Kluwer Arbitration Blog

Paris Arbitration Week: Non-Monetary Relief in International Arbitration of M&A Disputes

Ioana Knoll-Tudor (Jeantet) · Thursday, November 18th, 2021 · Jeantet

This post is a non-exhaustive summary of a hybrid conference organised during the Paris Arbitration Week 2021 by Jeantet. The panel discussed international arbitration of M&A Disputes, and in particular the types of non-monetary relief which parties to such transactions may seek. The panel, moderated by **Dr. Ioana Knoll-Tudor** (*Jeantet*, partner), was composed of **Francois de Verdière** (*The Goodyear Tire & Rubber Company*, Associate General Counsel), **Beata Gessel-Kalinowska vel Kalisz** (*GESSEL Attorneys at Law*, Founder and Senior Partner), **Edward Poulton** (*Baker & McKenzie LLP*, Managing Partner), **Sverker Bonde** (*Delphi*, Partner), and **Dr. Ali Baydoun** (*Jeantet*, Counsel).

General Causes of Disputes in the M&A Sector

Mr. de Verdière's comments laid the background to the discussion by describing in general terms the causes of disputes in M&A. Disputes are usually triggered when (1) the terms of the deal are ambiguously drafted, (2) the purchasing company conducted insufficient due diligence (DD) into the target company, leading to failed expectations, or (3) extraordinary situations arise. One example of the latter is Covid-19, during which time there has been a lot of focus on pre-closing undertakings and selected provisions such as financing conditions, force majeure, frustration of purpose, or impossibility to perform. While such clauses were usually 'boilerplate' provisions to which not a lot of consideration was given in the past, recently they received a lot of attention from practitioners. In Mr. de Verdière's experience, parties were able in most cases to resolve their differences out of court, as long as there was a clear understanding of the value of the target company and of the content of the Share Purchase Agreement (SPA). In those cases, however, where parties have not managed to resolve amicably their differences and turned to arbitration, they sought monetary or non-monetary relief.

Circumstances in Which a Party to an M&A Deal Finds it Necessary to Seek Non-Monetary Relief

Mr. Baydoun went through the anatomy of an M&A deal to speak about the situations in which parties may want to seek non-monetary relief (as opposed to monetary compensation), elaborating

on the *type of clauses* and *obligations* that are particularly susceptible to generating such disputes.

Such clauses and obligations may be divided depending on moment of the transaction when they are due.

Prior to the signing of a binding agreement, the main issue which arises is the sudden termination of commercial negotiations once some, but not all, of the aspects of the deal were agreed upon. In such scenarios, a potential buyer would perhaps like to obtain an order obliging the seller to go through with the signing. The chances of success of such a claim, in France at least, are almost nil based on existing case law to date.

Once the Share Purchase Agreement (SPA) is signed, there are two types of obligations which are of interest:

(1) The **primary obligations** are linked to the main object of the agreement, namely the obligation to transfer the shares and the corresponding duty to pay the purchase price. In this period between signing and closing, non-monetary relief seems to fit well the commercial needs of the parties: should a seller refuse to go through with the sale (maybe because it received a better price in the meantime), the best remedy for the buyer would be to seek an order obliging the seller to go through with the transaction, rather than obtain monetary damages.

(2) **Ancillary obligations** relate to confidentiality, non-compete, non-solicitation or non-poaching duties. Again, monetary damages are of little value when a party is breaching its confidentiality obligations and the main concern of the aggrieved party is to protect its business secrets; in such a case a *cease and desist* order forcing the breaching party to cease the breach (e.g. from spilling corporate secrets in connection with a confidentiality obligation) will better protect the commercial interests of an entity wishing to safeguard its competitive advantage than money will do.

(3) A distinct type of obligation is the ***management in the ordinary course of business of the target company***. Here, in case of breach, ordering specific performance (SP) would be complicated because the period between signing and closing is usually very short and the target company is not part to the agreement. **De Verdière** confirmed that from an in-house perspective management of the target company prior to closing is probably the most complex aspect, as there are commercial interests to close the transaction as soon as possible and to preserve the value of the target company.

Types of Non-Monetary Relief Available to the Parties to an International M&A Arbitration

Mr. Poulton went on to present the types of relief available to the parties. He noted that arbitral tribunals will have similar powers to grant remedies as are available to the courts, with the caveat that much will naturally depend on the seat of the arbitration and the substantive law applicable to the contract. Within the discretionary power of the arbitrators, the principal remedies which are usually granted are: specific performance, prohibitory injunctions, restitution, declaratory relief, rectification.

Specific Performance

Further, **Mr. Poulton** underlined that SP can occur in the form of specific performance of an obligation to make a payment (to be distinguished from compensation/damages) or a specific obligation either to do or refrain from doing certain things. In practice, it is not unusual for parties to seek this remedy, since it is the purest form of remedy and makes the defaulting party do exactly what it said it would do!

This is very much the case in M&A transactions: if the commitment is to buy/sell shares for a particular price, then an order requiring the defaulting party to take the shares/make payment, or accept payment/transfer the shares, is the most straightforward way of ensuring the right remedy is provided. On the other hand, damages, while offering some relief/compensation, will never quite replace the original performance. This is explained by the unique features of the assets transferred: shares in a distinct company with certain assets such as brand, know-how, and employees which may not be acquired somewhere else on the market. Therefore, SP as a remedy becomes attractive.

That being said, obtaining an award for SP and successfully enforcing it may be an entirely different story altogether. Certain hurdles exist in practice which may make SP or enforcement thereof difficult:

- A first layer of complexity is given by the **cross-border nature of the M&A transaction and the impact on enforceability**. If the target company is located in a different jurisdiction than the parties, assets, directors or employees, enforcement of the award may be challenging. Needless to say, arbitral tribunals tend to be wary of issuing awards difficult to enforce because the enforceability statistics ultimately reflects on their image and re-appointment prospects. One could however argue that from a philosophical standpoint, such concerns should be trumped by their duty to give the remedy most appropriate.
- Another barrier to SP is **a significant change in position**, in cases where SP ceases to be a feasible remedy. This arises, for example, if a company to be sold divested itself of a chunk of its business, and it becomes impossible to reconstitute such that even if SP is granted, it would not be the same performance. In such situations, one solution would be to seek (in addition to SP) monetary compensation in the form of damages for the carve-out.
- **Barriers to SP outside the parties' control –** a third obstacle concerns situations in which the transfer of shares is subject to prior authorisations from regulatory bodies, such as competition clearances for instance, or where the object of the transfer are shares in regulated financial institutions.

Declaratory Relief

Another type of non-monetary relief is declaratory relief (DR). In practice, DR may be sought either alongside another coercive measure (such as an order to pay), or by itself.

Mrs. Gessel conducted a review of all ICC M&A arbitration awards rendered in English in the period between 2010 and 2012. Her conclusions were that in 13 out of the 79 M&A awards (slightly over 10%) declaratory relief was sought by the claimants. While this is not a particularly large number, the figure is not insignificant either as it tends to show that the remedy can be useful

in practice. In terms of the situations in which this declaratory relief was sought, most prevalent were cases in which the disputed issues referred to declaration of price adjustment, put-call options, validity of the expert opinion and third-party claims against the target company for breach of representations and warranties.

The parties may want to seek DR in two types of scenarios:

- The first is illustrated by the **Aramco Arbitration** having as its parties Aramco, a British oil company, and Saudi Arabia. In the SPA, the two parties authorised the arbitral tribunal to only grant DR, because they did not want to jeopardise their long-standing business relationship by granting the tribunal the right to grant monetary relief. The case showcases the commercial function of such a declaration, which is its capacity to be an **instrument in the furtherance of mediation and negotiations,** which can safeguard the parties' commercial relationship.
- The second scenario in which DR is particularly useful is where at the time of the breach of contract or covenant, damage had not been incurred, but is anticipated to materialise in the future. Arbitral tribunals can rely on this tool therefore **where the damage cannot be evaluated** at the time the tribunal is asked to rule on the disputed issue.

The conditions for granting DR vary depending on the legal tradition of the courts in which such a declaration is sought. In Germanic traditions, on the one hand, the conditions are defined with a certain degree of precision. **A legal interest** must be ascertained, which require **certain pre-requisites** that the applicant must show:

- The nature of its interest is legal – not factual
- There is a controversy (real dispute) which gives rise to uncertainty
- The uncertainty relates to the legal relationship of the parties
- The uncertainty is no longer acceptable to the parties
- A declaration, if granted, will finally settle the dispute
- Finally, a declaration will only be granted if there is no other alternative by which the applicant may achieve its goal, ie monetary damages are inadequate.

In England, on the other hand, the two conditions which crystallised from case-law are formulated in a much more general way, requiring only that the declaration (1) will achieve a useful purpose and that (2) it is just.

As it happens with a multitude of other issues, international arbitration bridges the divide between the common law and the civil law worlds and sees arbitrators taking a middle-way approach, called **converged interest** – on which, see here.

Recommendations for Creating Synergies Between M&A and Arbitration Teams

Finally, the speakers gave some recommendations that would help disputes lawyers work better with M&A transactional teams in order to avoid disputes or mitigate risk for the clients:

- From a **drafting perspective**, **Bonde** advised M&A lawyers to make as many obligations of the seller as possible occur prior to closing (such as conditions precedent, closing deliveries etc).

Additionally, often contracts expressly stipulate that the 'only' remedy for certain breaches are monetary damages. This should change, when reviewing the draft contracts, lawyers should ensure that SP or DR are not excluded. Finally, attaching monetary-relief provisions such as liquidated damages or penalties to clauses where SP or DR are sought (such as non-compete, non-solicitation clauses) will always enhance the deterrence effect and make such clauses more powerful.

- Another drafting advice came from **Mrs**. **Gessel**, who noted that multi-contract disputes related to M&A transactions are on the increase. To ensure that all claims are heard in one-go and avoid the danger of parallel and potentially inconsistent findings, she advises M&A lawyers to (i) ensure that the same arbitration clause is included in all contracts related to the deal, and to (ii) explicitly provide for the possibility that all claims under the different contracts be brought in one single arbitration procedure.
- Finally, both **Poulton** and **Mr. de Verdière** emphasized the fact that the dispute and transactional teams must understand the context of their respective work and set up communication channels throughout the deal. The anecdotal 1 am deal-closings are actually a reality, leaving little time for thoughtful consideration of some provisions. Disputes lawyers should therefore show understanding and do not expect perfection, while transactional lawyers should seek a second pair of eyes from disputes lawyers. Such an approach would enhance synergies between transactional and disputes teams, would result in better drafted clauses, fewer disputes and happier clients.

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