Kluwer Arbitration Blog

Arbitration Meets M&A Transactions in Difficult Times: 6th Edition of the "Dispute Resolution in M&A Transactions" Conference in Warsaw

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On 26-27 May 2022, a record turnout of over 200 experts from around the world gathered in Warsaw for the sixth iteration of the "Dispute Resolution in M&A Transactions" Conference. It has become the world's largest event on M&A dispute resolution – thanks to the involvement of Prof. Beata Gessel-Kalinowska vel Kalisz, the Conference chair. Over two days, legal professionals were debating complex subjects, including: recent changes in M&A landscape, consolidation and de-consolidation in M&A arbitration, the idea of procedural and substantive justice as well as M&A issues in investment arbitration. The topics were legally challenging and of considerable practical relevance, supported by interesting case law.

Meeting in Difficult Times

This year's edition was exceptional for several reasons. It was one of the first in-person arbitration events after the COVID-19 pandemic. Of course, the joy of the 'live' meeting was dampened by the current situation in Ukraine. Welcoming remarks for the Conference participants were recorded by Olena Perepelynska, President of the Ukrainian Arbitration Association.

Claudia Salomon**,** the President of the ICC International Court of Arbitration, discussed the need for mutual assistance and support within society, also in crisis situations such as the war in Ukraine, in her inspirational opening speech. She reminded us that the very roots of civilization comprise of looking out for one another and talked about the values on which the ICC dispute resolution mechanism is based – inclusion of marginalised groups, such as people with disabilities, and promoting a culture of equality in all possible areas.

Hot Topics in M&A Arbitration

The first panel of the Conference, moderated by Prof. Dr. Kasper J. Krzemi?ski (NautaDutilh), provided a round-up of hot topics in M&A arbitration around the world. The panellists (Dr. Galina Zukova, ZUKOVA Legal; Edward Poulton, BakerMcKenzie; Dr. Nicolas Wiegand, CMS Hasche

Sigle; and Tunde Ogowewo, King's College London) discussed the changing M&A landscape, starting with many failed negotiations and aborted deals as the COVID outbreak wreaked havoc, proceeding into the 2021 M&A boom, which might now be followed by a wave of disputes. The audience was also provided with partial results of an interesting survey conducted by Baker McKenzie on M&A arbitration disputes. Some of the conclusions were highly surprising. For instance, the examination of arbitration awards identified no MAC clause disputes. Are MAC clauses so watertight these days? Or, maybe, we are in for a deluge of MAC disputes soon?

The speakers did not hold back from complex procedural topics, including the controversial issue of whether a tribunal should share its preliminary views with the parties and, if so, in what circumstances. It seems that any reasonable answer must include the very lawyerly phrase "it depends".

To Consolidate or not to Consolidate?

The second panel, led by Justyna Szpara (?aszczuk & Partners), focused on an issue characteristic to M&A disputes: consolidation and de-consolidation of arbitration proceedings. The panel featured Dr. Ioana Knoll-Tudor (Jeantet), Anna Guillard Sazhko (Shearman & Sterling), Nikolaus Pitkowitz, M.B.L.-HSG (Pitkowitz & Partners) and Rostislav Peka? (Squire Patton Boggs). The discussion centred around a case study involving three contracts (a guarantee agreement, an IP transfer agreement, and an SPA) with three different arbitration clauses. The case study was initially straightforward, but acquired successive layers of complexity from each speaker during the panel preparation. The panel considered *inter alia* situations in which: (i) the seller initiated an arbitration for payment against the target, which made a counterclaim and requested joinder of other parties; or (ii) two buyers were about to initiate arbitration against the seller, which, in turn, had a potential claim under the guarantee agreement. We were able to consider many scenarios for possible consolidation under, *inter alia*, ICC and VIAC Rules.

Do Principles of Equity Colour M&A Arbitration Jurisprudence?

Next, Prof. Beata Gessel-Kalinowska vel Kalisz (GESSEL) made a compendious introduction to the third panel, presenting differences between the notion of procedural and substantive justice and opening the way for a discussion between the panellists Prof. Ilias Bantekas (Hamad bin Khalifa University), Prof. Dr. Stefan Kröll (Bucerius Law School), and James Menz (rothorn legal). The speakers discussed how much the principles of equity colour M&A arbitration jurisprudence. This subject, seemingly theoretical, has significant practical meaning in arbitration proceedings. What is the role of substantive law in decision-making process? What are the parties' expectations in this regard? How can arbitrators without legal training apply substantive law? During the discussion, it was even considered that, even if the arbitrators are required to apply substantive law, there are no sanctions for not complying with this requirement.

Multiparty Multicontract Arbitrations

The first Conference day ended with a keynote speech of a true arbitration star – Bernard Hanotiau

(Hanotiau & van den Berg). The subject of the keynote perfectly reflected the complexity of M&A disputes and concerned two main issues: (i) to what extent can an individual / a company which is not a signatory to an arbitration agreement be a party to arbitration; and (ii) when arbitration is initiated under several agreements, to what extent does the tribunal have jurisdiction to decide issues arising under these various agreements? Mr Hanotiau discussed the questions by going through a selection of case law, coming to some interesting conclusions, e.g. that the determination of whether an arbitral clause should be extended to other companies of a group or to its directors / shareholders is more focused on facts than on law. The law does not necessarily play a major role in the final determination of non-signatory issues. There is also an agreement that the existence of a group of companies is not per se a sufficient element to allow the extension of an arbitration agreement to a non-signatory.

Mr Hanotiau emphasized that courts and arbitral tribunals, in the absence of an agreement between the parties, will generally refuse to join proceedings under one arbitration clause, when several proceedings contain truly incompatible dispute resolution clauses, unless it undoubtedly appears that all the disputes fall within the scope of the relevant arbitration clause.

Investment Arbitration: Recoverability of Reflective Loss

On the second day, the first panel kicked off with introductory remarks by Agnieszka Zarówna (White & Case) who presented the concept of reflective loss in investment treaty law. The discussion revolved around awards in Strabag SE v. Libya and Bilcon of Delaware et al v. Government of Canada. Prof. Marcin Ka?du?ski (General Counsel to the Republic of Poland) led the panel discussing this issue with Christina Beharry (Foley Hoag) and Dr. Crina Baltag (Stockholm University). Prof. Beharry spoke about the current treaty practice in bilateral and multilateral investment protection treaties concerning the efforts to exclude and/or limit the recovery of reflective loss. She also commented on the general unavailability of recovery of reflective loss in domestic legal systems and considered remedies currently available under investment protection mechanisms and outside international law. Dr. Baltag presented the current work of the UNCITRAL Working Group III on this topic and pointed out that the multilateral investment court is a response to the perceived shortcomings of the judicial systems in many countries.

New Type of M&A Investment Arbitration: Emerging Energy Transition Disputes

The second panel revolved around emerging energy transition disputes. The discussion was introduced by Agnieszka Ason (Oxford Institute for Energy Studies), followed by a panel moderated by Prof. Dr. Yarik Kryvoi, LL.M. (British Institute of International and Comparative Law) with the participation of Steven Finizio (WilmerHale) and Dr. Boaz Moselle (Compas Lexecon). The panellists discussed how energy transition disputes are now considered to be the new type of cases in M&A investment arbitration. The speakers highlighted that there is a growing number of disputes related to investments in carbon reduction technologies and linked to carbon offset credits. The discussion revolved around (1) environmental taxes and regulatory changes, (2) measurement, reporting, and verification of GHG emissions, (3) emission reduction technologies such as carbon capture and storage, and (4) protection of investments linked to carbon offset

credits. The panellists explained that there is growing pressure on energy players to improve their environmental performance. They highlighted the fact that stranded fossil-fuel assets translate to major losses for investors in advanced economies and made clear that, in the M&A context, the push towards decarbonization creates an incentive to make certain moves, such as divesting legacy oil and gas assets or acquiring cleaner energy business. Many of these transactions involve foreign investment and government support. Therefore, they are exposed to the risk of regulatory changes and, likely, are a breeding ground for disputes.

The discussions during the Conference were accompanied by four case studies presented by White & Case, Dentons, Quantuma and Queritius with a convincing illustration of how multi-stranded M&A disputes can be. They picked up on a variety of topics, ranging from emergency arbitrators, through the multiple roles of an expert, ending with the issue of arbitrating with sanctioned entities.

The participants seemed to agree on one thing: the event was an excellent opportunity to deepen their arbitration knowledge and hone a practical approach to M&A disputes, benefit from inspiration and invigoration by invited experts, and to network with arbitration practitioners from around the world (finally in person!).

The 7th edition of the Conference will be held in Warsaw on 23-24 May 2024 – mark your calendars now!

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