One-on-One / With

Alan M. Klein, Partner, Simpson Thacher & Bartlett LLP

New York

Mr. Klein's practice concentrates on M&A, U.S. securities law, and corporate finance matters. Mr. Klein has represented Microsoft Corp. in its approach to Yahoo! Inc., Gas Natural S.A. in its $30 billion bid for Endesa S.A., Rinker Group Ltd. in connection with its acquisition by Cemex S.A.B. de C.V., Portugal Telecom S.A. in connection with the unsolicited offer made for it by Sonae S.A., Matsushita Electric Works, Ltd. in its acquisition of ULT Holdings, Inc., Gerdau S.A. in its acquisition of Quanex Corp., Gerdau Ameristeel Corp. in its acquisition of Chaparral Steel Co. and Bavaria S.A., Latin America's second-largest brewer, in its sale to SABMiller PLC.

Q: You have consistently worked on some of the largest high-profile deals. One trend we noticed a few years ago is that some of the biggest deals closed in the shortest period of time. Are you seeing a slowing in terms of the speed of closing deals, these days, as buyers are more cautious and worried about hidden costs or concerns?

A: Potential buyers are certainly proceeding with caution in this environment. Tremendous uncertainty abounds as to the current appropriate value of businesses since there is such a lack of confidence as to the duration of the current economic climate, and thus future demand for products or services that can in turn, drive transactional activity, whether by financial or strategic buyers.

Overpaying for a company is a tremendous risk now and the perception that a buyer has spent too much for a business will be severely punished by the market. Potential or existing liabilities that might exist at a potential acquisition candidate also loom very large in a prospective buyer's mind, in addition to evaluating the business prospects of that company.

The result is that unless the buyer and seller know each other well or have a history between them of doing business, there are few deals to be done in the course of a weekend in the immediate future. Moreover, directors want to show they have fully exercised their duty of care in evaluating a material transaction in light of extra scrutiny coming from regulators and shareholders alike.

Q: Does a massive company like Chinalco or Microsoft consider going after a major target a serious cost? I'd assume legal and financial advisor fees would stymie attempts that were unlikely to be successful.

A: I don't think any company is frivolous about spending money on advisors, particularly these days. So, if something appears to be a long shot, a company will proceed slowly and cautiously, and re-evaluate whether to continue proceeding quite regularly. Part of that evaluation, of course, involves taking advice as to what the chance of success may be and there often needs to be some legal and financial review by outside advisors in order to come to a conclusion.

The costs at such a nascent stage are not tremendous, so I don't think in and of itself advisors costs determine whether to proceed. Certainly when compared to the overall investment and expenditure associated with undertaking an acquisition or other serious transaction, the cost of undertaking initial due diligence or an exploratory approach on a merger or acquisition, while not a trifle, is still relatively modest. And of course, companies that pursue large-scale transactions on the scale of a Chinalco or Microsoft are making long-term investment decisions where the ultimate value will enrich their business – and their shareholders – for years to come.

Q: Are you seeing partnerships, club deals and JVs becoming increasingly attractive during this time, as lower returns are an attractive trade-off for less risk?

A: Our clients are indeed exploring a number of creative alternatives to traditional dealmaking as a means of both mitigating risk and also taking advantages of market conditions to execute transactions that still make sense but that otherwise might not get done under current credit conditions. The most difficult aspect of the last six months has been to actually determine just how large the risks have been with respect to a given opportunity.

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Partner
Simpson Thacher & Bartlett LLP

The tremendous volatility in the equity markets, coupled with very little available capital from lenders, have made any normal process of evaluation virtually impossible. As that situation eases, there will be more opportunity to explore various structuring alternatives.

Q: Are you seeing a lot of deals get quashed recently?

A: If you mean, are there potential transactions that never see the light of day and of which the public never hears, there are certainly many of those. Far too many of those, unfortunately, these days. At the same time, Simpson Thacher has stayed very active across many segments of the market, including some milestone transactions that have been very much in the news.

The firm is representing Wyeth in its $60 billion merger with Pfizer and representing Blackstone in the recently announced acquisition of portfolio company Stiefel Laboratories by GlaxoSmithKline, a deal that is valued at around $3.6 billion. Our corporate group just closed on a $9 billion energy fund on behalf of First Reserve Corp., believed to be the largest energy-focused private equity fund on record. We also recently handled several major corporate debt offerings for such companies as Ingersoll-Rand, Black & Decker and Sunoco resulting in $1.6 billion in securities offerings. We recently advised U.K. private equity firm Lion Capital in an $80 million PIPEs investment in American Apparel – the first U.S. deal for Lion Capital.

Our infrastructure group just closed a $1.8 billion public-private partnership project to fund major improvements along sections of a highly trafficked portion of interstate in South Florida – the first successful PPP deal in Florida. And our bankruptcy group played a lead role in securing an $8 billion financing for bankrupt Lyondell Chemical Co., reportedly the largest debtor-in-possession loan in history. So, this just points out that the pipeline for corporate, capital markets and financing activity, while still challenged, is much more active than some observers would have it.

Q: When you're dealing with emerging markets, such as those in Latin America, what steps can you take to make a contract enforceable? Are there countries you advise against targeting for buyouts, for legal reasons?

A: Often, a contract between two parties from different jurisdictions will be under New York law or English law, in order to take advantage of being able to enforce the contract in that jurisdiction. Typically, this is a reflection of the high level of confidence that people have in the perspicacity and objectivity of the jurisprudence in those jurisdictions, although sometimes this may be due to a lack of confidence in the home jurisdiction of one of the parties.

Q: I see you represented investment firm Quadrangle Group. What kinds of buyouts were they doing?

A: They have primarily invested in telecoms and media businesses in the U.S. and Europe.

Q: How is the market's appetite for those auctions these days?

A: There have not been many active auctions recently. The market will have to recover a bit more before there is a significant uptick in that area.

Q: On the buy-side, are you seeing more trade buyers looking to do major deals, or are add-on acquisitions more common (though less headline-grabbing)?

A: Large corporations with cash, or access to debt, are in a very strong position to become active buyers, and we've obviously seen some major examples on that front recently in such sectors as health care/pharmaceuticals and technology. Challenged markets generally lead to industry consolidation, which in turn, brings investment opportunity for well-positioned strategic buyers. I would expect they will become increasingly active in the months to come.

Q: Many lawyers I know are busy with restructurings. Are you handling much distressed work at the moment?

A: Certainly all the transactional lawyers I know are working with clients who are either trying to rationalize their own capital structure, or who are trying to find opportunities involving other companies who need assistance with their capital structures. As exemplified by the record Lyondell DIP deal I just described, our corporate and bankruptcy groups have been very busy of late.

The firm has also been representing Motor Coach Industries in its successful emergence from Chapter 11. Our New York office just brought in prominent bankruptcy attorney Sudeep Qusba as a partner – as a firm, we do not add many lateral partners, so Sandy's arrival is a good indicator of how active the bankruptcy side of our practice is these days.

Q: Are buyers being more demanding in terms of reps and warrants?

A: Buyers have more bargaining power than they might have had 18 months or two years ago. They may not be asking for more than they did at that time, but they are less willing to accommodate alternatives to what they have requested, shall we say.

Q: Have you been involved in many take-privates lately?

A: No one has, unfortunately.

Q: I see you worked in London for some time, but settled in New York. Were you tempted to stay in London, for professional reasons?

A: Yes, I was certainly tempted to stay there. I spent close to five years in London in the mid-90's. Simpson Thacher's office there does work throughout Europe and I had a wonderful opportunity to do very interesting transactions with clients from many different countries.

Q: What is the biggest mistake of a deal you've seen?

A: There were a lot of misguided deals at the height of the tech bubble in the late 1999 to early 2001 period. Very few of those turned out as people hoped. A lot of buyers then were seduced by what turned out to be an utterly ephemeral notion of value for businesses that had few sales and few prospects to actually grow at the rates that were predicted.

Q: If there are any trends you've noticed in your work lately that I haven't touched on, I welcome any anecdotes you'd like to share.

A: It's not an exact science, of course, but the market simply feels better now than it did in January or February. Not as good as we all hope it will ultimately get, but better, with more signs that things are stirring. More clients are thinking about prospective transactions, taking tentative steps toward pursuing deals, even making proposals and having early stage discussions.

Interviewed by Corina Kellam, London, ckellam@factset.com, (+44) 77.0267.4485

To contact Mr. Klein, please email/call him on aklein@stblaw.com or 1-212-455-3188.