ALERT – DELAWARE BUSINESS COURT CONFIRMS RIGHT TO LIMIT LIABILITY BY CONTRACT

In a recent ruling, the Delaware Court of Chancery (the nation's leading business court [the "Court"]) has reaffirmed a party's right to expressly limit its liability by the terms of a contract, even under circumstances where such terms conflict with a party's statutory rights.

Buyers and sellers have long-used contractual liability limitation terms in transactional documents which serve to control a party's risk with respect to such party's respective representations and warranties. The practice of limiting liability, including such instances where claims-period time limitations are shorter than the applicable statute of limitations (i.e., the statutory-based time frame within which a claim or suit must be brought) is widespread in business and real estate transactions. Parties prefer to control their post-transactional liability by "putting a box" around potential future claims in relation to the transaction itself (as between the buyer and seller) and third party claims. Evidencing this common practice, the American Bar Association, in its 2011 Private Target Mergers & Acquisitions Study (the "Study"), found that claims-period time limitations for a period of eighteen (18) months or less were found in excess of seventy-five percent (75%) of the transactions analyzed in the Study[1]. In other words, transactional participants overwhelmingly favor limiting the duration and scope of their liability when entering into transactions.

On November 27, 2013, the Court in the case of *ENI Holdings, LLC v. KBR Group Holdings, LLC* (Civil Action No. 8075-VCG) confirmed a party's right to limit contractually its liability in contravention of the applicable statute of limitations.

In *ENI Holdings*, ENI Holdings, LLC ("ENI") had sold the engineering, procurement and contracting company of Roberts & Shaefer Co. ("R&S") to KBR Group Holdings, LLC ("KBR") pursuant to a Stock Purchase Agreement (the "SPA") for the sum Two Hundred Fifty Million Dollars ($250,000,000), which was subject to post-closing working capital adjustments. The SPA contained a fifteen (15)-month limitation on certain types of intra-party claims. ENI and KBR disputed the working capital adjustments and the amount of the final purchase price that KBR was to pay ENI. ENI filed a suit for breach of contract with the Court. In a tit-for-tat response, KBR filed counter-claims for indemnity and fraud, amongst other claims, against ENI. However, KBR's counter-suit was filed after the conclusion of the fifteen (15)-month limitation, but before the conclusion of the three (3) year statute of limitations. The Court held that, notwithstanding the applicable statute of limitations, the parties may, by contract, limit the survival period for claims "*..because [Delaware] respects the right to contract in general, Delaware recognizes the right of contracting parties to impose a shorter period of limitation than provided for by statute.*"[2]. In confirming the inviolability of the parties' right to contract, the Court dismissed several of KBR's counterclaims which were filed after the fifteen (15)-month deadline.

The key takeaway from the *ENI Holdings* case is that a party may in a transaction governed by Delaware law limit its liability in a transaction of any size or type by carefully crafting liability limitation terms with respect to the duration and scope of their representations and warranties. Courts interpreting Delaware law are likely to enforce such liability limitations even if they appear to conflict with statues that address such matter.

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[1] American Bar Association, 2011 Private Transaction Mergers and Acquisitions Deal Points Study; January 17, 2012; M&A Market Trends Subcommittee, p. 86.

[2] *ENI Holdings, LLC v. KBR Group Holdings, LLC* (Civil Action No. 8075-VCG); Del. Ch., November 27, 2013; p.2.