ARBITRATION IN POST-M&A DISPUTES: STRATEGIC CHOICE FOR ARBITRATORS AND EXPERTS IN VIEW OF EVIDENCE

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POST M&A-DISPUTES ARE ON THE RISE according to global research. This is caused by the strong M&A-market from mid-2020, with rising deal volumes (despite economic disruption stemming from coronavirus (COVID-19)), in combination with complex new deal and valuation structures with growing private equity involvement, advances in technology and rapidly changing economic conditions (with possible underperformance).

At the signing of a deal, the trend of rising disputes is an underestimated factor. When entering into an M&A transaction, the main negotiations often do not revolve around the 'applicable law and jurisdiction' clause. According to research, listed companies often opt for an arbitration clause to procure confidentiality, while smaller companies may, for the sake of convenience, choose the competent court at the place of residence of one of the parties.

Signing and closing of the transaction may, however, not be the end of the deal, but the starting point for further negotiation about adjustment of the purchase price. In the event that a post-M&A dispute arises, the choice of either a public court or arbitration (including the appointed arbitrators and experts) will determine the way legal proceedings are conducted between the parties during the months or even years following the transaction, possibly affecting the outcome of the dispute.

Over the past decade, choosing arbitration in M&A deals is steadily becoming more popular. At the same time, there is a tendency toward increased escalation after the deal. Taking into account this escalation, it is advisable to think strategically about the structure of the possible arbitration process, includ-

ing the choice of arbitrators and experts when looking at your evidence position (buyer or seller side). If your side is in a disadvantageous evidence position, you will need an arbitration process with a timely means of information gathering orders and arbitrators with an open attitude toward evidence gathering.

CHOOSING ARBITRATION

Under an arbitration clause, all disputes arising out of the deal are to be decided before a private tribunal instead of a public court. Parties often agree on arbitration for reasons of efficiency, flexibility and discretion. Where in court parties may appeal against a judgement, which can be time consuming, in arbitration the tribunal will come to a final decision (and can even provide for a fast-track in the case of pre-closing disputes, if provided for in the relevant documentation).

Through arbitration, courts in certain jurisdictions, where proceedings are slow and the outcome may be unpredictable, can furthermore be avoided. Confidentiality and avoiding a public process is perceived as another upside, especially by large international (listed) companies that prefer their proceedings to stay out of the public eye to avoid reputational damage (and any

adverse effect on their stock market value).

An arbitral award can, in addition, be enforced relatively easily across national borders (one of the strongest driving forces for choosing arbitration) and, finally, expertise and experience of the arbitrators and experts may also play a role when choosing arbitration.

The main perceived downside to arbitration is often the relatively high overall costs of well-known arbitration institutions, which can amount to hundreds of thousands of euros. In addition, parties may be concerned that the aforementioned efficiencies may not actually be achieved in practice.

Considering the persistent popularity of arbitration clauses in M&A deals, the downsides apparently do not outweigh the benefits. The current popularity of arbitration as a dispute resolution mechanism averages 33 percent of all deals, according to our 'European M&A Study 2022'.

APPOINTING ARBITRATORS

In arbitral proceedings, the choice of arbitrators and experts may be decisive. Arbitrators are appointed often on the basis of a (long) list of potential arbitrators depending on the funda-

mental aspects of the case, such as applicable law, seat of the tribunal and the given industry.

This list is subsequently narrowed down based on the specific characteristics of each arbitrator, taking into account his or her previous (publicly available) decisions and publications, which offer insight into how the arbitrator may view the dispute at hand. Potential connections with the other party and other arbitrators can be relevant as well when appointing an arbitrator.

Another element that parties often overlook is that choosing an arbitrator based in a common law versus civil law country (independent of applicable law) may influence the way evidence is assessed and contracts are interpreted. In common law countries, for example, relatively more weight is given to witness and expert statements than in civil law countries, where documents and exhibits are often deemed decisive.

This difference means that in hearings conducted in line with common law expectations, often more time is taken to fully exhaust witness and expert testimonies. In contrast, arbitrators based in civil law countries will frequently conclude a case by relying on the documentary evidence presented to them, even

without a hearing (to which experts are invited).

Therefore, choosing a common law arbitrator (even when civil law is applicable) can be a strategic choice if relatively few documents are at hand to substantiate the case and it is expected that certain witness and expert statements may be decisive.

It is advisable to interview the arbitrators before they are appointed, to be sure of their view on the information and evidence gathering process in arbitration. Furthermore, the view of arbitrators on the explanation of contracts is important: for instance, textual focus on the M&A contract versus a more open approach toward the intentions of the parties.

In the international arbitration landscape, there are also arbitrators who tend to combine both legal systems. The 'IBA Rules on Gathering Evidence 2020' tend to be a good balance between the two systems.

APPOINTING EXPERTS

Experts also play a crucial role in M&A disputes. M&A disputes often involve difficult discussions on damage pursuant to warranty breaches, price adjustments and earn outs, for which financial accounts have to be assessed to determine the enter-

prise value or stock value of a company.

In arbitration, there are two possibilities: experts appointed by the tribunal or party-appointed experts. Party-appointed experts are widely used in common law jurisdictions, where in civil law traditions the court typically takes the initiative in appointing experts (since the court bears the primary responsibility for fact-finding). In international arbitration, these two approaches have been combined, although the use of party-appointed experts remains prevalent in arbitration.

Arbitration with party-appointed experts often results in a so-called 'battle of the experts': a scenario in which expert witnesses from opposing sides of a legal dispute disagree over an issue that must be decided to resolve the dispute.

The role of party-appointed experts is to assist the arbitral tribunal in its reasoning and its decision-making process. Party-appointed experts, though having a duty to be objective and independent, may, however, often be biased and reach a conclusion in favour of the party that appointed them. This may not only be due to the fact that the expert is being paid by the party (as a 'hired gun'), but also because he or she may develop a greater personal and professional connection with this party. There-

fore, the other party would be wise to appoint its own expert to test the conclusions of the first expert during cross-examinations at the hearing, in order to provoke a 'battle of the experts'.

To come out in front in a 'battle of the experts', the first criterion an expert should meet (on top of being knowledgeable on the relevant subject) is the ability to qualify as an expert witness under applicable evidentiary rules (even though the rules of evidence may not apply). This gives the expert's testimony more weight. Second, the expert should be able to clearly communicate his or her opinion to the tribunal. This is especially important when one of the arbitrators is also an expert on the subject and an 'expert to expert' discussion can ensue, or when the expert is asked to testify during a post-hearing discussion on the calculation of damages.

It is ultimately left to the arbitral tribunal to assess the evidence brought forward by experts. Thus, carefully appointing your own expert may be crucial. If parties wish to avoid a 'battle of the experts', they can request a tribunal-appointed expert who is required to submit a written statement of impartiality and independence (though parties do have a say in the appointment process of a tribunal-appointed expert).

CONCLUSION

In arbitration, parties have more influence on the process under which the outcome of a dispute will be decided by appointing arbitrators, choosing party-appointed experts and structuring the procedural order. Depending on the evidence position of your side, it is advisable to think strategically about all these aspects, as these may well determine the outcome of the dispute and the calculation of compensation awarded. Optimising the evidence position (even before the deal, if possible) is recommended, as well as implementing possible foreseeable issues in the arbitration clause and, later, in the procedural order. Evidence is key.

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