

Committed Capital

BITE-SIZED TAKES ON PE HOT TOPICS

COMMITTED CAPITAL PODCAST SERIES

Delaware, Sandbagging and PE Transactions



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Dechert's Private Equity group presented "Delaware, Sandbagging and PE Transactions," a bite-size episode of the firm's Committed Capital Sidecar Podcast Series. New York-based PE partner Christian Matarese and Professional Support Lawyer Daniel Rubin discussed the issue of buyers "sandbagging" sellers with post-closing indemnification claims, market practice on this deal point, and new guidance from the Delaware Court of Chancery on sandbagging under Delaware law.

HIGHLIGHTS FROM THE EPISODE

Approaches to sandbagging

"Sandbagging" is the colloquial term for a buyer bringing a claim against the seller for breach or inaccuracy of a representation or warranty even though the buyer was aware of the contractual breach pre-closing. Parties can address the issue in the acquisition agreement via: (i) a pro-sandbagging provision explicitly authorizing the buyer to bring post-closing claims despite its prior knowledge; (ii) an anti-sandbagging provision explicitly stating that the buyer cannot bring a claim for breach of the contract if it knew of the breach or inaccuracy before closing; or (iii) remaining silent on the issue. Silence is the predominant market approach and in fact has become more common over time.

Delaware law

The prevailing assumption among sophisticated dealmakers and counsel had been that Delaware permits sandbagging even where the agreement is silent on the issue. However, the authorization to sandbag in the absence of a pro-sandbagging provision had never been directly addressed by a Delaware court, and the Delaware Supreme Court in 2018 suggested that the issue was still open.

New judicial guidance

The Delaware Court of Chancery recently addressed the issue squarely. In *Arwood v. AWS Site Services*, the Chancery Court confirmed that Delaware is a pro-sandbagging state that allows a buyer to bring a claim for breach of contract even when the agreement is silent on sandbagging and the buyer knew or should have known of the breach or inaccuracy before closing the deal. Counsel representing both buyers and sellers in deals with Delaware governing law should be aware of Delaware's pro-sandbagging stance and that other states take either the opposite or more nuanced approaches to the issue.

To hear the episode in full, click [here](#). For all episodes in our series, click [here](#).