ADVESTRA

When the Deal Goes Sour: Disputes in M&A

Basics, pitfalls and key takeaways

27 October 2026

Types of M&A Disputes by Phases



Pre-signing

- Binding parts of LoI such as:
  - Exclusivity
  - Confidentiality
  - Break-up fees
- Culpa in contrahendo

Interim period

- Regulatory approvals, third party consent
- Material adverse change (MAC)
- Other closing conditions

Post-closing

- Warranty claims
- Completion accounts mechanism
- Earn-outs
- Fraud
- Non-compete, non-solicitation

Numbers & Trends

M&A Disputes: Numbers & Trends

BRG M&A Report 2026

- **Numbers**
  - **81 %** reported an increase in M&A disputes in 2025 vs. 2024 (28% significant increase).
  - **60%** say the 2025 increase was concentrated in deals below USD 1bn.
  - **Due Diligence** was the leading contractual or process-related factor in disputes (+9%)
  - **Earn-outs and other post closing obligations** became a more significant contractual or process-related factor in dispute (+ 11%).
- **Trends**
  - **Nearly two-thirds** expect dispute values and volumes to rise further in 2026.
  - **Around 30%** cite the macroeconomic and geopolitical environment will be a leading factor in disputes over the next twelve months (up from 19%/22% in 2024).

Essential Terms and Mechanisms

Warranty Claims

The Basics

- Reps & warranties: a no-fault liability by which the parties contractually address the uncertainties regarding the target
- Among the most common disputes after closing
- By law, the sale-of-goods rules apply (art. 197 et seq. CO). Most of these rules can be changed by contract, so the SPA usually regulates everything itself
- Distinction: Fundamental error (art. 24 para. 1 no. 4 CO) or fraud (art. 28 CO) can make the contract not binding on the buyer. The result is unwinding of the deal, not a warranty claim.

Warranty Claims

Typical Deviations in SPA from Statutory Law

- Parties usually agree on specific rules deviating from Swiss statutory law governing
  - Duty to inspect (Untersuchungspflicht)
  - Notice of breach (Mängelrüge)
  - Statute of limitation (Verjährung/Verwirkung)
  - Limitation of liability (de minimis and basket thresholds, overall liability caps, reduced liability through fair disclosure, materiality and knowledge qualifiers)
- No limitation of liability in case of fraud (art. 199 CO)

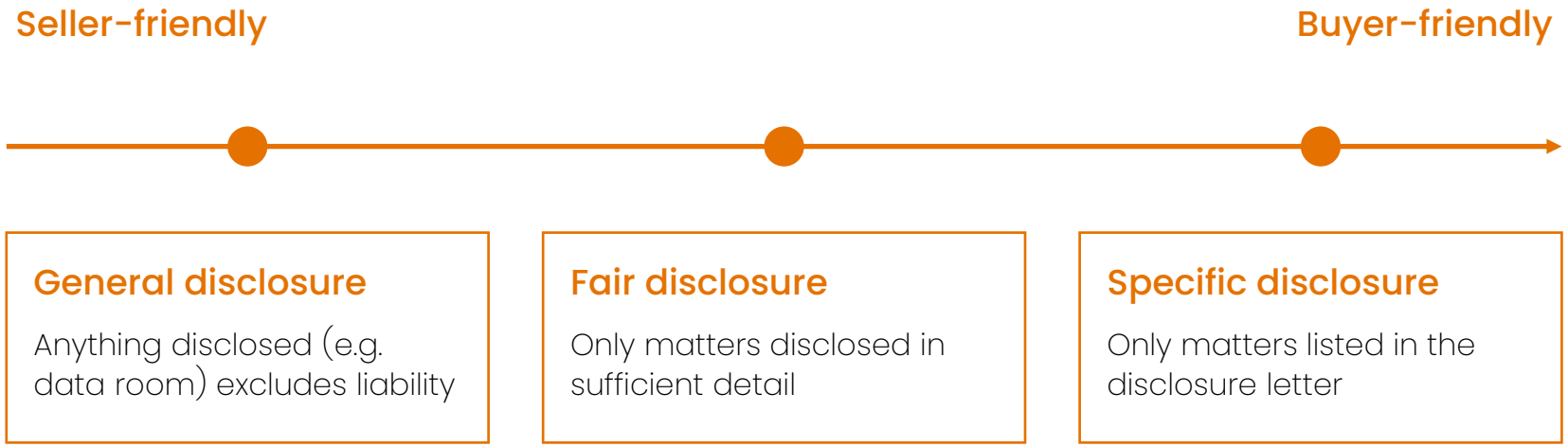
Warranty Claims

Due Diligence

- In principle: seller is not liable for defects buyer had knowledge at the time of acquisition (art. 200 CO)
- It is often difficult to prove which facts the buyer knew or reasonably should have known at the time of the acquisition
- Parties often agree on specific disclosure concepts.
- "Best knowledge" qualifiers move the risk of unknown issues to the buyer ("to the best of knowledge of the seller after having made due inquiry")
- The seller is always liable for matters it intentionally concealed

Warranty Claims

Due Diligence - Disclosure Concepts



Warranty Claims

Where the Fight Usually is

- Scope: does the warranty cover the issue?
- Disclosure: was the issue disclosed?
- Notice: was the claim notified correctly and on time?
- Damage: how much?

Warranty Claims

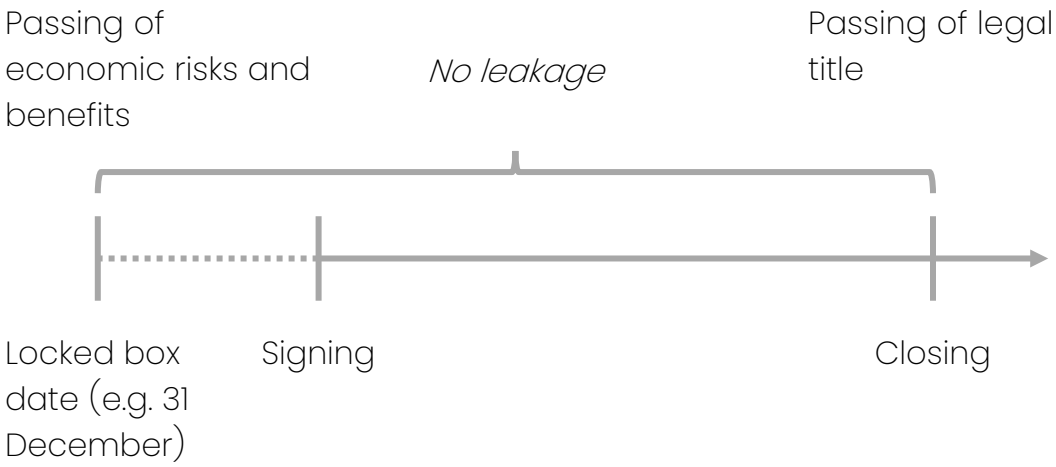
What Matters form a Dispute Perspective

- Good drafting helps, but hindsight is easy
- A disputed clause is viewed "differently" once a dispute arises
- Key: document the negotiation and drafting history

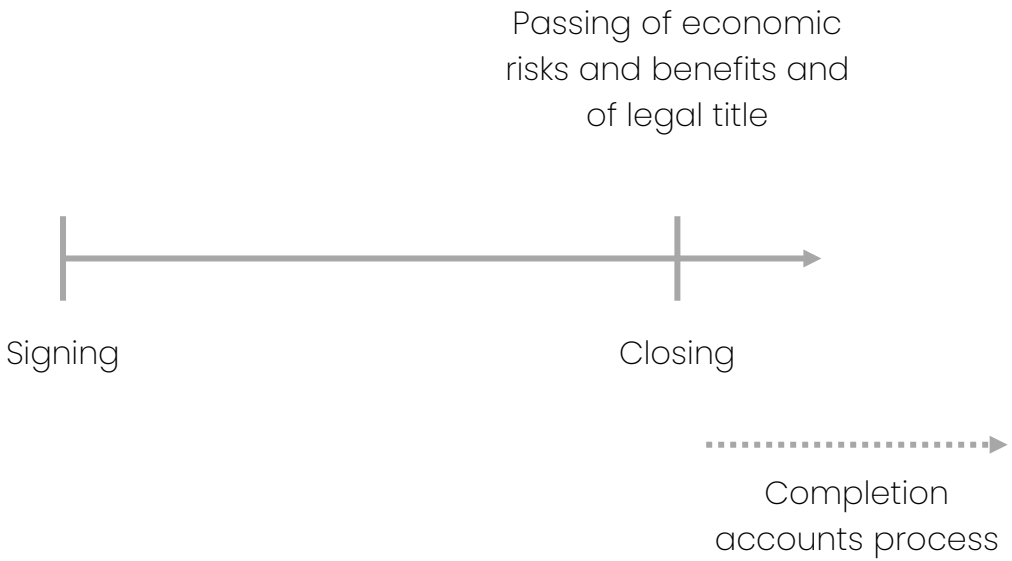
Price Adjustement Disputes

Completion Mechanism – Methods Used to Determine the Final Acquisition Price

Locked box



Completion accounts



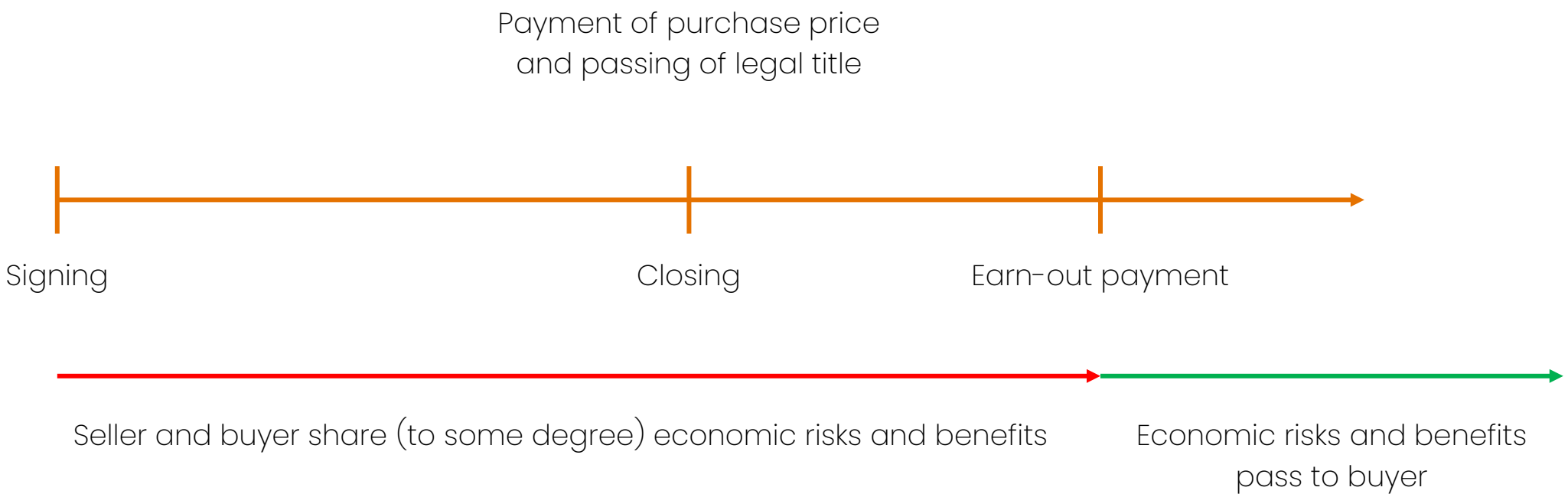
Price Adjustement Disputes

Completion Mechanism – Litigation Risks

- Buyer may use completion mechanism to **"re-negotiate"** purchase price
- In principle, only development between signing and closing relevant, but often Buyer will argue
  - misapplication of **accounting standards**
  - **balance sheet** should be re-evaluated
- Price adjustment and warranty claims **not** always clearly distinguishable
- **Notice of objection** vs. notice of breach

Price Adjustement Disputes

Earn-Out Agreements



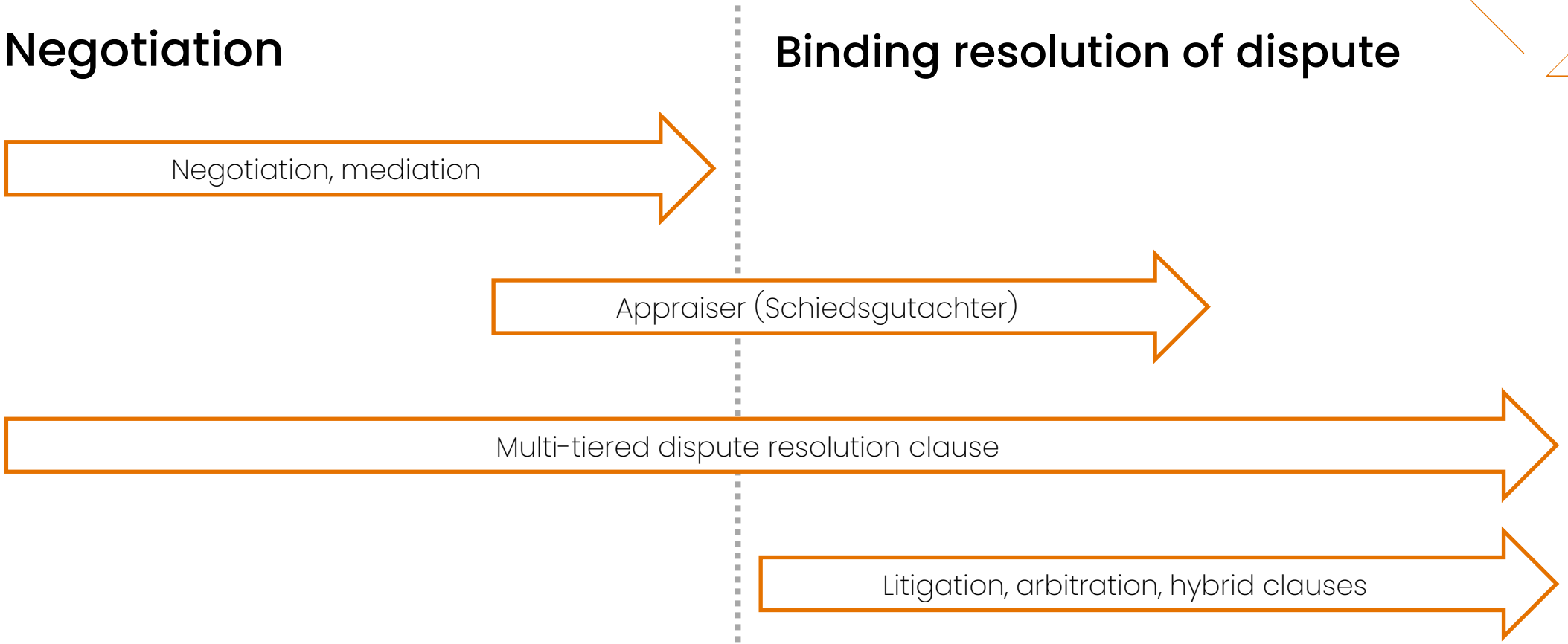
Price Adjustement Disputes

Earn-Out Agreements – Litigation Risks

- Disputes frequently arise from allegations that the buyer acted in **bad faith** by taking steps that **undermined the earn-out targets**
- High evidentiary burden, as seller must show that the earn-out metrics would have been achieved absent the buyer's conduct
- Additional conflicts often stem from
  - **unclear financial metrics** used in the earn-out calculation
  - when a seller continues working for the target and is perceived as **influencing the performance metrics.**

Dispute Resolution Mechanism

Dispute Resolution Mechanism



Litigation vs. Arbitration

Advantages litigation

- Predictability (no procedural games)
- Settlement hearing
- Appeal (only very limited review in arbitration)
- Costs (usually less expensive)
- (Time)
- Generally more favorable for sellers (exception: earn-out disputes where seller would be in the position of claimant)

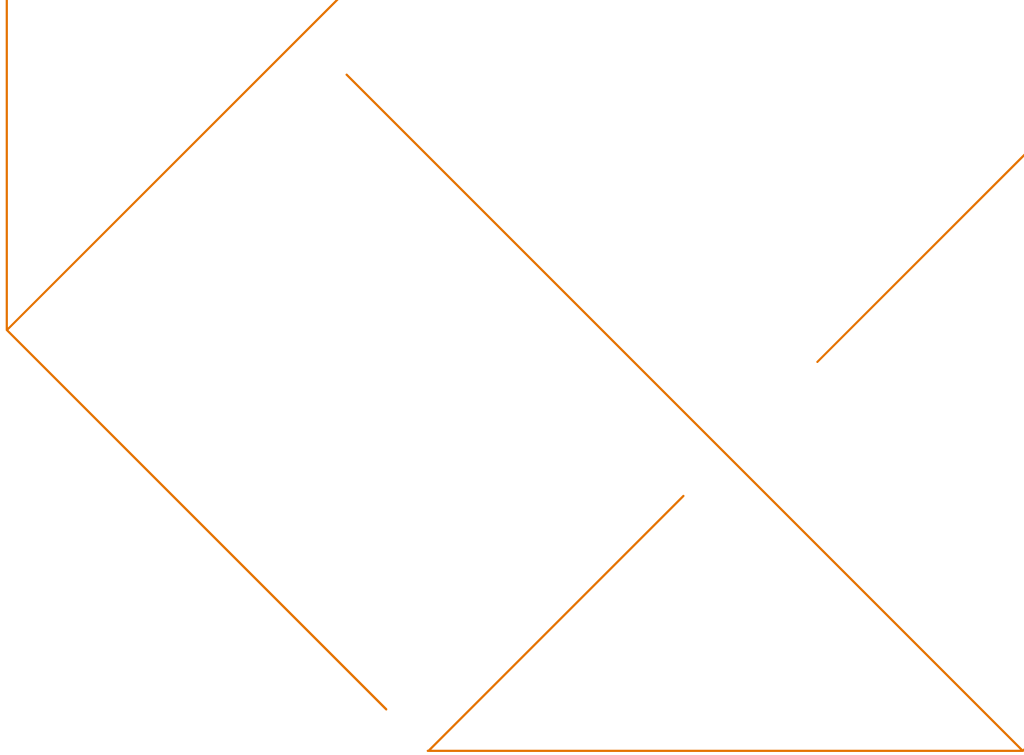
In case of litigation: choose Zurich Commercial Court (soon ZICC)

Advantages arbitration

- Flexibility
- Expert arbitrators
- Evidence (witnesses, lower burden of substantiation)
- Costs (as a deterrent, but full recovery)
- Language
- Enforcement
- (Confidentiality)
- Generally more favorable for buyers

In case of arbitration: choose Swiss Arbitration Centre or ICC

Time for Some War Stories



Notice of Objection

*"Unless Seller give, within 20 Business Days following receipt of the Closing Account, notice to Buyer that it disagrees with the determination of the Net Debt and/or the Net Working Capital as shown in the Closing Accounts, which notice shall describe the nature of any disagreement in reasonable detail, identify the specific line item(s) involved and the CHF amount of each disagreement and provide reasonable supporting documentation for each disagreement (**"Notice of Disagreement"**), the determination of the Net Debt and Net Working Capital, and the Share Purchase Price calculated based thereon, shall be deemed final and binding on the Parties for all purposes."*

Business Days

"Business Day shall mean any day on which commercial banks in [city A], Switzerland, and [city B], Germany, are open for normal business transactions."

R&W – Insolvency

"The Target Companies are not insolvent or unable to pay their debts within the meaning of the insolvency legislation applicable to such Target Company and have not stopped paying their debts as they fall due."

R&W – Damages

"Seller shall be liable to Buyer, subject to the exclusions and limitations set forth in this Article [x], for any direct damage, direct loss, expense or cost (including Taxes and reasonable attorney's fees, but excluding punitive, indirect or consequential damages, loss of profits or internal operating costs or expenses) (the Damage) incurred or sustained by Buyer and in relation of cause and effect (pursuant to Swiss law) with any of Seller's representations and warranties being breached, untrue or misleading or by a breach of Seller's other obligations under this Agreement. Any determination or calculation of Damage by reference to methods of enterprise valuation, such as discounted cash flow, multipliers or comparables or the like shall be expressly excluded."

Multi-Tiered Arbitration Clause

"In the case of a dispute arising out of, or in connection with, or relating to this Agreement (or subsequent amendment thereof), the Parties shall enter into settlement discussions, which shall first involve the chief legal counsel, second the CFO and finally the CEO of each Party. If any dispute arising out of, or in connection with, or relating to this Agreement is not settled within 20 (twenty) Business Days following the date on which the settlement discussions between such officers commenced, then such dispute shall be finally resolved by arbitration […]."

Key Take-Aways

- M&A disputes are **frequent** – keep this in mind already when negotiating the agreements,
- **Evidence** is key in every dispute – make sure everything is properly documented, not just due dilligence but also negotiations (meeting minutes), keep track of contract drafts, secure witnesses,
- Involve all relevant **stakeholders** early (business, accounting, inhouse, external legal, experts) – time and preparation are of essence.
- Litigation and arbitration are the **last resort** – consider all other options and make commercial assessment whether proceedings are worthwile.

Thank you!

