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Practice Leader Insights From Covington's Gregor Frizzell

By **Gregor Frizzell** (May 27, 2025, 3:51 PM BST)

In this Law360 U.K. Expert Analysis series, practice group leaders share thoughts on keeping the pulse on legal trends, tackling difficult cases and what it takes to make a mark in their area.

In this installment, Gregor Frizzell, *head of the EMEA corporate group and vice chair of the global corporate practice at Covington, discusses the creative challenges of merger and acquisition document provisions, how modernizing the archaic stamp duty regime would be welcomed by tax lawyers, and the potential guidance offered by a recent case on the interpretation of material adverse clauses.*

The Most Challenging Matter I've Worked On

Gregor Frizzell

I find a number of matters challenging, but that's probably more a reflection on me than the deals I work on! Every deal is different and ones in regulated industries, including life sciences and technology, can throw up some of the most interesting issues to solve.

While deals in those industries are known for complexities, a recent M&A matter in the renewable energy space presented a number of interesting challenges.

Our client was selling its interests in hydroelectric projects in Africa. These projects typically have multicompany and multijurisdictional holding structures above them, and complicated commercial arrangements at the operating level that need to be well understood when structuring the deal.

Additionally, any disposal or acquisition of project interest will involve the need to seek approvals, waivers or consents from a large number of partners and stakeholders, including governments, regulators, co-investor shareholders, lenders and off-takers, often resulting in a long period between signing and closing.

A lot of time and thought is therefore needed from both sides around the so-called standard provisions one sees in M&A documents. In this deal, a lot of time was spent negotiating the interim covenants, representations, warranties and consequent liabilities, i.e., recognizing a seller may not have direct management control or knowledge of day-to-day operations, responsibility for satisfying conditions

precedent, long-stop dates and the risk sharing on tax.

We found ourselves having to be more creative in the way we thought about these provisions than is typical, and we had to engage the client's corporate, legal, operations, tax and treasury teams a little more than is usual. I'm fortunate to have colleagues who are much smarter than me. Our project development, finance and tax teams were closely involved and were instrumental in getting the deal done, often having to find novel solutions to tricky risk-sharing points with the buyer.

Laws and Regulations in Need of Reform

The current U.K. stamp duty laws, dating back to the late 19th century — slightly before even I started my career — are an area where we often encounter issues on M&A transactions with a deferred consideration component. Deferred consideration structures are a particularly common feature in life sciences M&A. Buyers can often find themselves paying U.K. stamp duty on consideration that is ultimately never paid to a seller, and that stamp duty is irrecoverable.

Nobody wants to pay tax on money they haven't paid or earned. It is possible to structure around the issue, but the point is often overlooked at term sheet stage, particularly where the buyer is unfamiliar with the U.K. regime, often leading to last-minute head scratching and alarm.

In addition, the process of physically stamping stock transfer forms before changes in legal ownership can be registered is archaic and also an unfamiliar concept to many overseas clients. Modernizing the regime, which could include electronic filing of stock transfer forms and online payment of stamp duty to effect the immediate transfer of registered and legal ownership of shares in a U.K. company when an M&A deal closes, would certainly be welcomed by M&A practitioners and tax lawyers.

Important Developments and Trends I'm Tracking

The 2024 High Court case of BM Brazil 1 Fundo De Investimento Em Participacoes Multistrategia v. Sibanye BM Brazil (Pty) Ltd., relating to a dispute that arose on an M&A transaction, was of particular interest.[1]

The case involved the interpretation of a material adverse event or material adverse change clause in the sale and purchase agreement. These are often referred to as material adverse change clauses. MAC clauses allow a buyer to terminate a sale and purchase agreement after signing and before closing if a material adverse event or material adverse change affects the company or business it has agreed to acquire.

This case, brought by the seller of two companies that owned mines in Brazil, alleged wrongful repudiation of two sale and purchase agreements containing MAC clauses, and were governed by English law. Two weeks after signing, a geotechnical event occurred at one of the mines in Brazil, resulting in some damage to the mine.

The buyer took the view that the geotechnical event was material and would adversely affect the value of the affected mine, and they terminated its acquisition by relying on the MAC clause. The seller disagreed.

There have been very few cases considering MAC clauses in English law-governed sale and purchase agreements, so the judgment has been interesting for English law practitioners who often spend a lot of

time discussing the wording during negotiations.

The high court's central question was whether the geological event was, in fact, a material adverse effect allowing the buyer to terminate the sale and purchase agreements. It ultimately concluded that, based on an interpretation of the specific definition of "material adverse effect" in the sale and purchase agreement, such an event had not occurred, and that the buyer was not entitled to terminate the agreement.

In coming to its conclusion, the court provided helpful guidance for M&A lawyers for the construction and interpretation of MAC clauses. This included confirming that the ordinary principles of contractual construction should be applied.

The court also looked at U.S. authorities and confirmed that buyers have a high hurdle to clear if seeking to rely on such clauses.

The court also confirmed that, where the term "material" is not defined in a contract, there is no "bright line test," and a court will look at the facts and circumstances of individual cases. There was other detailed discussion of the clause in the judgment, providing helpful pointers for lawyers drafting and negotiating MAC clauses in future transactions.

I am sure that it was a relief to a number of M&A lawyers that the judgment confirmed much of what they had advised clients before the case came before the high court — it certainly was for me! It will be interesting to see how it affects the negotiation of MAC clauses in future deals, particularly in transactions in the mining and natural resources industry.

A Lawyer I Admire

More often than not our clients want to get the deal done quickly and efficiently, but also with the M&A documents clearly and correctly reflecting the agreed commercial and legal terms. We recently advised a client on the sale of a technology company where the seller and buyer wanted the sale and purchase agreement signed very quickly after the term sheet was signed.

Mike Turner and his team at Latham & Watkins LLP were on the buy-side, and it became clear that if we were to meet our respective clients' timing objectives, the legal teams would need to work quickly, collaboratively and be solution-orientated. Mike and his team did just that; the legal teams on both sides focused on the key issues and were able to take pragmatic and sensible positions.

M&A doesn't always need to be adversarial, and lawyers can properly protect their clients' interests in a collaborative environment with "the other side."

My Advice to Junior Lawyers

Corporate transactional work, and M&A in particular, can involve long hours and stressful deadlines. Never commit to social engagements when you're in the middle of a deal!

As one of the corporate lawyers on the deal, you're at the center of everything. That can be incredibly rewarding. It's really important to understand the client's motivations and ultimate objectives behind the transaction. Understanding those objectives and motivations, as well as your client's existing business and how that will be affected by the deal, is vital in providing the right advice and focusing on

the key points and issues.

It is, of course, important to be thorough and provide the best possible advice, but it's sometimes easy to over-worry or over-lawyer less material points, which can distract you from the things that matter most to your client.

You'll also be working with lawyers from other practice areas — the real lawyers, as I like to call them. I've always found it helpful to my ongoing development to take time to understand the issues they raise, and how to frame and address those in discussions with the client and when negotiating with the counterparty.

And be nice; there's sometimes a perception that M&A lawyers need to be aggressive and uncompromising. That is sometimes what your client wants, but even then it's important to be thoughtful, polite and respectful.

Gregor Frizzell is a partner and a vice-chair of the corporate practice group at Covington & Burling LLP.

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[1] BM Brazil 1 Fundo De Investimento Em Participacoes Multistrategia v. Sibanye BM Brazil (Pty) Ltd [2024] EWHC 2566 (Comm).