



Post-Acquisition Disputes

KPMG Forensic

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KPMG INTERNATIONAL


cutting through complexity

KPMG's Post Acquisition Disputes

include accounting, economic, loss quantification and valuation-related advice and opinions as well as document disclosure services. Our objective assessments help to resolve disputes in arbitration, litigation, insurance claims and transactions. We serve as privileged consultants, expert witnesses, arbitrators and neutral/independent accountant experts. We also support parties in negotiations and mediations. Our senior professionals include seasoned expert witnesses and arbitrators who deal with some of the largest and most complex disputes in the world.

When disputes arise, it is important to gather the relevant facts, isolate and understand the key business and financial issues so as to identify the economic implications as soon as possible. Cross-border disputes can involve complex economic, financial and technical issues as well as multiple languages, client locations and applicable laws and standards. Parties with an understanding of the issues can make better decisions when responding to disputes.

KPMG's Dispute Advisory Services teams assist litigants and their legal counsel with potentially costly and disruptive disputes and litigation worldwide. KPMG member firms deliver a wide range of services to assist with the resolution of disputes including:

- Forensic accounting investigations
- Early case assessment
- Document and electronic record disclosure

- Data analysis
- Corporate intelligence
- Valuations
- Economic analysis
- Accounting and auditing expertise
- Damages assessment
- Advice on negotiation strategy
- Expert witness testimony
- Independent expert determination

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, inadequate up-front 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.

Post-closing acquisition related dispute advisory services

01

Preparation or review of closing statements

- Assistance in preparing closing statements
- Calculation of purchase price adjustments
- Review of closing statements to ensure consistency with the accounting principles set forth under the agreement

02

Dispute notice and good faith negotiations

- Review of draft closing statements/earn-out statement
- Assistance with preparing any objection or dispute notice
- Assistance with strategy for good faith negotiations
- Drafting position statements on the disputed items
- Advising on discovery issues and access to books and records

03

Dispute resolution process

- Advising on the selection of the neutral/independent accountant or being that accountant
- Assisting as advocate in presenting the position to the arbiter or neutral/independent accountant
- Acting as the independent expert witness
- providing neutral/independent determination or arbiter services
- Assisting with international arbitration or local courts and arbitrations



Closing Statements Disputes

KPMG firms advise on the preparation or review of closing statements and dispute notices, provide support in settlement negotiations, and help to present a client's case before a neutral/independent accountant/determiner, both orally and in writing.

Some questions to consider:

- Is there a likelihood of a dispute over one or more of the balance sheet areas in the closing statements?
- Do you think that you have paid too much for a business?
- Have you received a dispute notice from the other party?
- Are you finding it difficult to negotiate the resolution of disputed items with the other party?
- Have settlement negotiations broken down?
- Have you or the other party invoked the expert determination clause in a sale and purchase agreement?

KPMG Forensic can help

You may need	We provide	Potential benefits to you
Assistance in preparing or reviewing closing statements.	Assessment of whether the completion statements have been prepared in accordance with the provisions in the sale and purchase agreement.	Identification of adjustments that could impact the value of consideration paid by the buyer or received by the seller.
Assistance in preparing or reviewing a dispute notice.	Identification of items which can be taken forward for determination by a neutral/independent accountant.	Awareness of the strengths and weaknesses of your case. Ability to negotiate from a position of strength.
Assistance in settlement negotiations.	Assessment of the strength of your position. Identification of a likely range for settlement.	A fair and satisfactory result and faster resolution of a dispute, saving time and money.
Advice on selecting a neutral/independent accountant and negotiating terms of reference.	Help in sourcing an experienced neutral/independent accountant, negotiating timetables and the process.	A qualified expert with a suitable timetable and terms of engagement to determine your case.
Assistance in the preparation of submissions, both oral and written, to a neutral/independent accountant.	A professionally prepared report or presentation which explains your position effectively and forcefully.	Credible and professional presentation of your case by experienced forensic accountants.
The appointment of an independent accountant to determine or arbitrate the matters in dispute.	Independent accountants who are experienced neutral determiners and arbitrators (see page 8).	An objective determination or award settling the dispute.

Warranty Disputes



A KPMG professional can advise you or your client in a warranty dispute and act as an expert witness where appropriate. Warranty claims arise when a purchaser discovers after closing a difference between the acquired business as warranted and its condition at the date the vendor gave the warranties, subject to any disclosures.

Some questions to consider:

- As a purchaser, are you concerned that financial, commercial or accounting information which has come to light post-acquisition would have affected the purchase price if you had been aware of it beforehand?
- Are you unsure whether a financial or accounting warranty has been breached?
- Are you facing a warranty claim which is diverting management's time from running your business?
- Do you need help to quantify the amount of a warranty claim or to evaluate, document and present your position in a warranty dispute?
- Are you in need of a credible independent expert witness opinion to help resolve a warranty dispute?

KPMG Forensic can help

You may need

- Dispute advisory services in presenting or defending a claim for breach of financial or accounting warranties.
- Quantification of damages, an evaluation of the likely outcome of the dispute, and assistance in negotiations.
- An impartial assessment of the warranty claim and strong expert testimony.
- A high quality realistic, written report setting out the factual details and arguments concerning the warranty claim.

We provide

- Wide-ranging industry focused tactical advice and experience in the dispute process.
- Efficient project management, document control and disclosure management.
- Objective opinions on the strengths and weaknesses of your case.
- Robust and credible expert witnesses with considerable experience of cross-examination.
- Reports drafted with precision and clarity, readily comprehensible to the non-accountant.

Potential benefits to you

- An accurate assessment of your position as soon as possible.
- A realistic view of the reasonable settlement range to allow you to negotiate from an informed position.
- A credible presentation of the evidence by a reputable expert witness.
- Clear and objective reports that provide a powerful presentation of facts, opinions and conclusions.



Neutral/ Independent

Accountant Expert Determinations

KPMG professionals have been appointed on many occasions as a neutral/independent accountant to carry out expert determinations. Our team includes qualified members of the Institute of Arbitrators and of the Centre for Effective Dispute Resolution (CEDR). We are also represented on the Institute of Chartered Accountants in England and Wales (ICAEW) list of neutral/independent accountants.

As with other forms of alternative dispute resolution, the benefits of expert determinations lie in their greater speed and lower costs in comparison to litigation or arbitration. We understand that, in order for these to be realized, the process must be run efficiently by a knowledgeable and experienced individual who understands not only the process to be followed but also the industry sector practices relevant to the dispute.

Our Approach

Provide clarity

around what is in dispute before finalizing our appointment, thus significantly reducing the risk that litigation is required in order for the determination process to be concluded.

Control the process

efficiently, including management of the timetable and circulation of submissions. This helps the dispute to be resolved in a timely manner, with neither party able to gain an advantage through the making of unsolicited submissions.

Stay within the scope

of the terms of the determination. A great deal of trust is placed in a neutral/independent accountant due to the final and binding nature of the determination. Where neutral/independent accountants stray beyond their remit the integrity and validity of the determination may be compromised.

Make use of industry expertise

where appropriate. Our global network of professionals holds a huge amount of industry specific understanding and experience, which we can access as necessary for an in-depth, focused understanding of the key aspects of the dispute.

Focus on the contractual basis for the dispute

as the basis for a price adjustment is driven by the wording of the sale and purchase agreement. Advise on the accounting aspects of numerous sale and purchase agreements each year, providing us with a thorough understanding of price adjustment mechanisms and how these work in practice.

Give careful consideration

to the parties' submissions, meeting the neutral/independent accountant's critical obligation to understand the parties' positions in respect of each disputed item, consider what evidence is admissible and assess that evidence objectively.

Arrive at a well thought out

and robust determination. KPMG member firms are adopting a conscientious and professional approach to deciding the outcome of the dispute, specifying the basis for the decision if requested.

Case studies

01

Europe – United Kingdom

Mining

Client Challenge

- The parties wanted a swift expert determination to resolve the dispute. Given that this was an independent determination there was virtually no interaction between the two parties and communication had to be managed simultaneously with both parties in an independent manner.
- The matters in dispute included the appropriateness of certain provisions and impairments made against assets in the business, interpretation of clauses specifying certain accounting treatment to be applied in the completion statements, with applicable tax rates to be applied.

KPMG Response

- There were 14 points of dispute and the work involved interpreting the sale and purchase agreement to determine relevant facts. Both sides of each argument

needed to be considered. Research needed to be done into relevant International Accounting Standards (IFRS) and their application to the case at hand.

- After the initial submissions by both parties, numerous questions remained that needed to be answered. This made delivering a swift determination more challenging and was only achieved by calling upon our significant past experience of running such processes.
- KPMG in the UK determined the accounting interpretation and application of the relevant clauses in the sale and purchase agreement governing the basis of preparation of closing statements used to determine the final purchase price.

Benefits to Client

- The clients benefitted from KPMG's in-depth knowledge in expert determinations and were able to obtain a swift resolution to the dispute.

02

United States

Telecommunications Hardware Provider

Client Challenge

- The client, a private company based in the United States owned by a private equity firm, recently completed the purchase of a company which provided similar and complimentary services to those of the client.
- As the spa provided for arbitration in the event of a dispute, the client faced an uncertain and unpredictable timeline that could possibly include a requirement to make voluminous written submissions to an arbitrator.

KPMG Response

- KPMG in the US worked quickly to respond to the needs of the client. Per the sale and purchase agreement, our client prepared and delivered selected post-closing financials to the seller; This statement contained significant adjustments resulting in the seller disputing the calculations. As a result, KPMG was engaged by the client to assist and advise on next steps, including the possibility of bringing the dispute to arbitration.

- KPMG worked rapidly to gain an understanding of potential items in dispute and draft position statements as requested by counsel and client.
- KPMG teamed effectively with a law firm on this engagement to deliver our services under attorney-client privilege.
- KPMG Forensic specialists were supported by Transaction Services and Accounting Advisory colleagues regarding due diligence and complex accounting matters.

Benefits to Client

- KPMG responded rapidly to the client's request for a multi disciplinary team to review records and meet with personnel on site in order to gather the best available data to support a potential dispute.
- KPMG was able to work under the legal privilege of the client's legal advisor, which maintained legal privilege in case any legal proceeding related to this matter developed.

03

Asia Pacific/Australia

Financial Services

Client Challenge

- A global investment bank (through a real estate investment trust) had acquired the shareholding in a major residential property developer. After three or four years of significant losses, the real estate investment trust entered into a transaction where the controlling shareholder of the developer would buy back the company at a significant discount to the earlier transaction.
- The purchaser prepared the completion accounts having regard to the provisions of the acquisition agreement. The real estate investment trust disputed the completion accounts for significant balances which accounted for over one quarter of the working capital adjustment. The acquisition agreement had a provision which separated the accounting of work in progress accruals from the balances in the calculation of working capital.

KPMG Response

- The KPMG team project managed the joint expert engagement on behalf of two KPMG audit partners who were selected by the parties.
- The task was to draw on the audit and accounting skills of the senior audit partners and develop a deliverable that set out our analysis of the disputed balances.

- On the guidance of KPMG in Australia, the parties resolved to settle one of the remaining differences between themselves having regard to the materiality of the balance relative to the overall matters in dispute. This left one significant balance for an interim determination.
- KPMG's analysis of the significant balance proceeded on our understanding of the provisions of the acquisition agreement. There was a change in the accounting of work in progress accruals at the reference date and at the completion date. The change related to the time period that the trade creditor's subsidiary ledger was kept open after period end.

Benefits to Client

- KPMG established that the accounting at the reference date had closed off the trade creditor's ledger one business day after period end. The purchaser had left open the trade creditors ledger for a period of six business days.
- A determination was put to the parties helped enable them to put the residual balances in context of the overall balances which were at dispute. One of the parties had pressed other claims under warranties which were not the subject of the expert determination.
- The parties proceeded to resolve the residual balances which enabled the developer and the real estate investment trust to put a potentially substantial dispute behind them.

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