



Post-M&A Arbitration

Ordinary Course of Business Between Signing and Closing During COVID-19

FTI Consulting was commissioned to act as an expert witness in an ICC arbitration, in the wake of a dispute over actions that the target company in a takeover had taken to mitigate the impact of COVID-19 between the signing date and the closing date.

SITUATION

Following the signing of an agreement for a proposed multi-billion-euro takeover of a European specialised retail group by a global leader in the manufacturing and distribution of specialised equipment, the buyer sought to cancel the agreement due to the target company's drastic measures during the COVID-19 pandemic that were in breach of the 'Ordinary Course' covenant of the agreement.

OUR ROLE

FTI Consulting was engaged to assess three main areas of contention, namely, to assess:

- the information provided by the target company to the buyer, when it sought the buyer’s consent for an ‘ordinary course’ deviation, and whether such information was sufficient (from a corporate finance perspective) for the buyer to evaluate the requested deviation;
- what would have been the target company’s financial and business position but for the measures taken; and
- whether the target company’s measures during the COVID-19 pandemic could be said to have a long-term adverse impact that may only emerge with clarity post-closing.

FTI Consulting’s transaction services expert concluded (i) that the buyer was not in a position to consent knowingly to the measures taken by the target company; (ii) that the measures collectively and in their extent were not necessary and (iii) that such measures could hamper the company’s ability to compete with competitors and to pursue long-term growth.

OUR IMPACT



The ICC tribunal ruled that our client, the acquiring company, had the option to back out of the takeover due to the Claimant’s material breaches to its obligations to the Respondent.



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