Insurance and indemnification

Directors' and officers' insurance plays an important role in liability actions brought by shareholders against directors or officers, at least in the case of public or large private Swiss corporations.

Further, the majority of Swiss commentators concur that a company may advance the legal fees of its directors and officers where they are named as respondents, at least in the case of liability claims brought by third parties such as shareholders. Similarly, the company may bear the legal fees of the respondent or indemnify him or her, unless the director or officer in question acted with intent or gross negligence.

vii Settlement

Where the board of directors represents the corporation in a challenge action against a shareholder resolution, the board may not enter into a settlement, as it does not have the power to modify shareholder resolutions. Such settlements would require shareholder approval. Notwithstanding, settlements under which the claimant shareholder withdraws the challenge are permissible.

Furthermore, it is permissible to settle liability claims, and this often occurs.

viii Other issues

Under Swiss corporate law, shareholders are entitled to information regarding matters affecting the company. They must exercise this right at the annual general shareholders' meeting. The board of directors may only refuse requests for information where a company's business secrets or other important interests would be jeopardised. In the case of unjustified refusal, the board of directors may be sued by the shareholders.

Shareholders also have the right to request, at the company's annual general shareholders' meeting, a special audit of specific company matters to the extent that such an investigation is necessary to safeguard their rights. Typically, such special audits are requested to investigate potential liability claims against directors or officers. If the annual general shareholders' meeting approves the special audit, a special auditor can be appointed by the competent court upon the corporation's or any shareholder's request. If the special audit fails to receive approval, shareholders holding at least 10 per cent of the share capital or shares with a nominal value of at least 2 million Swiss francs may apply to the competent court within three months and request the appointment of a special auditor. The request may be granted upon a prima facie showing that directors or officers violated their duties and caused damage to the corporation or shareholders.

IV COUNTERPARTY CLAIMS

i Common claims and procedure

Pre-closing, disputes between the parties may arise with respect to the fulfilment of no-material adverse change (MAC) conditions or interim covenants (in particular the seller's obligation to conduct the target's business in the ordinary course between signing and closing). At least

one such dispute (in the context of the current coronavirus crisis) regarding a Swiss company operating a chain of upscale department stores was prominently reported in Swiss media. However, the parties to that deal ultimately managed to settle their differences amicably.

Indeed, an amicable resolution at an early stage is rather typical and explains the scarcity of pre-closing litigation or arbitration in Switzerland. Where a buyer announces its intent not to close, the seller has exceedingly limited options to compel the buyer to do so within a reasonable period. As a rule, interim relief will not be available to the seller, as Swiss courts would not issue preliminary injunctions for specific performance of the obligation to close the deal, as this would create a *fait accompli*. If provided under the parties' contractual arrangement, an expedited arbitral procedure (such as the one under Article 42 of the Swiss Rules of International Arbitration) may be available to the seller. Otherwise, the seller is left with pursuing its claim for specific performance in ordinary proceedings on the merits, which may take considerable time – all the while the seller would be forced to continue to hold and operate the target. For all practical purposes, this is often not a valid option.

In fact, M&A disputes before arbitral tribunals or courts in Switzerland almost exclusively relate to the post-closing phase, namely claims for breaches of representations and warranties as well as claims for price adjustments or earn-out payments. Other M&A related disputes typically involve claims to enforce exclusivity or confidentiality agreements as well as damages or break-fee claims in relation to aborted negotiations.

For share deals, it is important to note the Swiss Federal Supreme Court's practice, that the statutory regime governing warranty breaches in contracts for sale only applies to the sold good (i.e., the shares) itself. Issues with the target company therefore only lead to warranty claims where the parties included related representations and warranties in the M&A agreement, which is standard practice for Swiss transactions. In an asset deal, this issue does not arise and defects of the sold assets would give rise to statutory warranty claims under the CO.

Under the statutory regime, the buyer is held to examine the sold good as soon as can be expected in the ordinary course of business, and must notify any defects to the counterparty without delay. Any claims based on defects that were or could have been discovered based on such a timely examination become forfeited if not duly notified. Swiss M&A contracts therefore regularly include provisions deviating from the statutory regime and setting notice periods within which defects giving rise to claims for breaches of representations should be notified to the counterparty.

For price adjustment or earn-out disputes, Swiss M&A contracts frequently provide for expert determination as an alternative dispute resolution mechanism. The determination made by the expert (typically an audit company) is binding upon a Swiss court as per the CCP unless the proceedings were affected by grounds for recusal, unequal treatment or if the determination is manifestly incorrect. Expert determination procedures may also be agreed to resolve other types of issues (including legal issues), even though this is somewhat less common (in particular with regard to legal issues).

In order to initiate an expert determination procedure in price adjustment disputes, the seller is usually required to submit a notice of objection within a certain agreed period after the buyer, based on the closing balance sheet, has made an initial calculation of the price adjustment. Regularly, the contract will also provide for a duty to conduct negotiations prior to initiating expert determination proceedings. Where one of the parties refuses to participate

in expert determination proceedings, the counterparty must initiate ordinary proceedings (most often before arbitral tribunals) in order to compel participation by the non-cooperative party.

As a general matter, contractual claims under Swiss law become time-barred within 10 years of falling due. Claims for breaches of representations and warranties in sales contracts become time-barred after two years according to statutory default rules. M&A contracts often deviate from these rules and provide for shorter periods available to the buyer in order to initiate (arbitral) proceedings against the seller. Such contractual rules can force the buyer to introduce an action before it is able to quantify its claims. In that case, the buyer may also initiate the action as a claim for an unspecified amount, reserve a later quantification of its claim or submit prayers for declaratory relief (see below).

With respect to evidence-taking and procedural requirements, the above remarks as to shareholder claims apply *mutatis mutandis* to counterparty actions.

ii Remedies

Counterparties to Swiss M&A agreements may raise claims for specific performance (e.g., in the case of claims for earn-out payments or price adjustments), monetary damages (e.g., in the case of breaches of representations and warranties) or declaratory relief.

Modern M&A contracts often limit the available remedies for breaches of representations and warranties to claims for monetary damages. Sometimes, the seller will retain the right to remedy a defect *in natura*. Parties regularly exclude other statutory remedies such as rescission of the contract for fundamental error. In most cases, contracts will limit liability, for example, by an exclusion of consequential or incidental damages or by introducing damages caps. Any such limitations, however, will be held invalid if the seller fraudulently concealed the defect giving rise to the claim for breach of representations and warranties.

To recall, damage is defined as the difference between the actual value of the claimant's assets and the value the claimant's assets would have but for the breach in question. In the case of breaches of representations and warranties, the claimant must therefore show both the target company's actual value as well as the value it would have if the breached representation or warranty had been true and correct. Sophisticated M&A contracts sometimes include provisions on damage calculation methodology (or exclude the application of certain methodologies). Absent such provisions, the claimant must substantiate and prove the damage suffered by objective means such as a discounted cash flow calculation. As a rule, the parties to the dispute will submit expert testimony in order to show the amount of damage suffered.

Sometimes counterparties may also turn to arbitral tribunals or courts to seek declaratory relief. This is particularly necessary when the claimant wishes to raise claims based on several different breaches of representations and warranties in the same proceeding, but is not yet able to quantify the damages caused by some of these breaches. In this case, the claimant may request a declaration of liability in principle. While the requirements for the admissibility of prayers for declaratory relief are strict before state courts, arbitral tribunals (which handle most counterparty M&A disputes) are usually more liberal in this respect.

iii Defences

Disputes relating to alleged breaches of representations and warranties frequently turn on the knowledge of the parties at the time of closing. In this respect, sellers often argue that the buyer was aware of the facts and circumstances giving rise to a breach of representations and

warranties, which excludes such claims. This defence heavily depends on the due diligence conducted by the buyer as well as the disclosures made by the seller (and the disclosure concept chosen by the parties, i.e., whether a fairly- or specifically-disclosed-standard applies). The seller will often have difficulties showing knowledge of the relevant facts by the buyer as it no longer has access to the target company. Hence, sellers are well advised to carefully record the entire due diligence process in preparation of potential disputes.

A further defence available to sellers is their own lack of knowledge with respect to facts and circumstances, giving rise to a breach of representations and warranties, unless the contract provides for liability irrespective of the seller's knowledge. As the claimant buyer bears the burden of proof to show knowledge of the relevant facts by the seller, the success of this defence heavily depends on the evidentiary means available to the buyer. Also from a buyer perspective, a careful post-closing due diligence and document conservation is important.

In price adjustment disputes, sellers often argue that the objection notice made by the buyer was belated or provided insufficient detail to allow the seller to assess the claims made by the buyer and to prepare for settlement negotiations. As a consequence of a belated or insufficiently detailed notice, the adjustment claim will be deemed forfeited.

iv Arbitration

Arbitration is the dispute mechanism of choice in M&A agreements under Swiss law. Most parties and practitioners regard arbitration as a commercially effective means to resolve M&A disputes, and prefer it over state court proceedings. The main advantages of arbitration are:

a the possibility to select a neutral forum, thus preventing home bias;
b the option to appoint arbitrators experienced in M&A disputes;
c the confidentiality of the award; and
d the flexibility in tailoring the arbitral procedure to the specific needs of the parties, including conducting the proceedings in whatever language the parties choose.

V CROSS-BORDER ISSUES

Under Swiss law, be it in a national or international context, challenges against shareholder resolutions must be brought at the registered office of the corporation. Liability actions against directors and officers may be brought either at the registered office of the corporation or the respondent's domicile, subject to certain limitations and additional requirements where the respondent resides in a Member State of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The Swiss parliament recently strengthened the statutory basis for arbitration clauses in articles of association. Hence, Swiss corporations may select an arbitral tribunal sitting in Switzerland as the competent forum for disputes including challenge actions against shareholder resolutions as well as liability claims against directors and officers. Arbitration clauses in articles of association will be binding upon the company, its shareholders as well as its governing bodies.

Swiss M&A agreements most frequently contain choice-of-law clauses providing for the application of Swiss law and arbitration clauses providing for the jurisdiction of arbitral tribunals seated in Switzerland.

VI YEAR IN REVIEW

While the coronavirus crisis, as is the case globally, has led to a marked slowdown in deal activity on the Swiss M&A market, Switzerland has thus far not experienced a significant decrease in M&A disputes (the authors have been involved in eight post-acquisition disputes over the past 12 months, although most of these transactions had closed before the pandemic). On the other hand, the authors have noted a heightened market demand for advice pertaining to the effects of the pandemic and the related economic fallout on M&A deals. In particular, there is interest from counterparties to M&A agreements in questions relating to no-MAC clauses, ordinary-course-of-business-covenants and other pre-closing issues.

VII OUTLOOK AND CONCLUSIONS

It remains to be seen whether the coronavirus pandemic will trigger increased dispute resolution activity in Switzerland. If the crisis deepens again, the Swiss market may experience an increase in pre-closing disputes, which thus far have played only a limited role.

As mentioned, a significant change will take effect from 2021 with an express statutory basis for arbitration clauses in articles of association.

Appendix 1

ABOUT THE AUTHORS

HAROLD FREY

Lenz & Staehelin

Harold Frey is a partner at Lenz & Staehelin, Zurich, where he leads the litigation and arbitration practice. He has represented clients in various litigation cases before all major Swiss courts and international arbitral tribunals. Matters included a wide range of legal issues and industries (such as financial services, telecom, pharmaceutical and construction). Mr Frey has profound knowledge and extensive experience in all aspects of M&A dispute resolution. Over the last 12 months alone, he has been involved in eight M&A disputes as counsel or arbitrator. Mr Frey is a lecturer on M&A litigation at the University of Zurich and author of various publications in the field. He studied law at the University of Zurich (lic.iur.) and New York University School of Law (LLM).

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Andreas Rötheli is a partner and heads the corporate and M&A practice group of Lenz & Staehelin in Geneva. He regularly advises on international and domestic transactions, including private equity buyouts and transactional real estate matters. Mr Rötheli is consistently recommended by many rating agencies in his practice areas.

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Xavier Favre-Bulle is a partner and heads the arbitration group and sports law group at Lenz & Staehelin in Geneva.

Mr Favre-Bulle has 25 years of experience in dispute resolution (arbitration as counsel or arbitrator, ADR, court litigation). He has been involved in more than 235 arbitrations (e.g., sales agreements, agency and distribution, licences, joint ventures, shareholder agreements, post-M&A disputes, in various business industries such as energy, construction, luxury goods, telecommunications, pharmaceuticals, banking and sports).

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