Kluwer Arbitration Blog

New York Arbitration Week 2023 Recap – Effectively Managing M&A Risks and Disputes: Key Issues and Top Tips

Kevin Mastro (White & Case LLP) and Eric Lenier Ives (Assistant Editor for Canada and the United States) · Monday, December 4th, 2023

On November 16, 2023, during the 5th annual New York Arbitration Week, DLA Piper hosted a double feature event focused on the effective management of risks and disputes in the context of M&A transactions. The first portion of the event featured a fireside chat with Jonathan Olefson (General Counsel and Corporate Secretary of Syneos Health) and Charlene Sun (Partner, DLA Piper) discussing an in-house counsel's perspective on post-M&A disputes and what clients look for in their outside counsel. The second portion of the panel, moderated by Julie Bédard (Partner & Head of International Litigation and Arbitration Group for the Americas, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, New York, NY), brought together Frances Bivens (Partner & Global Head of International Arbitration, Davis Polk & Wardwell LLP, New York, NY), Stephen Davidson (Managing Director, M&A and Transaction Solutions, AON Risk Solutions, New York, NY), Melissa Sawyer (Partner and Global Head of Mergers & Acquisitions Group, Sullivan & Cromwell LLP, New York, NY), and Paul Di Pietro (Counsel, ICC International Court of Arbitration, New York, NY) to discuss their experiences on M&A dispute resolution.

The two panels provided helpful insights into how and when disputes arise in the M&A context, what in-house counsel and M&A practitioners think about when drafting dispute resolution clauses, and the particular types of transactions where arbitration is the preferred dispute resolution mechanism.

Post-M&A Disputes: Lessons Learned and What Clients Look for in their Outside Counsel

During the fireside chat, Mr. Olefson drew from his previous experience as a corporate associate in private practice and his current work as in-house corporate counsel to highlight some lessons he has learned in his transition from private practice to in-house counsel, what in-house counsel looks for when drafting dispute resolution clauses in M&A transaction agreements, and what he looks for when choosing outside counsel.

Mr. Olefson emphasized that there is an inherent unpredictability to M&A transactions, part of which can be attributed to the "human element" associated with such transactions. He noted that noncompete agreements, notice provisions, and earn out provisions are often sources of post-M&A disputes in the health care and life sciences industries, and that practitioners must try to anticipate such disputes, no matter how comprehensive the agreements or provisions may be.

As for dispute resolution provisions, Mr. Olefson stressed that, for in-house counsel, it is frequently more important to focus on the company's commercial objectives and ensure that the deal closes than on any particular dispute resolution provision. That being said, the sensitivity of a potential dispute, the requirement that the parties continue to work together, and the possibility that emergency or expedited relief could be required in a dispute are all relevant issues that require close consideration. With respect to emergency relief, he acknowledged that although arbitration rules increasingly provide for emergency relief, there is generally more comfort in resorting to the courts for such relief, even if the merits of the dispute are to be arbitrated.

As for what in-house counsel look for in outside counsel, the answer was clear: the best. In particular, he stressed that clients need to know that their outside counsel can handle high-profile and important matters in a competent and proficient manner, with a focus on the company's commercial objectives. So long as outside counsel can provide that, other concerns, including costs, remain secondary.

Post-M&A Disputes: A View from the Trenches

In the second half of the event, the panelists first discussed whether disputes in the M&A context are arbitrated more often pre- or post-closing. The panelists were unanimous that post-closing disputes are far more frequently arbitrated and that pre-closing disputes are more often negotiated since the parties remain eager to close their deal. The panelists were also skeptical that arbitration could be used to force a counterparty to close a deal. They agreed that while there is variation from transaction to transaction, obtaining specific performance to close a deal is difficult even in court, and that such relief is even more difficult to obtain in arbitration. As to their preferred judicial forum and law if they were to seek specific performance in a court, the panelists suggested that, in the United States, they generally find either New York or Delaware to be acceptable as a forum and as a governing law, while Ms. Bivens noted that Delaware law may be preferable for transactions involving the creation of a new corporate form. However, when it comes to cases before the ICC, New York law is more common than Delaware law. No matter the context, whether it be pre- or post-closing, the panelists all agreed with Ms. Sawyer that litigators and disputes lawyers should be involved early and often once a notice of dispute is received, even if the dispute will likely be negotiated.

As to the most frequent types of post-M&A disputes, the panelists agreed that disputes over representations and warranties were the most common. Disputes frequently arise from representations and warranties made about accounting standards, the accuracy of financial statements, legal compliance, taxation, the condition of assets, and material customers. Ms. Sawyer noted that in high-value disputes, claimants will often pair their representation and warranty claims with fraud claims predicated on the same facts. While all panelists agreed that such fraud claims are very rare and difficult to prove, they also agreed that the credibility of witnesses, particularly in the arbitration context, becomes paramount to such claims.

Ms. Bivens noted that disputes also frequently arise about the perimeter of the underlying transaction, the scope of a target company's liability, and earn out provisions. There is a particular risk to disputes arising from earn out provisions as these provisions tend to be heavily, but quickly, negotiated near the closing of a deal to bridge a pricing gap between the parties. Due to a flurry of drafts changing hands in the final hours, these provisions, if not carefully attended to, can lead to protracted but avoidable disputes. Still, the panelists unanimously agreed that the risk of disputes cannot be entirely eliminated, otherwise no M&A transaction would ever close. Instead, time is

best spent by M&A practitioners on the proper allocation of risk among the parties.

The panelists then addressed the types of M&A transactions to which arbitration is best suited. The panelists noted that arbitration works best in: transactions where confidentiality is important, transactions with sensitive business secrets, cross-border transactions in jurisdictions with political risk, transactions where time is of the essence, transactions where an award will need to be enforced outside the United States, and transactions concerning joint ventures. As to transactions where arbitration is not preferred, Mr. Davidson highlighted that purchase price adjustment disputes may be more appropriately handled by an expert determination by an accountant. They cautioned, however, that expert determinations tend to raise their own issues, including their enforceability abroad, and may not be the right approach should the dispute become overly complex.

Finally, Mr. Di Pietro highlighted some recent statistics from the ICC concerning M&A-related arbitrations. Between 7 and 14 percent of the ICC's cases relate to M&A disputes, most of which are heard by three arbitrators. These arbitrations tend to raise procedural and jurisdictional issues, including the scope of the arbitration clause, potential time bars, and the enforceability of the arbitration clause against non-signatories, such as banks or other financiers. Regarding emergency relief, the ICC is seeing parties agree to emergency arbitrator provisions more frequently. While stressing that voluntary compliance with ICC awards is the norm, Mr. Di Pietro also highlighted the importance of drafting such provisions to expressly state that any emergency arbitration relief is a final, enforceable award under the New York Convention, so as not to leave to a judge's discretion whether such relief is enforceable should enforcement be necessary.

Conclusion

Together, both panels highlighted some of the key issues facing M&A practitioners, in-house counsel, and outside counsel when it comes to M&A disputes. While the panelists all agreed that every transaction is unique, there are commonalities for which arbitration lawyers can and should be on the lookout. M&A practitioners are likely to be more focused on closing their deal than on the particulars of the dispute resolution clause. Therefore, it is important to remain open to a variety of potential dispute resolution mechanisms. It would be wise to analyze whether the particular transaction requires confidentiality, whether one may need to obtain emergency relief, and whether enforcement may be required abroad. These factors are likely to determine which type of dispute resolution settlement is appropriate. Finally, the panelists stressed that outside counsel should prioritize the commercial objectives of their clients. When it comes to M&A disputes, a commercial focus, together with a flexible approach to dispute resolution, appears to be the winning formula.

Kevin Mastro is a law clerk at White & Case LLP in New York and Eric Ives is an Organizing Committee Secretary of New York Arbitration Week 2023.

Kluwer Arbitration Blog's full coverage of New York Arbitration Week is available here.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Monday, December 4th, 2023 at 8:21 am and is filed under M&A, Merger, New York Arbitration Week
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.