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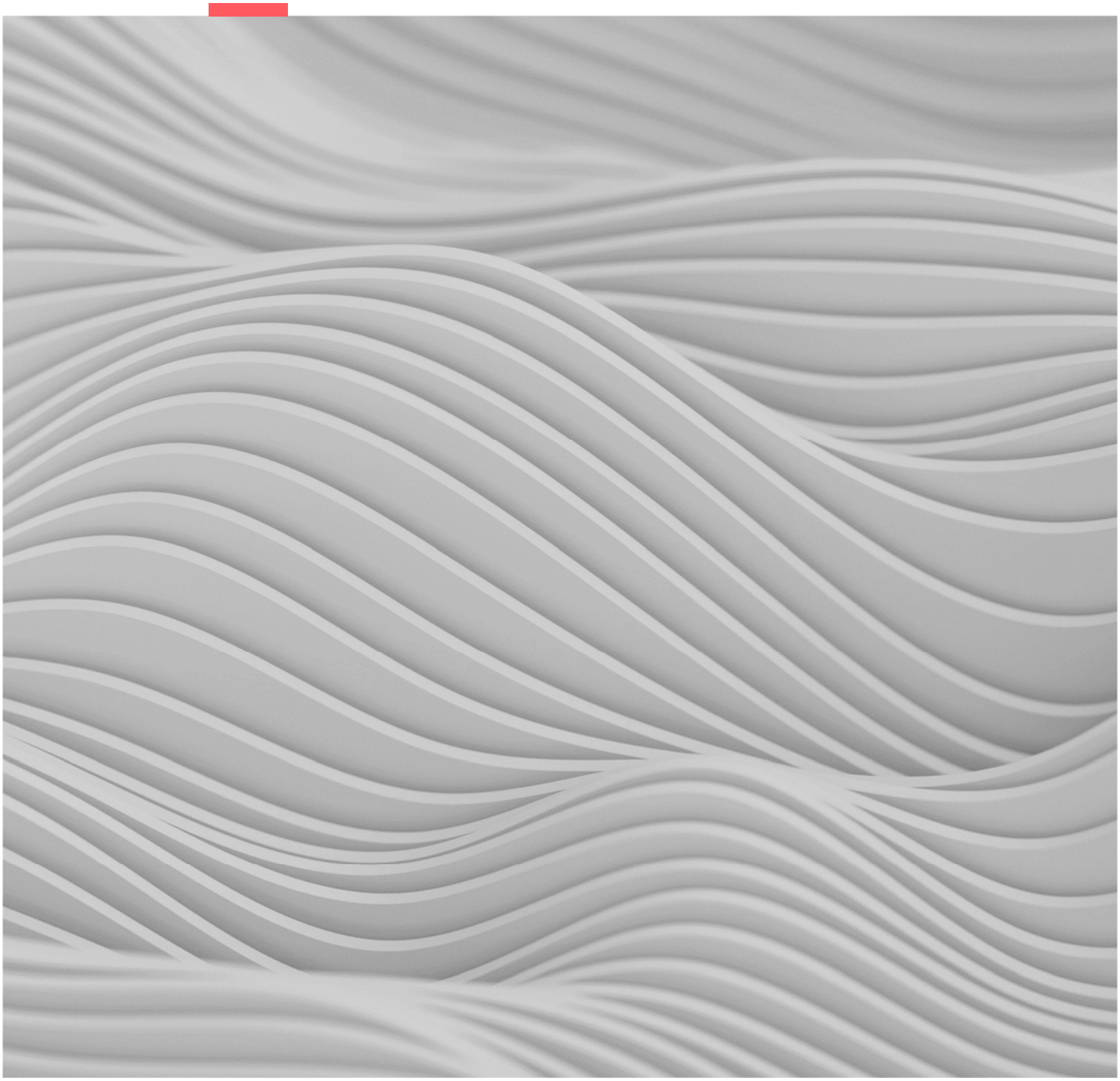
10 KEY ISSUES IN M&A LITIGATION

Key 1. Preliminary agreements. Breach.



10 KEY ISSUES IN M&A LITIGATION

Company acquisitions through the purchase of stock are complex transactions that can lead to disputes between buyers and sellers. In the absence of agreement, these disputes will be settled before a court or an arbitral tribunal.

Based on our litigation and arbitration experience, we will outline the 10 main disputed issues and some solutions to prevent them through the following “information pills.”

The first few pills concern substantive issues: breach of preliminary agreements, price determination, lack of veracity or breach of representations and warranties, specific indemnity clauses, the relevance of the buyer’s knowledge in contractual liability mechanisms and risk coverage through W&I insurance.

The next pills address procedural issues: contractual claims procedures, third-party determination of contractual aspects, expert evidence in court or arbitration proceedings, submission of the dispute to court or arbitration and whether to provide alternative dispute resolution mechanisms such as mediation.

KEY 1

Preliminary agreements. Breach.

Buyers and sellers enter into preliminary agreements to prepare, negotiate and sign a future contract. In M&A transactions, during this period, the parties usually sign a letter of intent ("LOI," also called memorandum of understanding, heads of agreement or term sheet), stating their intention to begin or continue negotiations to reach a final purchase agreement.

LOIs can have different content, but the parties typically address the following aspects: the state of their negotiations to date; a statement of their willingness to negotiate the purchase of a company and, if applicable, an obligation to negotiate exclusively for a certain period of time; provisions governing the negotiation process; and confidentiality obligations. It is also common to include a non-binding clause whereby the seller and the buyer state that they are not obliged to enter into the transaction on the terms set out in the letter, while including certain binding clauses (e.g., confidentiality, exclusivity, jurisdiction and applicable law).

The parties may be interested in signing a LOI for diverse reasons, e.g., ensuring exclusivity of the offer for a certain time; establishing confidentiality (and its scope) of the information disclosed during negotiations; setting out the conduct required of the participants in the negotiation and of the directors and officers of the parties; or determining due diligence terms and period.

Regardless of whether they have signed a LOI, Spanish law and the general duty of good faith under our Civil Code impose certain obligations on the buyer and the seller during the negotiation phase.

This negotiation phase may result in signing the purchase contract or breaking down of negotiations.

When negotiations break down, the remedies available to the "frustrated" buyer or seller will depend not only on the documents signed and the status of the negotiations but, in particular, on the actions of the parties. All this will determine whether we are dealing with mere preliminary agreements, a pre-contract or even a final contract. These will produce different effects and claims of different scope.

While the consequences of breaking down preliminary negotiations are clear, the line between a preliminary agreement and a contract (or, as the case may be, a pre-contract) in complex negotiations may be blurred. This is a question of fact to be determined by the courts or arbitration on a case-by-case basis, including any compensation.

To avoid undesired consequences for the parties, it is important to have specialized legal advice regarding the letter of intent and the actions of the parties during the negotiation phase:
To define the scope of the obligations undertaken and their consequences.
To claim or defend against potential liability for *culpa in contrahendo* in the negotiation of preliminary agreements**.**
To claim or defend against liability for breach of obligations under the letter of intent such as confidentiality, exclusivity, non-receipt of offers or transfer of information.

Future brochures will address the following issues:

Key 2	Price
Key 3	Representations and warranties
Key 4	Specific indemnities
Key 5	W&I insurance: A growing trend
Key 6	The impact of the buyer's knowledge on the seller's liability
Key 7	Contractual prior claims procedure
Key 8	Third-party determination of contractual elements
Key 9	Expert evidence
Key 10	Dispute resolution procedures—court or arbitration? Mediation as an alternative

For additional information, please contact our *Knowledge and Innovation Group* lawyers or your regular contact person at Cuatrecasas.