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Litigation & Arbitration

Post M&A Disputes and Current Challenges

Andersen in Europe

INDEX

Introduction

The closing of a transaction may be of joy for the teams involved, however it also poses some challenges due to constant uncertainty, the strategic nature of transactions and the politics behind it.

The examples mentioned in this publication illustrate how, immediately after the success of a merger, come the equally interesting, though not as spectacular, issues of disputes in M&A transactions.

Disputes in these transactions can now relate to both their terms and the purchase price of the shares. Personnel issues related to the management of the merged entities (not to mention issues of resulting monopolies) can also be the cause of disputes. The example of the Twitter acquisition shows how a poorly prepared due diligence report at the pre-transaction stage can affect the subsequent assessment of the transaction itself.

Issues related to disputes in post-M&A transactions are usually confidential and most often go to arbitration rather than to the courts of law. The following articles show what the causes of disputes may be, what the jurisdiction of the ordinary courts is, and whether arbitration is better in such situations.

Enjoy the reading.
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Czech Republic

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Although disputes may arise at any stage of an M&A transaction, post-closing disputes are usually the most problematic. M&A transactions can give rise to post-acquisition disputes for a number of reasons. Typical issues leading to a dispute in M&A transactions are volatility in the target company's market, or ambiguity in the drafting of the share purchase agreement ("SPA"), among many others. Some of the most challenging disputes focus on whether the purchasers effectively obtained what they paid for.

The majority of the issues leading to an M&A dispute can be mitigated at the pre-execution stage by drafting and negotiating a airtight SPA. The representations and warranties ("R&Ws") given by each of the parties is the key instrument to allocating risks between them. R&Ws are essentially statements of fact through which the sellers make certain claims about the target company, on which basis the purchasers are in a position to evaluate the financial and operational position of the target business. If, after closing, any of such R&Ws turns out to be untrue, inaccurate, or misleading, the purchasers will usually have a claim under the SPA which, if successful, may result in the seller being require to refund a portion of the purchase price. Other important instruments that may be effective in mitigating potential disputes are price adjustment mechanisms, typically deferred payments, or earn-outs. In the current post COVID-19 environment, a broader use of earn-outs elements to enhance the price tag negotiation may be observed.

Whilst R&Ws and price adjustment mechanisms are risk-mitigating approaches, they also are in themselves a common source of disputes. This is because, in essence, they both allow challenging the quantum of legal, financial, and tax considerations.

In terms of M&A dispute resolution mechanisms, choosing between the courts or arbitration is a common issue in SPAs. In the Czech Republic, arbitration is usually the preferred choice for the parties to M&A transactions, as arbitration proceedings are shorter, more flexible and confidential than a Court case. Even so, it is important to consider a number of circumstances, including the choice of the arbitrators and their specialization, the venue, or the language.

In addition, the choice of governing law must be considered in the case of cross-border transactions.

Aside from the seller, the purchaser and the target company, other parties are usually involved in M&A transactions, including other shareholders and subsidiaries/affiliates of the target company, guarantors, and other stakeholders. However, most procedural rules, including those in the Czech Republic, are written on the assumption of two-party disputes, namely the claimant and the defendant. Therefore, it remains to be seen how provisions on consolidation and joinder will evolve, so that multi-party and multi-contract M&A disputes can be addressed not in multiple parallel proceedings relating to the same set of facts, but effectively as part of one proceeding.

Finland

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By tradition, Finland is not a particularly litigious country. In a small jurisdiction, both the business and legal communities are small, and people know each other. In practice, this results in a situation where most disputes are settled by good faith negotiations and only disputes that involve a large financial interest or raise complex legal issues will be litigated (most often by arbitration). According to Finnish business magazine *Talouselämä*, between 2018-2022 approximately 500 - 700 mergers and acquisitions were completed every year.

Often, sale and purchase agreements (SPAs) are governed by Finnish law and disputes are referred to arbitration under the arbitration rules of the Finland Chamber of Commerce. According to the statistics of the Finland Chamber of Commerce, during 2022 some 50 arbitration proceedings were initiated regarding acquisitions or joint ventures. Obviously, there is a substantial number of transactions that provide for a foreign dispute settlement mechanism, but such cases typically involve only larger cases that are fewer in number. Accordingly, on the basis of the *Talouselämä* and the Finland Chamber of Commerce statistics, we may assume that the "dispute rate" in M&A and joint venture transactions is approximately 7-8 %.

Most of the M&A disputes relate to (i) adjustment of the purchase price, (ii) the earn-out mechanism, or (iii) a breach of the seller's representations and warranties (RWs). Exact statistics providing a break-down of the nature of disputes are not available but, as a rule of thumb based on the personal experience of the author of this article, a clear majority of the disputes relate to the criteria and interpretation of earn-out clauses. This is, as such, not surprising as due diligence processes and Warranty & Indemnity insurance (W&I) have developed to provide a comprehensive means to identify in advance and allocate the risk in case of a dispute over the seller's warranties.

Disputes about purchase price adjustments are, on the other hand, almost exclusively settled in closing expert procedures that can conceptually be seen as an alternative dispute resolution mechanism. Closing experts are normally selected amongst the so called "Big 4" firms and their mandate is limited to giving their opinion on the accounting aspects of the closing accounts, not on the interpretation of the sale and purchase

agreement. Sometimes the parties may agree that if the ruling of the closing expert deviates more than, say 20-50 % of the claims by the losing party, the dispute can be referred to be finally settled by arbitration.

As for public M&A transactions, an increase in public takeover bids may be observed. In accordance with the EU takeover directive, once a bidder reaches the 90% threshold of shares and votes, a squeeze-out process kicks in. In Finland, squeeze-out processes are settled in statutory arbitration by arbitrator(s) appointed by the Redemption Board of the Finland Chamber of Commerce. The award by the arbitrators can be appealed to the District Court of Helsinki and, subject to a grant for appeal by the Supreme Court, to the Supreme Court. Squeeze-arbitrations involve two main issues. The first is to make sure that the squeeze-out criteria apply, i.e. does the majority shareholder and its related entities (as defined in the Finnish Companies Act and other relevant legislation) own more than 9/10 of the issued and outstanding shares and votes? The second issue is the determination of a fair redemption price. The tender price is assumed to reflect the fair price unless there are specific reasons to deviate from this assumption. There is an increasing tendency to challenge the tender offer price assumption, in particular in complex consortium deals where some of the large shareholders are also members of the consortium.

Germany

In Germany, post-M&A disputes are usually referred to arbitration, as most M&A agreements contain an arbitration clause. Arbitration is generally perceived as preferable to litigation for several reasons, significantly the particular expertise of specialized arbitrators, the confidentiality of the case, internationality, and overall efficiency of the proceedings, to name but a few. However, are these perceptions borne out by the facts? Indeed, a strong case for referring M&A disputes to ordinary courts can be made. This holds particularly true here, as German courts have started to make efforts to become a serious alternative to arbitration.

Expertise: German judges are highly trained legal professionals, confronted with a huge variety of cases raising a wide range of legal questions. Thus, it can generally be assumed that German judges are perfectly able to gain an in-depth understanding of the particulars of a post M&A dispute. However, it is also the case that arbitrators specialized in M&A transactions might be better well-equipped to grasp the fundamentals of a dispute. Arbitrators may also deal with it quicker and might thus be able to be more efficient than a judge. To address this issue several German Regional Courts have established dedicated divisions for M&A disputes or, more broadly, commercial disputes. This is the case inter alia, of Düsseldorf, Frankfurt, Mannheim, Stuttgart, Hamburg and Berlin.

Confidentiality: Whether arbitration does provide for confidentiality depends on procedural rules chosen for the arbitration or on binding statutory rules at the seat of arbitration. For example, in England and Wales an implied

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duty of confidentiality is recognised in every arbitration clause. In Germany, however, no such duty exists unless it is explicitly agreed upon by the parties. In other words, arbitration in Germany does not necessarily provide for a better protection of trade secrets than litigation. However, German procedural law offers the possibility to exclude the public from hearings if business secrets are to be discussed.

Internationality/Enforceability: In international M&A transactions arbitration clauses are usually included for various reasons. For example, if the parties to a Sale Purchase Agreement ("SPA") have their place of business in different jurisdictions, they may be reluctant to agree upon the local courts of either party. In these circumstances, arbitration in a third country may offer the desired neutrality. Furthermore, arbitral awards may be enforced virtually in any jurisdiction based on the New York Arbitration Convention. Finally, arbitration offers the possibility to conduct the proceedings in English. While the aforementioned considerations may be sensible in many cases, there are cases in which they do not apply. For instance, neutrality is not an issue if both parties reside in the same jurisdiction; nor is enforceability of the award if both parties reside within the EU. Regulation (EU) No 1215/2012 allows for recognition and enforceability of any decisions passed by a member state's court within the EU. Finally, some German Regional Courts have tackled the language barrier issue by establishing dedicated divisions where litigation may be conducted in English. In addition to the commercial disputes divisions, the Regional courts of Cologne and Bonn (to name a few) allow oral hearings in English without an interpreter.

Efficiency/Cost: Arbitration is oftentimes perceived as swifter and more cost efficient than court litigation. While this may hold true in some cases, it is not always correct. Procedural efficiency largely depends on the conduct of its participants. In terms of costs, arbitration may also prove to be a better option than court litigation over several instances. However, if the case is settled in the first instance or the judgement entered by the first instance court is not appealed against, litigation is likely to be less costly than arbitration. On the other hand, the possibility of having a first instance judgement reviewed by at least one hierarchically superior court affords greater legal certainty not available in cases referred to arbitration. The litigant against whom an arbitral ruling is entered can do nothing about it, as German courts do not review arbitral awards on the merits. Finally, litigation may be better suited to multi-party disputes, especially where the target becomes engaged in a dispute with a third party based on which the buyer will claim against the seller for breach of warranties or otherwise. Litigation allows the target to prevent inconsistent decisions in disputes between the target and a third party, on the one hand, and the post-M&A dispute between seller and the purchaser on the other. This is because German procedural law allows third parties to intervene with binding effect for themselves in proceedings of which they are not a party.

To make court proceedings even more attractive to potential litigants, a request has recently been made by the CDU parliamentary group to reform German procedural laws across different areas, including turning Higher Regional Courts into first instance courts for international commercial disputes. It remains to be seen if such reforms will find their way into the relevant procedural regulations.

Italy

M&A transactions not only involve the exchange of large amounts of capital, but also complex legal and commercial issues. As a result, it is not uncommon for disputes to arise at the pre-closing and post-closing stages of the deal.

Disputes may arise from the transaction's main underlying agreement, and from ancillary arrangements (e.g. exclusivity covenants, letters of intent, confidentiality undertakings, etc.)

During the **pre-closing phase**, the most frequent dispute occurs where one of the parties does not proceed with the transaction. In this context, disputes may arise as to whether or not the prospective purchaser's interest, as expressed in a letter of intent or other similar document, is binding. This kind of documents is generally categorised by case law under the category of minute or punctuation of contract .

In particular, the Italian courts have held that the notion of minute or punctuation of contract includes documents containing partial understandings on the future settlement of interests between the parties (punctuation of clauses), and preparatory documents that pave the way to the negotiations (complete punctuation of clauses) (Cass. No. 2204/2020). Accordingly, even in the presence of a complete understanding of a particular contractual relationship, a merely preparatory act of a future contract, which is not binding between the parties, may be integrated in the absence of the parties' actual intention to consider the contract concluded (Cass. No. 910/2005; No. 14267/2006). In assessing whether the

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parties' understanding purports to be a definitive settlement of the relationship or a document with a merely preparatory function for a future transaction, the court may rely on the interpretation criteria dictated by articles 1362 *et seq.* of the Italian Civil Code. Interpretation does not differ where the matter revolves around ascertaining, first of all, whether the parties intended to express a legally binding set of interests, and the court need to ascertain, beyond the *nomen iuris* and the form of the document, the will of the parties as expressed by their common conduct, even after entering into the relevant document, and also based on the overall regulation imposed by them, interpreting the clauses by means of the others. This determination is reserved to the judge of the merits and cannot be reviewed by the court of legitimacy except in cases of unsubstantiated or poorly substantiated ruling (Cass. n. 2720/2009; n. 14006/2017).

Post-closing litigation includes disputes relating to issues arising during the negotiation and execution stages of Sale Purchase Agreements (SPAs).

In Italy, a large part of post-closing disputes concern the breach of Representations and Warranties (or R&Ws). These are statements made by the seller and the purchase intended to allocate the risks associated with the M&A transaction between both.

R&Ws violations mainly concern the actual truthfulness of statements related to the company's financial situation as shown in the financial statements, compliance by the company's management, with tax and labour duties (among others), and, more broadly, with the law, and the suitability of the company's assets for the business.

Generally speaking, SPAs usually provide for contractual mechanisms specifically aimed at avoiding the commencement of actual court or arbitration proceedings, which may therefore occur only where the dispute resolution method(s) included in the SPA have been exhausted. In the event of an alleged breach of the R&Ws, the indemnifying party is required to indemnify the indemnified party for any losses and, except in cases of wilful misconduct and gross negligence, anything not covered by the RWs is not indemnifiable. As a result of the above, the extent and details of the R&W also have an impact on the final determination of the price.

In numerous cases, the Italian courts have been called upon to rule on the correct identification of the remedies available to the purchaser of corporate shares in the presence of defects related to the characteristics and value of the assets included in the target company's corporate assets. The prevailing view held by Italian scholars and by case law distinguishes between the *immediato* (immediate) and *mediato* (mediate) object of the sale, arguing that the immediate object of a sale of corporate shares is the corporate shareholding itself, the mediate object being the portion of the corporate assets represented by such shareholding. Accordingly, claims for termination of a SPA on the basis of a material breach of the seller's business RWs, i.e., those related to the assets of the target company, where the SPA provides for an indemnity instead of contractual termination, are held to be unfounded, as it is not possible to apply the traditional remedies available under sale and purchase contracts (*ex multis* Cass. Civ. sez. I, 13/03/2019, Cass. n. 16031 of 19/07/2007).

Indemnification clauses are intended to apply, in almost all cases, for a limited period of time during which the 'contingency' must occur in order for the buyer to make a valid claim.

Other than in cases of fraud, the seller's liability is usually also limited in terms of amount, by means of special clauses that cap the seller's maximum aggregate liability and/or the minimum threshold below which the claimant will not be entitled to claim (*de minimis).*

Post-M&A disputes often arise not only from the breach of R&Ws, but also from other circumstances, including disagreements over the calculation and payment of any earn-out, i.e., the mechanism by which price adjustments are made tied to target company's post-closing financial performance.

Disputes may also arise over provisions requiring the purchaser to pay the seller an additional amount based on the actual collection of receivables claimed by the target, which at closing were of doubtful collection.

The enforcement of the seller's duty to pay any pre-closing receivables (and therefore pertaining to the seller) is subject to the purchaser's duty to ensure that the target company takes any reasonably possible action to obtain payment In the event of a failure to take any contractually available actions to recover any debts, the seller may be entitled to damages.

Finally, in terms of dispute resolution, one should consider the referral of any disputes to arbitration via certain arbitration clauses that may be included in the SPA and/or in ancillary agreements. The main advantages of arbitration over standard court proceedings include speed, flexibility, and the possibility for the parties to appoint arbitrators with a solid expertise in post-M&A disputes. Also, the parties may choose the language and venue of the arbitration proceedings, which is particularly relevant in cross-border M&A transactions. However, certain peculiarities of arbitration, including the issue of arbitrability and some specific aspects of corporate arbitration, should be considered. Therefore, great care should be exercised when drafting arbitration clauses, as this will help to avoid later complications in the resolution of any potential disputes. These peculiarities of arbitration will be addressed in the next in-depth analysis of the Andersen Litigation & Arbitration Service Line.

North Macedonia

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In recent years, some of the world`s largest economies have been heavily impacted, by the Covid-19 pandemic and, more recently, by the war in Ukraine.

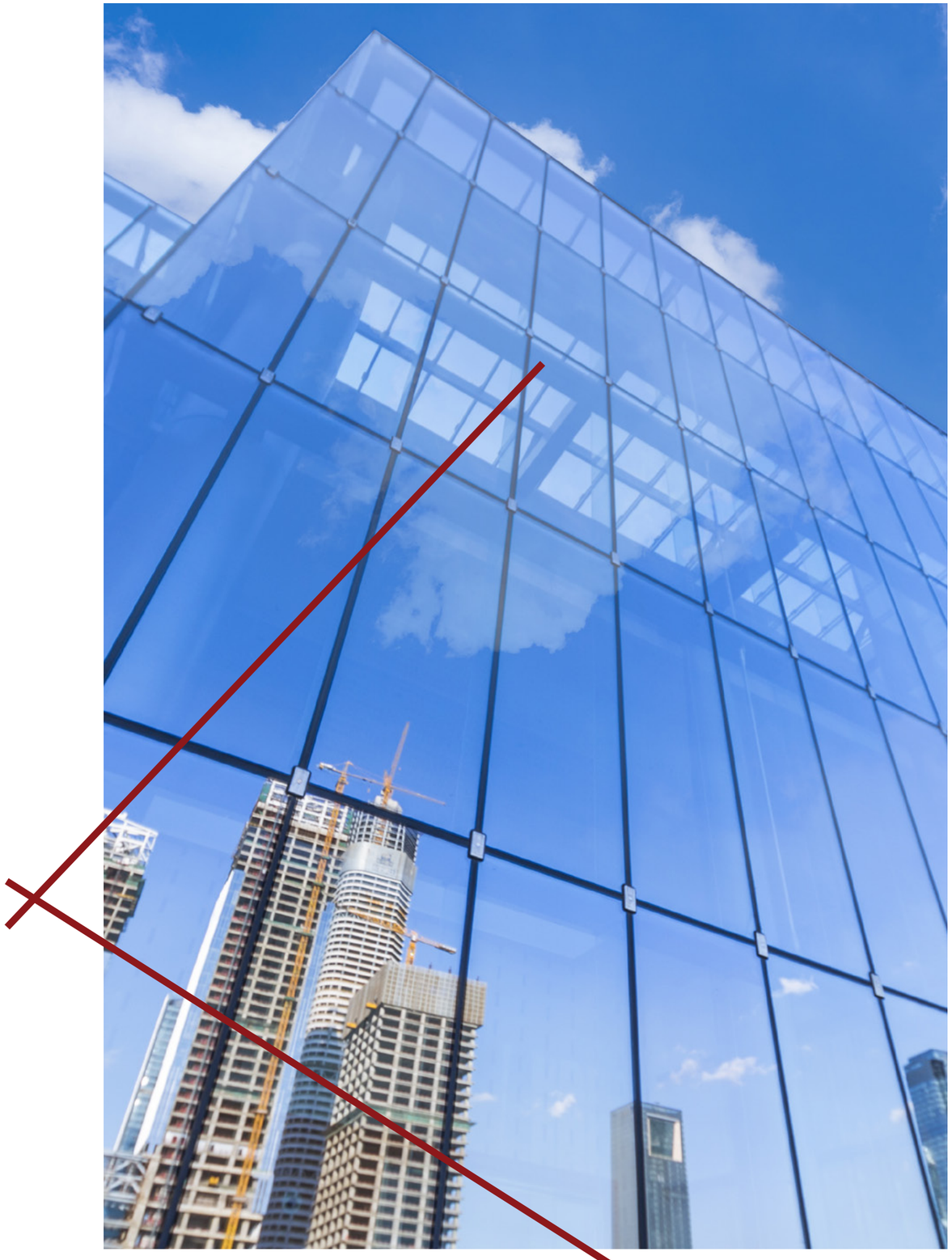
In North Macedonia, 2022 saw the highest inflation rate in the last 20 years and a rise of prices of products and utilities, thus heavily straining the Macedonian economy , particularly domestic and foreign companies operating in that market.

As a result of the above M&A transactions in North Macedonia have stagnated.

Still, an analysis of the Macedonian market reveals a few landmark M&A deals that have impacted the market. These usually involve telecom operators, electricity suppliers, and pharma companies. The above, however, does not mean there are no ongoing M&A transactions involving smaller companies. These take place on a regular basis, especially in the IT, waste disposal, and beverages industries, among others.

A close study of M&A transactions in the Macedonian market shows no major disputes. Where a conflict does arise, most are settled amicably.

Our recent case-law research does not show any M&A disputes in the previous period. For this reason, we are inclined to believe that the North Macedonian market is relatively stable, and M&A transactions usually encounter no major setbacks which would require litigation.



Poland

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M&A transactions may consist of a merger of two business entities into a single organization (merger) or the acquisition of a company's shares by another resulting in the latter gaining control over the acquired company (acquisition).

In the Polish legal system, M&As are governed by the Polish Commercial Companies Code. Some statutory provisions applicable to this type of deals are also contained in the Polish Civil Code, particularly such matters as the acquisition of a company and its implications, but also sale agreements because share purchase agreements ("**SPAs**" are classified as sale agreements.

As with any business transaction, disputes in M&As may arise. Because of the high purchase prices of shares, the economic impact of M&A transactions, and the changing economics of transactions in a volatile and disrupted market, post-M&A disputes do occur more frequently than is commonly believed

Possible causes of a post-M&A dispute

The price of shares to be acquired under a SPA is determined in accordance with the principle of contractual freedom on the condition that it must be at arm's length, i.e. the price must not deviate significantly from prevailing market conditions.

In straightforward transactions, nothing prevents the parties from determining a fixed sale price for the shares. However, where the value of the shares to be sold and the price are badly determined, this may result in a post-M&A dispute over the adjustment of the share purchase price. To avoid post-M&A disputes of this nature, using one of the methods of determining the purchase price is advisable. These are: completion accounts, the locked box or the earn out mechanisms. In Poland, court rulings entered on post-M&A disputes are very rarely published. Most post M&A disputes are settled by arbitration.

The Polish Civil Code provides for situations where the price may be adjusted by a court ruling. Rebus sic stantibus , which applies where there is an extraordinary change of circumstances, is a case in point, which applies where performance of its obligations by the purchaser would be unduly burdensome or is likely to result in a threat of material loss, which the parties did not foresee at the time of entering into the agreement.

However, instances where the price is adjusted upon a ruling of the court are very rare and are of limited use in M&A transactions. In Poland and indeed in may other jurisdictions, court rulings entered in cases involving post-M&A disputes are published very rarely. In fact, these disputes are not usually resolved by the courts but are referred to arbitration.

This is because most M&A agreements contain an arbitration clause. Also, M&A agreements usually follow a standard template and arbitrators know exactly what to look for and where. In contrast, a judge sitting in an ordinary court needs to deal with many other cases, which is likely to have an impact on the quality of the proceedings and result in delays. In Poland, disputes submitted to the Court of Arbitration at the Confederation of Leviathan must be resolved within 6 months of the appointment of the adjudicating panel, except where the case is complex, in which case this deadline can be extended. Companies are thus increasingly considering arbitration as a valid dispute resolution method, as timings are shorter time and fees are lower than those of state courts.

To try to avoid a post-M&A dispute over the purchase price of shares, one of the methods for determining the share sale price should be applied. Parties to M&A transactions on the Polish market draw on experience gained in the international transaction market. In practice, the most widely-used price determination methods include:

1) completion accounts,
2) locked-box mechanism, and
3) earn-out.

The most important features of the above models are presented below.

Completion accounts

In this model, the share purchase price is determined based on the financial data of the target company as of the closing date. However, it should be noted that it is practically impossible to obtain financial data for the closing date on the day of the transaction. It often takes several weeks to elaborate reliable data on the value of the transferred company.

Locked-box mechanism

In the locked-box model, the sale price of the target company is determined based on the financial data available prior to closing (e.g. audited financial statements for the previous fiscal year) and there is no adjustment. In transactions conducted on the basis of the locked-box model, the price is often directly stated in the contract in a specific currency.

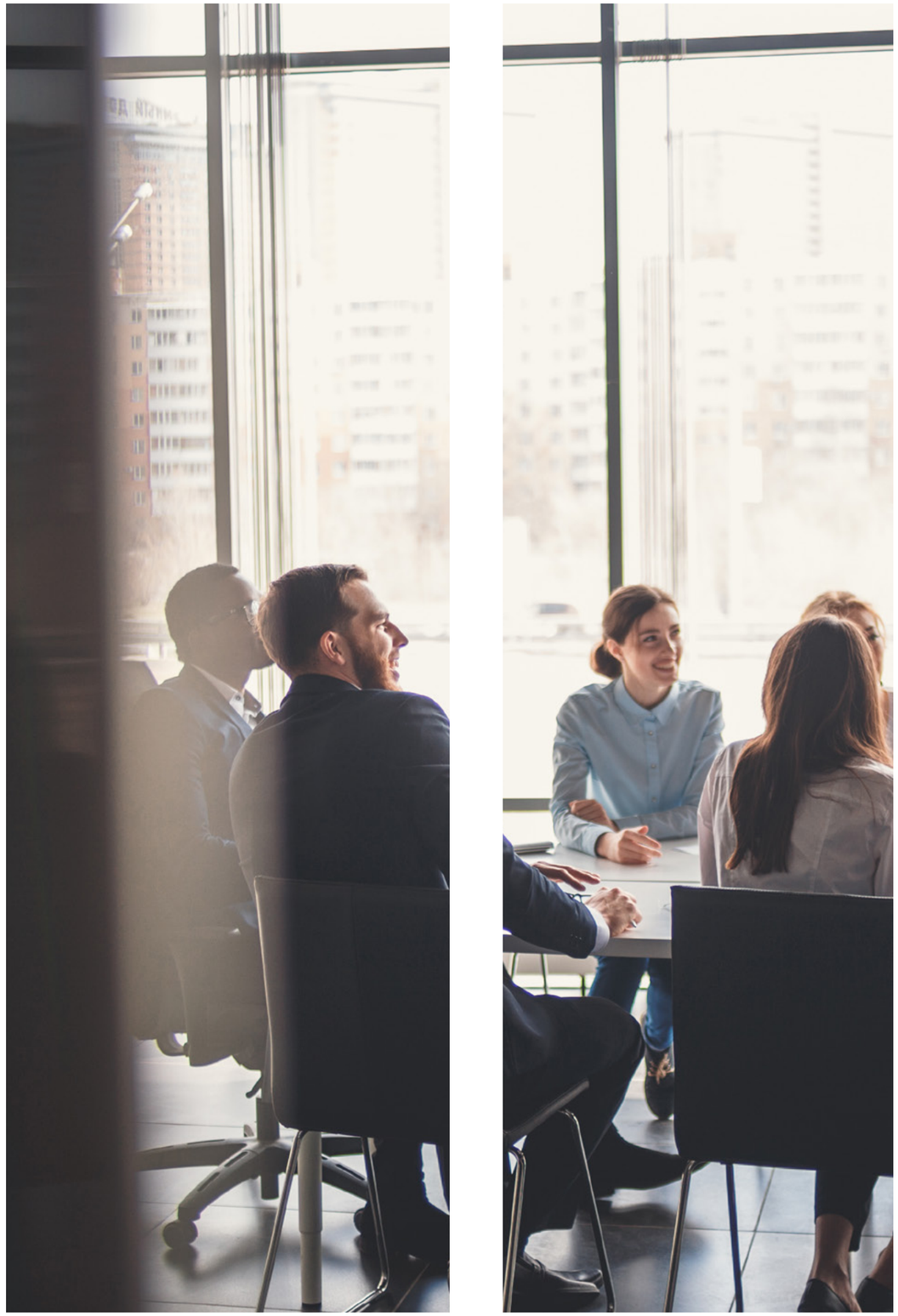
The contract also does not indicate how the price was calculated or what the calculations were based on.

In this way, the parties agree that the price is a certain fixed, unchangeable amount, and there is no instrument in the contract to verify the price or otherwise challenge it.

Earn-out

As the Polish Supreme Court explains in its judgment of October 14, 2011, ref. III CSK 315/10): "The earn-out clause in business transactions is used in the transfer of companies (enterprises) where the price is divided into two parts. The first part is paid on completion of the transaction. The second part is paid afterwards on a mutually agreed date. As a rule, this deferred payment includes a variable amount, as it is a function of the target company's financial performance." The first portion of the price, as determined on the basis of a valuation, is fixed. It is not dependent on achieving specific requirements/assumptions. The second deferred portion of the price depends on reaching pre-established targets, for example, in terms of sales, profits, or costs. Depending on the method adopted by the parties, the final value of the shares may differ significantly from the original estimation. The earn-out clause is used across various types of M&A transactions.

Tax consequences. When a dispute arises over the adjustment of the share sale price, it is important to bear in mind the potential tax implications. Any subsequent change in the share price will result in a change of the taxable base. This may give rise to an additional tax burden arising from Value Added Tax, the tax on civil law transactions or Corporate Income Tax.



Slovakia

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Since the terms and conditions of any M&A transaction are generally strictly confidential, it is not surprising that the parties typically choose arbitration (as opposed to ordinary courts) as their dispute-resolution mechanism. In Slovakia, privacy is one of the key advantages of arbitration over traditional court proceedings.

As a result, the case-law emanating from the Slovak Supreme Court and the Constitutional Court is remarkably incomplete. Their rulings refer largely to the invalid transfer of the shares/business as opposed to issues arising from perfectly valid contracts, including the parties' representations and warranties (R&Ws), post-acquisition obligations, contractual penalties, and share agreements.

On the other hand, large M&A transactions usually involve a foreign component, as the investor/purchaser is from another jurisdiction and the parties tend to choose other legal frameworks (or regularly at least arbiters from Austria or Czech Republic).

The available case law which, as anticipated, relates to M&A transactions the validity of which is challenged by either party, is worth discussing at some length.

Slovak Tourism

One of the most important recent cases reported involves Slovak Tourism, the owner of a thermal park in Slovakia. The root of the dispute lies in the compliance of the share purchase agreement (SPA) with Slovakian law and the company's articles of associations, including the rights of other shareholders. The SPA, which consisted in the transfer of more than 95% of Slovak Tourism's shares, included the transfer of a receivable amounting to, approximately, €2,000,000. The value of the shares had been determined by at least 3 different experts. Whilst some experts considered that the value of the shares matched the amount of the receivable, assuming that certain set-off the claims had ceased to exist, others suggested that the value of the shares was in excess of 32,000,000 € or 72,000,000 €. The case, therefore, touched on the possible infringement of the rights of the rest of the shareholders.

The case hearings continue into 2023. Therefore the court's view on the case is still unknown.

Carlton

The Carlton case refers to a hotel and administrative building in Slovakia's capital, Bratislava. The owning company's financial position was severely compromised as a result of substantial loans . The company was sold with certain ownership shares of persons and had a certain impact on the new owning company. Regarding to publicly provided information there were some disagreements between the new owners, some financial discrepancies (as who is authorized to use the finances) and some discrepancies related to "fraudulent" transfer of shares or of the assets of the company (the buildings themselves). The Carlton case is a landmark case on fraudulent actions by one of the partners of the company's new owner with more than 30 administrative, criminal and civil cases pending.

Although the case is still in progress, it is still worth pointing out as it refers to key important factors in any M&A transaction. Crucially among these is that any new project should be related to a new SPV supported by a sound, written shareholders' agreement (SHA) with sufficient security of any finances, if they are provided only by one of more partners (shareholders) even among partners cooperating on many projects for a long period of time.

Slovnaft

This case refers to the sale of shares of Bratislava based, oil refining company Slovnaft. An amendment to the Slovak Securities Act in 2018 simplified the right of redemption. Previously, shareholders intending to exercise their right of redemption were required to enter into separate agreements with each minority shareholder before a transfer of securities could take place. This resulted in all previous attempts at exercising the right of redemption were unsuccessful. This right was among the first ones to be exercised by Slovnaft, as a result of which international oil producer MOL would become the sole shareholder. As Slovnaft's new majority shareholder, MOL applied to the National Bank of Slovakia for prior approval to buyout Slovnaft's shares. Upon analyzing the applicable requirements (in particular, whether MOL was the owner of shares with a nominal value of at least 95% of Slovnaft share capital and whether it exercises the right to buy out within 3 months from the expiry of the takeover bid preceding the exercise of the right to buy out), granted its consent to the exercise of the right to buy out the shares of the issuer - company Slovnaft. In case that the company does not meet the minority shareholders' objections, the minority shareholders have the right to bring an action to review the amount of the consideration before the relevant court. In this case the minority shareholders initiated a legal proceeding against the majority shareholder, despite the amount of the costs, which incurred them due to initiation of the legal proceeding (in some European countries, these costs are borne by the controlling shareholder and not by the minority shareholders). The outcome of the court proceeding is not known yet.

All of the above are important, as they point to potential issues that can be minimized by a careful due diligence which:

a) as far as possible ensures the validity of the contract itself, and
b) provides a basis for a proper price determination and a set of balanced R&Ws.

Finally, and is probably also the case with other jurisdictions, in the Slovak Republic cases are often time-consuming and costly. This is the reason why many M&A transaction disputes are quite often settled out of court. This also explains why there are very few rulings rendered by Slovakia's higher judicial authorities on this important sector of business law.

Spain

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Cross-border M&A transactions have surged steadily in the past decades from 31 billion USD in 1985 to over 1.2 trillion in 2020. While most transactions are completed in a smooth an orderly manner, the fact is that M&A disputes have become more common in recent times, which means that law practitioners have been called upon to handle sometimes very complex issues that are essential to successfully resolve the dispute as quickly as possible.

1) Choice of forum

When drafting an agreement related to M&A transactions, one of the fundamental choices the parties need to address is whether to submit the dispute to the ordinary courts of justice or to arbitration. Based on our experience, we would suggest that arbitration is better suited to resolve international corporate disputes, including M&A disputes. Some of the advantages inherent to arbitration are generally well-known and include the following:

- Confidentiality. Understandably, the parties to an M&A transaction will prefer to deal with their disputes privately, particularly where the dispute has to do with price calculation and price adjustments.
- Flexibility. Contrary to cases followed before the ordinary courts of justice, arbitration proceedings are flexible, in that the parties, assisted by the arbitrator(s), will be in a position to establish the key milestones of the proceedings thus tailoring the different stages of the arbitration to their needs.
- Expertise. While most ordinary courts will have little or no experience with complex M&A matters, by referring their litigation to arbitration the parties may appoint experienced arbitrators to deal with challenging disputes.
- Enforceability. Pursuant to the New York Arbitration Convention, the parties will have the ability to enforce an award in most jurisdictions worldwide.

2) Appointment of a third party expert

in the context of M&A disputes, reference needs to be made also to expert determination clauses, where the parties appoint an independent expert to resolve technical or factual disputes, mainly related to the determination of the shares based on earn-out clauses.

Under these circumstances, it is essential to draft the expert appointment clause very carefully, drawing a very clear distinction between the time when the expert has to act and the time where it is for the Courts or arbitrators to decide. Often there is a very thin line in between, which may cause the parties (basically the claimant) finding themselves in a position where they do not know what route to follow. We have seen many cases where arbitration proceedings have been stayed because the parties did not strictly follow the procedure they had agreed when entering into the agreement.

Least but not least, reference needs to be made to the powers given to the independent expert for the purpose of deciding on the dispute. As Jake Lowther put it in a paper submitted to the IBA Annual Conference in Seoul in 2019, the expert's decision has no res iudicata effect and might not be enforceable unless agreed otherwise by the parties, in which case it will be very hard to set aside the expert's other than on the grounds of "gross error").

3) Claims for breach of representations and warranties (R&Ws)

Finally, we would like make a short reference to claims based on a breach of R&Ws.

As Noradéle Radjai stated, in the context of M&A transactions, R&Ws are statements of fact about the status, qualities, and material aspects of the seller, the buyer and the target company. R&Ws offer certain assurances and allocate risk for frustrated expectations, thereby facilitating transactions.

R&Ws are a fundamental aspect of any M&A deal, all the more reason to ensure they are very carefully drafted. Using standardized clauses is rarely ideal, as when arriving to a dispute the parties will not know what precise clause will be applicable to the case at hand. It is therefore crucial to establish a direct and clear link between the underlying facts of the transaction and the R&Ws made by the purchaser or (mainly) the seller to avoid a situation where the parties will be very much involved in discussing the interpretation of the contract instead of discussing the merits of the case.