Kluwer Arbitration Blog

2024 Conference on Dispute Resolution in Merger and Acquisitions Transactions

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On 23-24 May 2024, the vibrant city of Warsaw, Poland, hosted the highly awaited 7th Conference on Dispute Resolution in M&A Transactions. The event was organized by ICC Poland, ICC International Court of Arbitration, and GESSEL Attorneys-at-Law.

The conference brought together more than 230 leading practitioners, experts, and scholars from around the world to explore the challenges, trends, and developments in the ever-evolving field of dispute resolution in M&A transactions.

The speakers delved into a variety of crucial issues within the field including hot topics in M&A arbitration, new developments from practitioners, jurisprudence and academia, presented insightful case studies on insuring legal risks in transactions, discussed the nuances of calculating quantum and the significance of expert determination. Furthermore, experts dissected the nature of arbitration awards, scrutinized the independence and impartiality of party-appointed experts in M&A disputes, and explored the complexities of arbitration in wartime, drawing examples from regions spanning Europe, the Middle East, and Africa. The conference provided a comprehensive platform for industry professionals to engage with these critical arbitration topics, fostering knowledge exchange and deeper understanding within the field.

Welcoming Remarks With a Glimpse Into the Future

The Conference was inaugurated by Prof. Beata Gessel (GESSEL Attorneys-at-Law) and Cezary Wisniewski (Linklaters). Gessel indicated that each edition of the event not only brought forth new speakers and diverse topics, but also showcased the latest advances in case law and in the doctrine from around the world.

Wisniewski pointed out that the world today is marked by distinctive characteristics in terms of social, economic, and political aspects. He addressed the audience with a strong and thought-provoking message asserting that in the era of artificial intelligence, arbitration must continue to be human-based and human-driven. We should be prudent in making our resolutions and decisions relating to arbitration today, since these are tomorrow’s precedents.

Arbitration Should Be Influenced by Culture and Aligned With Business

Alexander G. Fessas (ICC), delivered a welcome address, emphasizing that business needs arbitration and favours an amicable and flexible approach to dispute resolution. Therefore, the role of the arbitration community is to strengthen the relations with business and to build mutual trust. The future of arbitration will be directly influenced by the evolving business landscape. The ongoing recession is expected to have an impact on M&A transactions, potentially leading to an increase in disputes and controversies.

Fessas referred also to a recent survey conducted by the International Chamber of Commerce, Jus Connect, and McCann Truth Central on Cross-Cultural B2B Relationships. In addition to other intriguing findings, the survey confirmed that business leaders favour amicable, interest-based dispute resolutions over legal proceedings, which indicates a preference for achieving a fair and equitable resolution over seeking fault or errors in the opposing party during legal dispute resolution processes.

Hot Topics in M&A Dispute Resolution

The first panel, moderated by Alicja Zieli?ska-Eisen (Queritius), featured Christian Borris (Borris Hennecke Kneisel), Joanna Kisieli?ska-Garncarek (GESSEL), Joanna Kolber (Strelia), Ioana Knoll-Tudor (Addleshaw Goddard), and Annet van Hooft (Van Hoft Legal).

The panelists provided comprehensive overviews of current trends and developments in M&A dispute resolution from various jurisdictions. The topics revolved around issues such as the impact of the impecunious party on the arbitration agreement, the adequacy of state courts or arbitrators as a forum from which to obtain interim relief in M&A-related disputes, procedural challenges in dealing with W&I insurance claims and "insurance towers" in arbitration, and the manner in which French courts approach multi-party/multi-contract issues in M&A arbitrations.

Finally, the subject of whether arbitration is the proper forum for ESG-related disputes was presented, with interesting remarks supporting the confidential nature of arbitration, which is perhaps more appropriate for dispute resolution in this area.

Dialogue Between Counsel on Legal Nature of M&A Award

The second panel focused on the legal nature of an M&A arbitration award. Moderated by Mary Mitsi (Queen Mary University of London), the panel provided engaging and captivating experience through a dialogue of attorneys – Krzysztof Reidl (?aszczuk & Partners) and Krzysztof Sajcha (Rymarz Zdort Maruta) standing on the opposite sides of the curtain, with insightful comments from Eduardo Vázquez de Prada (J. Almoguera Abogados) and Monique Sasson (Delisasson). The panel discussed the ongoing debate over whether an arbitration award is constitutive or declaratory in nature, which is a crucial distinction that significantly affects arbitrators' capacity to adjudicate M&A cases, including the impact on the price adjustment and interest computation.

Micha? Jochemczak (Dentons) and Dominika Karsznia (ValueMind) presented a thought-provoking case in which they both participated and which concerned the acquisition of a

manufacturing company and the ensuing dispute over warranty liability and the price determination structure.

Arbitration – Its Past and Future

One of the highlights was Gessel's conversation with Yves Derains (Derains Gharavi).

The heated discussion provided a ground to reflect on the evolution of arbitration, its key milestones, and the opportunities arising from international trade and the globalization of economic activities. Derains was introduced as a leading representative of the French school of international arbitration and a proponent of *lex mercatoria*. He emphasized that arbitrators, with their competencies and extensive powers, should remain central to the entire concept of arbitration.

First, arbitration is not merely a form of justice but a fair method of resolving business disputes, achievable through cooperation. Second, arbitrators should play a more active role in the proceedings and organize them in function of the characteristics of each case, which implies that they analyse carefully the parties' memorials from the outset. Finally, Mr. Derains stated that arbitration should offer more than just neutrality by fostering a strong relationship with businesses, grounded in mutual trust and respect for diversity and flexibility.

Party-Appointed Experts and Their Neutrality

On the final session of day one, Mark Kantor moderated a discussion involving Folashade Alli SAN (Folashade Alli and Associates), Luminita Popa (Suciu Popa), Alexander Demuth (Secretariat), and Renato Nazzini (King's College London).

The deliberation centred on addressing a striking query regarding whether party-appointed experts ought to be regarded as impartial and objective neutrals or as hired agents aiding the interests of the parties that appointed and instructed them.

Marcin Czepelak, Secretary General of the Permanent Court of Arbitration ("PCA") provided an overview of the history of the PCA, highlighting its status as the oldest permanent arbitration institution established 125 years ago at the First Hague Conference held in 1899. This event led to the conclusion of the 1899 Hague Convention for the Pacific Settlement of International Disputes, which provided for the first global mechanism for the settlement of international disputes. Even during that era, arbitration was grounded on three fundamental principles, which now serve as the cornerstone of this method of dispute resolution, *i.e.*, (i) the parties' consent to submit their dispute to arbitration, (ii) the parties' choice of arbitrators, and (iii) the respect for the rule of law.

M&A Arbitration in Wartime – An SCC Perspective

Jake Lowther (SCC) delivered another presentation examining arbitration from the viewpoint of the arbitration institution, particularly in periods of heightened instability and conflicts. Lowther provided a historical overview of the SCC, elucidating why Sweden has traditionally been a

preferred venue for resolving East-West disputes through international arbitration.

Expert or Arbitrator – Who Is More Suitable in M&A Financial Disputes?

In their case study on post-M&A dispute, Adelina Prokop and Moritz Keller (Clifford Chance) presented issues concerning the scope of representations and warranties as well as the interplay and tensions between expert determination and arbitration. They stressed that special attention should always be paid to drafting representations and warranties provisions carefully, with particular emphasis on limitations of liability or the scope of losses that could be claimed for breach, pursuant to the applicable law.

M&A Arbitration in Times of War – Breaking Up Is a Challenging Process

The final panel was moderated by Bartosz Kru?ewski (Clifford Chance) and featured Timur Bondaryev (Arzinger), Joshua Kelly (Freshfields Bruckhaus Deringer), Steven Finizio (WilmerHale), and Judith Mulholland (Baker McKenzie).

The panel's focus was on disputes stemming from M&A transactions in high-risk jurisdictions due to geopolitical factors such as wars or internal unrest.

Mr Bondaryev emphasized that initially the Ukrainian market was largely controlled by Russians across nearly every sector. While this dynamic shifted after 2014 and the annexation of Crimea, it was not until February 24, 2022, that Ukraine enforced a full and substantial sanctions regime. The panelists agreed that investing or litigating/arbitrating in countries with high geopolitical risk requires strategy, in-depth knowledge and orientation of the current situation and experience in such legal scenarios.

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