

Co-causation in liability for the results of litigation concerning third party claims

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- In M&A transactions, the Buyer usually steps into the legal situation of the Target. Subsequent or uncertain third party claims against the Target may disturb contractual equilibrium between the parties to the M&A transaction post closing and expose the Buyer to significant loss. Indemnity clauses are a tool for managing this risk. Under an indemnity clause in an M&A contract, the Seller assumes the risk of third party claims being successfully litigated against the Target.
- An unfavorable award influencing the situation and value of the Target is a legally relevant fact. The award, however, always results from a certain process. The different parties may be more or less allowed to participate in the process and may use this opportunity more or less prudently, thereby accordingly contributing to the final result.
- As a matter of principle, a party should be responsible for its negligence and should not be able to shift this responsibility onto the other party. In other words, a negligent party should not be allowed to rely upon its negligent conduct in order to raise claims against the other party. This follows from such universal principles of law as the principle of good faith and fair dealing, *venire contra factum proprium*, prohibition of abuse of rights and *estoppel*.
- The parties are always obliged to cooperate prudently and in good faith in their dealings. Moreover, each of them is always obliged to prevent occurrence or increase of loss for which the other party is responsible.
- Hence, if ever the Buyer fails to act prudently in litigation concerning the claims of a third party against the Target, the Seller should be relieved of responsibility in so far as he can prove that the Buyer's negligence contributed to the unfavorable award or decision. The parties' agreement can indicate more specifically the Buyer's obligations in this regard, in particular when it comes to notifying the Seller about the litigation and requesting and effectively using his assistance.
- On the other hand, the Seller should be precluded from questioning his liability for an unfavorable award, to the extent he failed to act prudently in order to prevent it.
- As a general rule, however, court awards or administrative decisions are legally presumed to be correct. It is the Seller who is generally responsible for the value of the object of the transaction, and therefore bears the general risk of litigation involving the Target. Hence, when such argument is at all relevant, it is the Seller who bears the burden of proving that the unfavorable results of litigation involving the Target could be attributed to Buyer's negligence.
- It can be particularly problematic to establish the existence and extent of Seller's liability where the Buyer/Target decides to settle the litigation with the third party. A settlement is always concluded based on uncertain predictions as to prospects of success in a dispute. Although it will be difficult for the Seller to verify whether such predictions are correct, he should always be able to examine whether the Buyer acted prudently to make a reasoned and well informed settlement decision and to raise any negligence of the Buyer in this regard in order to escape or limit liability.