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M&A Arbitration and Expedited Procedures: A Need for Speed?

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In an M&A transaction, two or more corporate entities or their operating units are transferred or combined, resulting in the creation of a new entity, or in one of the former entities acquiring the shares or the assets of the other. An M&A transaction may take many different forms and different sets of contracts may be used to formalize it. However, what it is common to all M&A transactions is that the process is generally disruptive for the business of the different entities involved. This is particularly the case in hostile M&A transactions, when an entity attempts to take the control of another without its consent. But even in friendly deals, the period during which the transaction is negotiated or executed comes with a great deal of uncertainty: the deal may be pulled for a number of reasons; unexpected information may be revealed, external events (including economic, political and regulatory) may occur, altering the conditions in which the parties expected the transaction to take place; scrutiny is increased, and, in any event, control of the business is expected to change hands. All of these situations may give rise to disputes between the parties not only when the deal is through, but also during the process. This is why parties to these types of transactions may have a genuine interest in resolving these disputes in an expedited manner. In these cases, resorting to fast-track arbitration (either designed ad hoc for the transaction, or relying on existing expedited procedures under the rules of an arbitral institution) may be a good option.

Typology of Disputes in M&A Transactions

Disputes in M&A transactions are more common than one might expect, and the way in which they are to be handled has become a strategic decision in the transaction. Different types of disputes generally arise at different stages of M&A transactions, and the need for a speedy resolution is not the same in all of them. Generally speaking, we can identify three different periods when disputes may arise: pre-signing, between signing and closing, and post-closing of the deal.

The pre-signing stage refers to the period during which the parties establish the first contacts and sign a letter of intent which sets forth the terms under which they will proceed to negotiate the deal. During this period, disputes generally refer to the binding effect of the letter of intent, breaches of covenants contained in it (such as confidentiality agreements) or claims for the abandonment of the negotiations (*culpa in contrahendo*).[1] Disputes at this stage generally do not have a particular need for speed. If despite the dispute, the parties continue to be interested in the deal, they will normally overcome their differences and will most likely not consider litigating; if on the other hand, parties walk away from the deal, it seems unlikely that the parties have any special urgency to determine the consequences of the breach, as they will normally concentrate in other businesses. Precisely as a consequence of this limited interest of the parties to resolve disputes occurring at this early stage, it is not often that letters of intent include arbitration agreements.[2]

In the period after the closing of the transaction, when it has been given full effect and the control of the business or of the shares has changed hands, disputes will often arise, for example, in respect of the application of price adjustment clauses and breaches of representations and warranties or indemnities. These disputes are frequently decided in arbitration and generally require a complex legal or factual analysis. For this, and also due to the fact that the transaction has already taken effect, the parties do not tend to have a particular need for speed when resolving disputes arising out of this phase, except if the dispute involves claims that the transaction should be undone, when the need for a swift resolution of the dispute becomes more acute.

It is during the period between the signing of the transaction and the closing when the need for a speedy resolution of disputes that may arise becomes more extreme and perhaps justifies the use of fast-track arbitration.

Disputes in the Post-Signing and Pre-closing Period

The period between the signing of the transaction and the closing, which may last for months, even over a year, is marked by temporariness and uncertainty: the deal is done, but not yet effective, while regulatory approvals (predominantly antitrust and merger control clearance) are obtained, necessary restructuring steps are taken (for example, the creation of a vehicle entity, the spin-off of the business to be transferred, etc.) and other conditions precedent (such us approvals and waivers from borrowers and guarantors) are met. In fact, the occurrence or not of these events may delay the execution of the transaction and even put it at risk. Further, during this period, external circumstances may change affecting the rationale

or the commercial sense of the transaction or the parties may simply change their mind. The following categories of dispute typically arise during this period:

- In the first place, the very occurrence of the conditions precedent that would trigger closing may become at the heart of a dispute between the parties.[3] In this type of dispute, the parties may have differing views on whether the condition precedent has taken place or not, and if not, whose responsibility is it and who is to suffer the consequences of this noncompliance.
- Secondly, during this period, while the combination or transfer has been agreed upon, the business often continues to be run by the selling party or original owner. However, the seller may no longer feel in charge of the business, while the purchaser is not yet in control, which may damage the value of the business. Further, the interests of the parties may not be fully aligned during that period or may even be conflicting if the seller has within its reach, for example, increasing the price to be received. In these circumstances, it is not unusual that differences in respect of the management of the business arise.[4]
- Thirdly, M&A contracts habitually include "Material Adverse Clauses" (MAC), which attempt to protect one of the parties from the occurrence of a relevant change of circumstances affecting the business. Normally, the occurrence of one of these circumstances allow the purchaser to rescind the contract or to significantly modify the price or other conditions. It is usual that parties dispute whether the material adverse event has taken place, and its consequences.[5]

These disputes are extremely time critical, as they normally prevent the closing from taking place. Further, the longer the closing takes, the more likely it is that other disputes will arise during this period, thus trumping the transaction.

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Consequently, parties are interested in a dispute resolution method that would allow them to have the controversy decided promptly, so that the period of uncertainty is reduced to a minimum.

Dispute Resolution Mechanisms and Expedited Arbitration

While arbitration is the preferred method of dispute resolution when it comes to disputes arising out of M&A transactions, as it allows a specialized resolution of complex commercial disputes in a swift manner and with moderate costs, increasing complexity in commercial arbitration makes the average time to resolution too lengthy for the needs of disputes arising out of this post-signing and pre-closing phase. In fact, it is not unusual for an international arbitration to take over 18 or 24 months to be decided, which is excessive when an M&A transaction is pending.

Parties may, however, resort to "Fast-Track" arbitration to decide specific disputes within a short time frame. This may be done through a tailor-made procedure with short deadlines or by resorting to institutional rules providing for expedited procedures,[6] such as the recently launched Expedited Arbitration Rules of the International Chamber of Commerce (ICC),[7] the Singapore International Arbitration Centre (SIAC),[8] and the American Arbitration Association's International Centre for Dispute Resolution Arbitration Rules (ICDR).[9]

Parties may also consider other mechanisms which allow obtaining a quick ruling in a dispute, such as *dispute boards* (which are increasingly used in complex construction projects) or emergency arbitration proceedings[10] (such as the Emergency Arbitration Rules of the ICC,[11] SIAC,[12] or the emergency measures of protection under the ICDR rules).[13] However, none of these mechanisms offers a final determination of the controversy, which may (in the case of dispute boards) or shall (in the case of emergency arbitration) be submitted to final decision by an arbitral tribunal, which may in fact overturn the earlier ruling.

Drafting a Fast-Track Arbitration Clause for M&A Disputes

If parties consider including a fast-track procedure to resolve M&A disputes, the first question that they should analyze is whether this procedure shall apply to all disputes arising out of the transaction or only to certain disputes. Arguably, it is not necessarily a good idea to submit all disputes to the fast-track procedure, as disputes arising after the closing may be better dealt with in a procedure allowing the parties more time to prepare the case. Therefore, it is important to carefully determine which disputes are to be submitted to fast-track arbitration and which ones will be decided following a standard procedure.

The second decision to be made is whether to use pre-set rules of expedited arbitration or to design a tailor-made procedure in the arbitration agreement. While pre-established rules, such us the expedited procedure contained at the ICC Rules,[14] the SIAC Rules,[15] or the ICDR Rules[16] have the clear advantage of offering tested

rules, which limits the risk of poor drafting or unwanted loopholes, sometimes the existing procedures do not offer the parties the speed they need for their dispute. These rules allow for a decision up to a period of six months, which may not be sufficiently fast for the parties' needs.

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The third point that drafters of these fast-track clauses need to consider has to do with the design of the procedure.[17] While parties may want to expedite resolution of the dispute, they need to make sure that the resulting procedure provides equal treatment to the parties and does not prevent parties to reasonably present their case; otherwise, the enforceability of the award would be endangered. Similarly, it needs to be ensured that the tribunal (preferably a sole arbitrator) has enough time to render a reasoned decision, unless he or she is dispensed from the duty to provide reasons in jurisdictions where this is allowed and where enforcement might be sought.[18]

Finally, if this tailor-made procedure is to be administered by an arbitral institution, it is advisable to discuss in advance with the institution that the procedure designed will be compatible with the rules of the institution and that the institution will be able and willing to administer the arbitration as agreed by the parties.

Conclusion

Disputes arising during the period between the signing and the closing of an M&A transaction are particularly time-sensitive. During that phase, the transaction is pending, and resolving disputes in a speedy manner may be the difference between a successful deal and a failed transaction. Fast-track arbitration procedures may offer the parties the mechanism they need to resolve such disputes within the required deadline. Parties may rely on pre-set institutional expedited rules or design tailor-made fast-track procedures; in this second scenario, parties need to be extremely careful to balance their need for speed and due process requirements, to avoid endangering the enforceability of the award.

Endnotes

1. E. Fischer and M. Walbert, Chapter I: *The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions*, in C. Klausegger, P. Klein, et al. (eds), Austrian Yearbook on International Arbitration 2017, Austrian Yearbook on International Arbitration, Volume 2017, 1 at 21.
2. B. Ehle, *Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions*, in Comparative Law Yearbook of International Business (2008), at 291.
3. A. Carlevaris, *The Arbitration of Disputes Relating to Mergers and Acquisitions: A Study of ICC Cases*, ICC International Court of Arbitration Bulletin Vol.24 No. (2013), at 4.
4. B. Ehle, *supra* note 2, at 293.
5. A. Broichmann, *Disputes in the Fast Lane: Fast-Track Arbitration in Merger and Acquisition Disputes*, International Arbitration Law Review, Issue 4 (2008), at 148-149.
6. *Id.* at 146.
7. ICC Arbitration Rules 2017, Article 30 and Appendix VI.
8. SIAC Arbitration Rules 2016, Article 5.
9. ICDR Arbitration Rules 2014, International Expedited Procedures.
10. E. Fischer and M. Walbert, *supra* note 1, at 32-35.
11. ICC Arbitration Rules 2017, Article 29 and Appendix V.
12. SIAC Arbitration Rules 2016, Schedule 1.
13. ICDR Arbitration Rules 2014, Article 6.
14. ICC Arbitration Rules 2017, Article 30 and Appendix VI.
15. SIAC Arbitration Rules 2016, Article 5.
16. ICDR Arbitration Rules 2014, International Expedited Procedures.
17. K. Sachs, *Solving Tensions Between Expert Determination and Arbitration Under M&A Contracts*, In International Arbitration Under Review: Essays in Honour of John Beechey (2015), 367-368.
18. However, in a very interesting decision (*Newedge USA, LLC v. Manoel Fernando Garcia*, STJ September 1, 20014), the Brazilian Superior Court of Justice recognized for the first time an unreasoned award issues in New York, despite the fact that the Brazilian Arbitration Act requires arbitral awards to provide reasons, stating that it did not violate Brazil's public policy. See H. Burnett and M. Carreteiro, *Brazilian Court Recognizes An Unreasoned New York Arbitral Award* In Kluwer Arbitration Blog, September 29, 2014.

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