



Post-acquisition Dispute Advisory

Beyond the Due Diligence : bringing security to your transactions

DEAL ADVISORY

March 2021

kpmg.fr

Beyond the Due Diligence : bringing security to your transactions



Disputes arising from acquisitions and disposals, as well as other forms of commercial agreements, have become increasingly common and complex in today's marketplace.



Because of the complexities, differing interpretations of accounting principles, and the lack of specificity around the financial provisions in many sale and purchase agreements, buyers and sellers often find themselves in dispute over these provisions (such as final adjustments to consideration and earn-out provisions).



Additionally, inherently limited scope of due diligence can often lead to unforeseen obligations or exposures that may not have been contemplated by the parties, which could result in an unexpected reduction to consideration or a potential warranty claim.



Our dedicated KPMG's Post-Acquisition Dispute team can assist you to:

- ✓ Minimize your M&A dispute risks
- ✓ Find and drive value throughout disputes arising from business transactions



Our team is led by Partners and Directors with at least 15 year experience of M&A related matters (e.g. contract vetting, completion accounts preparation/review, independent expert, R&W disputes).

Our team combine accounting, financial, investigative and SPA expertise with a proven track record in navigating parties through complex M&A purchase price disputes.

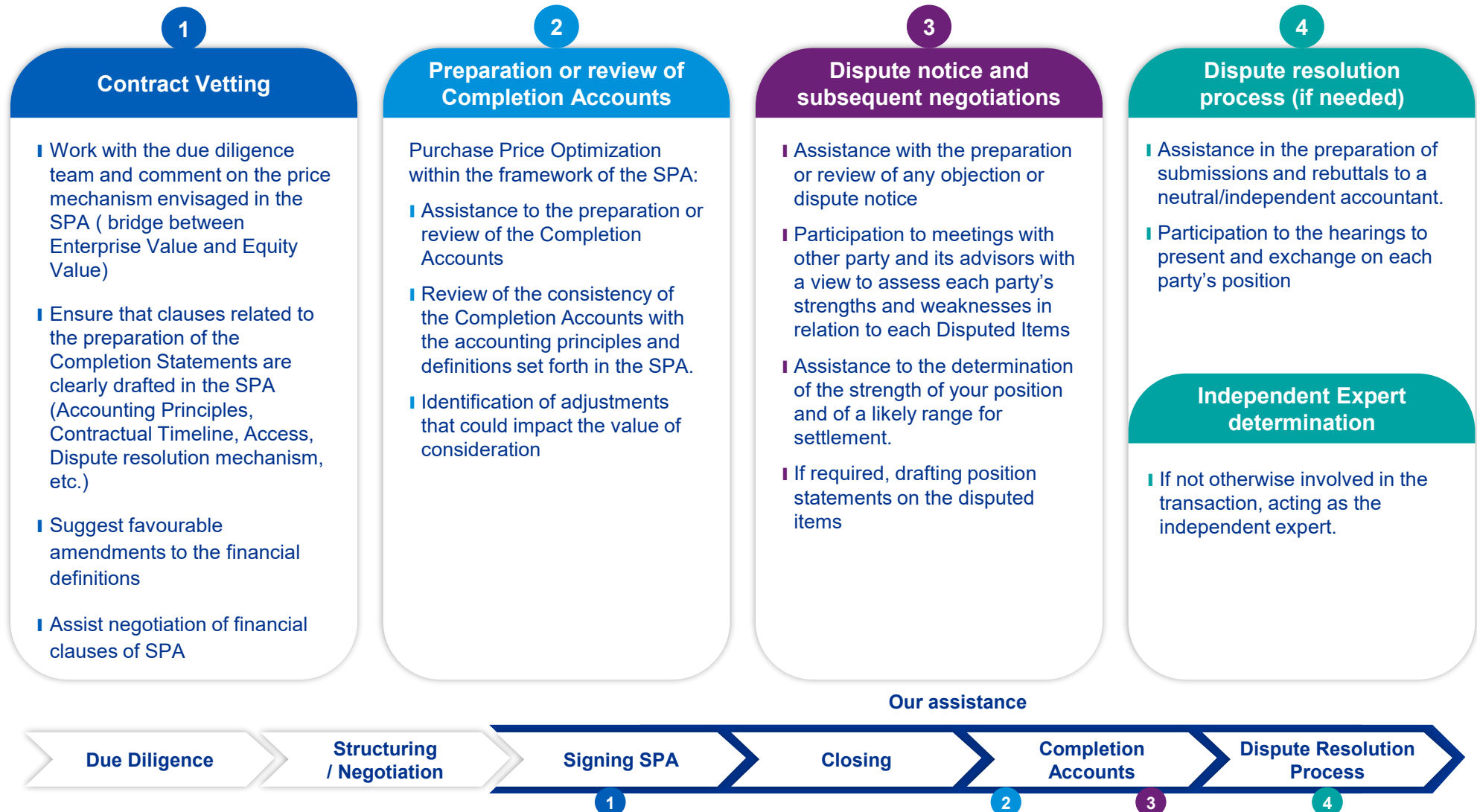
Overview of the SPA vetting and M&A dispute playing field



Completion accounts and Earn-Out

Where a deal includes a post-completion price adjustment, for debt, working capital, or other areas, we support clients in preparing or reviewing the completion accounts and the draft price adjustment calculations. We bring a rigorous focus on deal value to this element of our work.

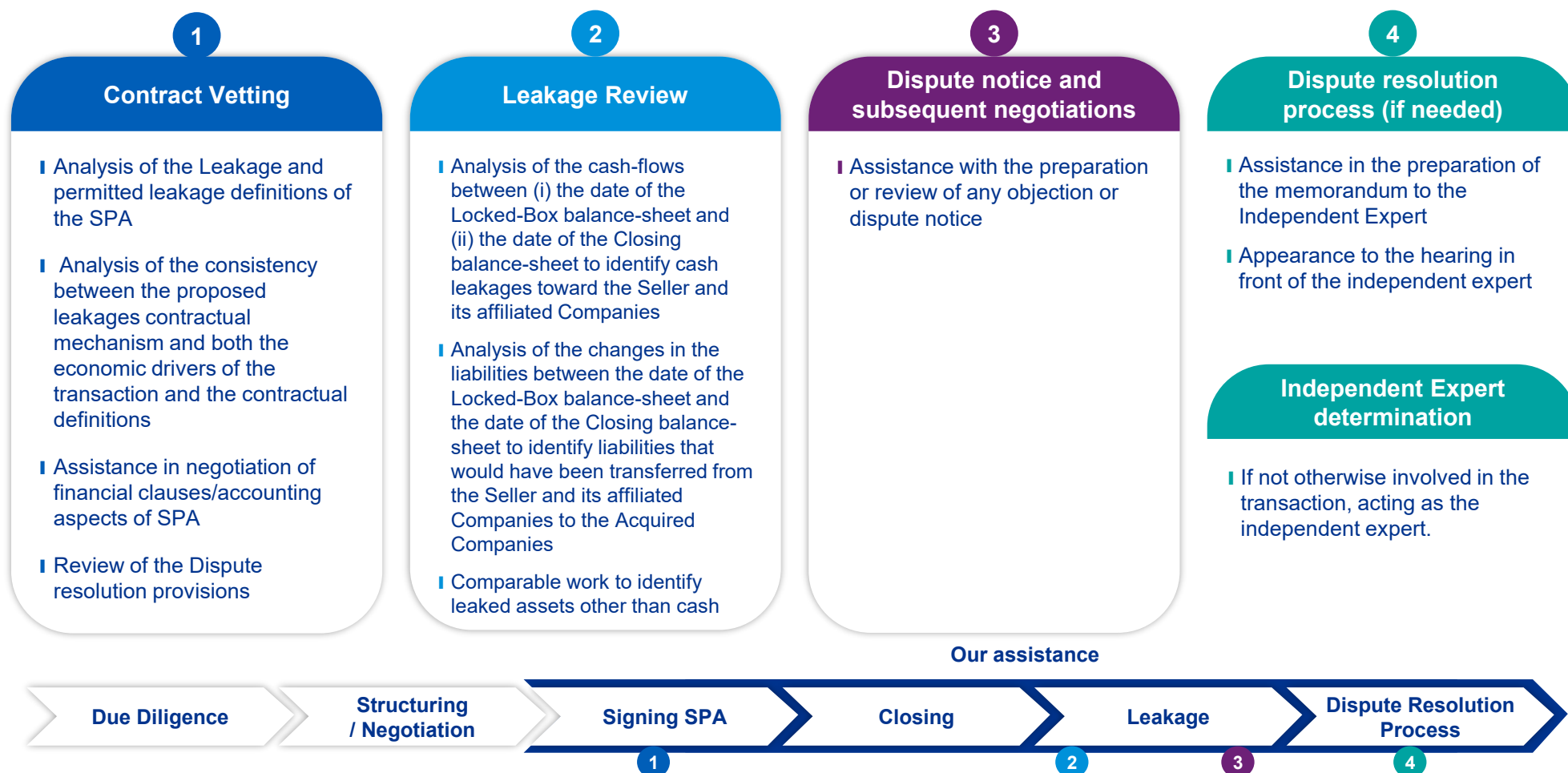
We perform the same type of work in the context of an earn-out.



Leakages review

Whilst locked box transactions do not provide for a post deal purchase price adjustment, they do allow for claims in relation to leakages, which are transfer of value from the Target company to the Seller's group during the period from the date of the locked box balance sheet to the closing of the transaction.

As locked box arrangements become more prevalent, and are applied to more complex carve-out situations, the risk of leakage occurring (by accident rather than by design) as a result of a failure of intended carve out, separation and ring fencing procedures likewise increases. We help clients identify and secure appropriate value to compensate for leakage through focused, rapidly executed reviews of trading and balance sheet changes in the locked box period and around completion.

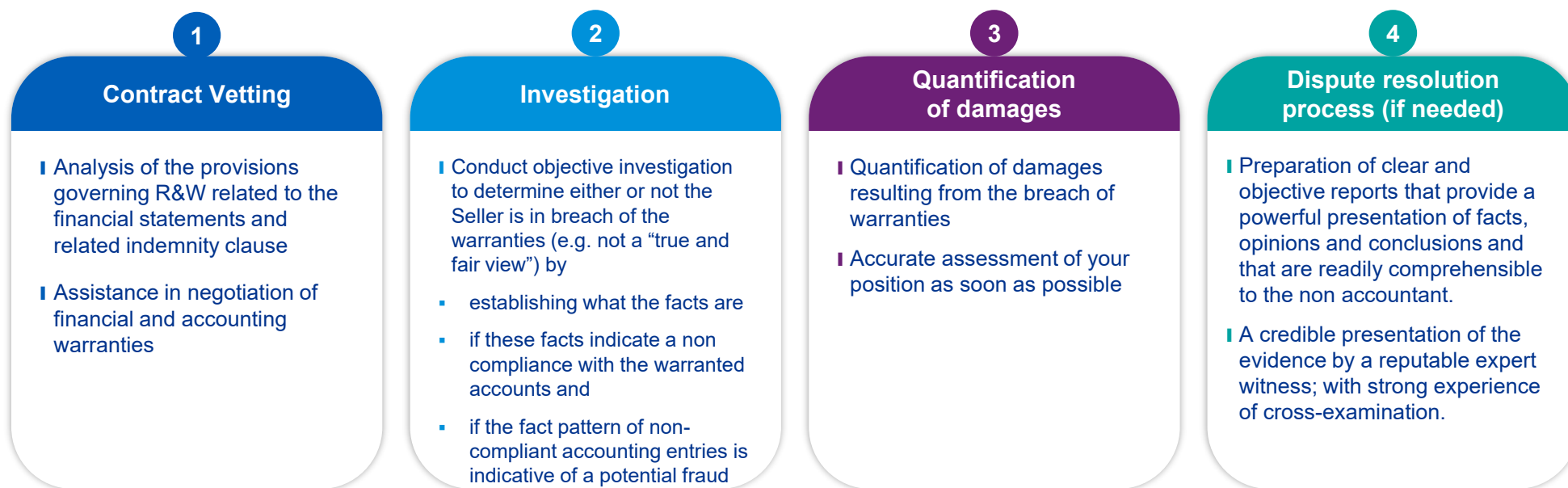


Warranty Claim

Buyer usually require the Seller to indemnify or hold harmless for losses resulting from breaches of representations and warranties the Seller made in the SPA.

A breach of the financial statement representation for example, may occur when an error/fraud is discovered post close that requires the company to restate a financial statement that was represented in the SPA to have been complete and accurate and/or prepared in accordance with GAAP. Additionally, if the financial statement breach was relied upon in deriving the base purchase price and the purchase price was a multiple of EBITDA, this error/fraud could potentially create damages based upon the same EBITDA multiplier.

Our professional can assist you in presenting of defending a claim for breach of financial or accounting warranties. They can also act as expert witness where appropriate.



Why are we different and can bring more value to You ?



Unique dedicated post acquisition dispute team

The senior members of our team all have personal experience of working on all stages of the process, from the initial SPA vetting down to being an expert in a French Court or in an Arbitral Tribunal on a warranty claim.

We believe that our unique “one-shop” team is a key factor to provide you with meaningful and consistent input throughout your M&A process.

Working as an integrated team with you and your advisors ensure that the key features of the transaction identified through due diligence are adequately addressed to your benefit, through a completion price adjustment mechanism, or through warranties and indemnification



Strong experience of acting as independent expert

Having served either as consultant assisting a party during expert's proceeding or as independent expert making the determination on numerous disputes arising from such mechanism, we can guide you throughout the entire M&A process:

- Contract Vetting Phase: Identify strengths, weaknesses and pitfalls of contractual mechanisms from your perspective (completion accounts, leakages and earn-out).
- Completion Accounts preparation and review: Assess the strength and weakness of both parties' positions to identify a possible range of settlement.
- Independent Expertise: Assist you with the preparation of a bespoke standalone and documented submission to the Expert according to best practices




























































Experienced team in both Warranty Claims and complex investigations

Having assisted clients when negotiating Warranty and M&A Claims, and having served as Expert Witness or member of a Tribunal in several warranty litigation or arbitrations (in front of Arbitral Tribunals and local Courts), we can provide a valuable insights when assessing your chances of prevailing in claims from a financial perspective.

Should you identify potential wrongdoings as part of your transaction, our proven track record as Forensic accountants in the context of a either an accounting fraud or a warranty claim will assist you in taking the appropriate steps to address these matters (factual confirmation, assessment of damages, etc.)

A Proven track record – Completion Accounts and Earn-Outs

Sample of KPMG assistance to Completion accounts and Earn-Outs since 2016

Sector	Year	Carve-out ?	Side	Preparation or review of completion accounts/ earn-out	EV range	Independent Expert / Dispute?	Nb of adjustments identified	Value range of adjustment identified by KPMG (€m)	Main countries
 Chemical	2016	✗	Buy-side	Preparation (earn-out)	< 500 m€	✗	9	0 € – 50 m€	 
 Automotive	2017	✓	Sell-side	Review	< 500 m€	✓	34	0 € – 50 m€	 
 Construction	2018	✓	Buy-side	Review	500 m€ - 1 bn€	✓	182	50 € – 100 m€	  
 Automotive	2016	✓	Buy-side	Preparation	500 m€ - 1 bn€	✗	126	50 € – 100 m€	      
 Security	2017	✗	Buy-side	Preparation	1 bn€ - 5 bn€	✗	40	0 € – 50 m€	   
 Automotive	2017	✗	Buy-side	Preparation	1 bn€ - 5 bn€	✗	24	> 100 m€	   
 Software	2018	✗	Buy-side	Preparation	1 bn€ - 5 bn€	✗	42	0 € – 50 m€	 
 Pharma	2019	✓	Buy-side	Review	1 bn€ - 5 bn€	✗	164	50 € – 100 m€	     
 Catering	2019	✓	Buy-side	Review	1 bn€ - 5 bn€	✗	179	50 € – 100 m€	    
 Pharma	2019	✓	Buy-side	Review	1 bn€ - 5 bn€	✗	35	0 € – 50 m€	
 Fashion	2018	✗	Buy-side	Preparation (earn-out)	< 500 m€	✗	10	0 € – 50 m€	 
 Pharma (swap)	2017	✓	Buy-side	Review	5 bn€ - 10 bn€	✗	93	50 € – 100 m€	  +27 other countries (inventories)
		✓	Sell-side	Preparation	> 10 bn€	✗	179	50 € – 100 m€	    

KPMG support in front of Independent Expert since 2016

Side	Year	Amount in dispute (€m)	% in favor of the party assisted by KPMG	Hearing
Buy-side	2018	42.7	47%	
Buy-side	2016	12.8	85%	✓
Buy-side	2017	55.8	51%	✓
Sell-side	2017	20.0	75%	✗
Sell-side	2018	1.3	95%	✗
% Win average			71%	✗

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Times as Independent Expert nominated in the SPA

1

















Time as tribunal-appointed Expert in a purchase price-related arbitration

A Proven track record - Leakages and Warranties claim

Sample of KPMG assistance to leakages since 2017

Sector	Year	Carve-out ?	Side	EV range	Independent Expert / Dispute?	Value range of adjustment identified by KPMG (€m)	Main countries
 Energy	2018	✗	Buy-side	< 500m€	✗	0 € – 10 m€	
 Energy	2019	✓	Buy-side	< 500m€	✗	0 € – 10 m€	
 Energy	2020	✓	Buy-side	< 500m€	✗	0 € – 10 m€	

Sample of KPMG assistance to Warranties Claim

Sector	Proceedings	Claim (m€)	Role/ Function	KPMG investigation	Cross Examination	RWI?	Main countries
 Software	Negotiation with Insurance	€ 80M	Consulting Expert	✓	✗	✓	 
 Construction	Arbitration (*)	€201m	Consulting Expert	✓	✗	✗	 
 Pharma	Arbitration	1,8 Bn€	Expert Witness	✗	✓	✓	  
 Automotive	French Court	13.6m€	Consulting Expert	✗	n.a.	✗	
 Energy	Arbitration	€80m	Member of the arbitral Tribunal	n.a.	n.a.	✗	
 Financial Serv.	French Court (*)	€18m	Consulting Expert	✓	✗	✗	

(*) Settlement reached during the course of the proceedings, leading to a price reduction

An experienced dedicated team



Jean-Luc Guitera

Partner, Deal Advisory
EMEA Head of KPMG Dispute Advisory Service



Profil

- Jean-Luc has been for 3 years a FDD Partner and for 18 years a dispute and investigation partner .
- Jean-Luc has signed 19 expert determinations in relation to M&A disputes, and has served in number of arbitration warranty claims as Expert Witness, Tribunal –Appointed Expert or co-Arbitrator. He is listed as a “Global Elite Thought Leader” by the Global Arbitration Review for 2021.
- His areas of expertise are independent expert determination, joint-ventures, engineering and construction, Transportation, Aerospace, Defence, and more generally complex contracts accounted for using the Percentage-of Completion method.



Representative engagements

- Expert-witness in an international arbitration related to a €1,8 Bn Warranty claim for accounting fraud between a PE and a corporate.
- Independent Expert in a € 50 Mn purchase price dispute between two French industrial Groups in the Transport sector.
- Investigation performed for a French Corporate on a US acquisition to assess whether misrepresentations had taken place during the sales process and whether there was an accounting fraud
- Completion accounts and negotiation assistance to a French Corporate for the acquisition of the German subsidiary of a major US automotive group



Caroline Albarel

Partner, Deal Advisory
Financial Expert before the Court of Appeal of Versailles



Profil

- Caroline has an extensive experience in contract vetting and in the preparation/review of Closing Accounts. She has led international completion engagements in the context of large and complex transactions, including business carve-out and swaps.
- Caroline's experience covers multiple industries (pharmaceutical, construction, automotive, retail) for both Corporate and Private Equity firms.
- Her areas of expertise also include warranty and earn-out claims, quantification of damages and independent expert determination. She has also managed fraud investigations arising further to acquisitions



Representative engagements

- Consulting Expert to a French Corporate in an international arbitration in relation to a €290m claim associated with the acquisition of a division of long term contracts (construction industry).
- Contract Vetting and assistance to the preparation and review of Closing Accounts in the context of a significant business swap in the pharmaceutical sector (including carved-out matters).
- Independent Expert in a purchase price dispute between two real estate players relating to the sale of a portfolio of hotels in France.
- Financial expert in an earn-out litigation in front of French Court (EBITDA determination)



Eric Bourdonnais

Director, Deal Advisory



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- Eric has more than 30 years of experience. He took part in the setup and development of the Transaction Services department of KPMG Paris.
- He has led numerous purchase price determination engagement, either acting as a financial advisor for the Buyer or the Seller, or acting as an Independent Expert.
- Eric has specialised in the analysis of complex industrial projects working as a financial expert in the context of litigations (power plant, construction, defence industry)
- Eric also regularly acts as a financial expert in the context of commercial or expropriation disputes.



Representative engagements

- Review of Closing Accounts prepared by Seller in the context of a significant acquisition by a Private Equity of an European pharmaceutical business.
- Assistance to the preparation of Closing Accounts and litigation support role for an automotive OEM that purchased a major business from a French group.
- Consulting expert in an earn-out litigation during independent expertise (French Court)
- Management of an independent expertise on a purchase price dispute between two French Industrial Groups on the disposal of a major division in charge of the construction of electricity transmission and Distribution Networks.



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