Declared a "sexy" area of specialism by **Stephen Jagusch QC** in a keynote speech, M&A disputes managed to hold the interest of 200 delegates from around the world at a two-day event in Warsaw.

Held by the Lewiatan Court of Arbitration, the event looked at best practice and recent developments in M&A disputes – including pre-closing and post-closing disputes and disputes involving publicly listed companies – as well as the potential for non-monetary relief.

The biennial event was opened by the court's honourary president, **Beata Gessel-Kalinowska vel Kalisz** of Warsaw boutique Gessel, a former transactional lawyer-turned arbitration specialist who came up with the idea of a conference on this theme in 2009 in response to the increasing number of cross-border M&As in central and eastern Europe.

Although some said it was too narrow a subject, she said the event has "gradually established itself in the itinerary of international arbitration practitioners", reflecting how "ingrained" M&A transactions are in business activity.

Eight years on, the number of transactions is growing without abatement, especially in emerging economies, said Jagusch – head of international arbitration at Quinn Emanuel Urquhart & Sullivan – in a speech reported by GAR last week. At a time when international arbitration practitioners increasingly have to specialise, he recommended M&A as an interesting area which straddles industry sector.

Jagusch also spoke about the frequency with which evidence of corruption emerges in such disputes, especially when the M&A transaction involved state entities in emerging economies, putting specialists in this area "at the forefront of an intriguing and developing area of law".

"I am not jumping at shadows here," Jagusch said. "Corruption has manifested itself, one way or another, in most of my M&A arbitrations over recent years."

Along with Jagusch's speech, a highlight of the conference was a presentation by **Tunde Ogunseitan**, counsel at the ICC International Court of Arbitration. He said that arbitrations relating to share purchase agreements, shareholders' agreements and joint venture and cooperation agreements, which generally underlie M&A transactions, represent a healthy portion of the court's caseload and have emanated from 31 different countries since 1986. Two-thirds have involved more than two parties.

In 2015, such disputes accounted for 13.6% of new cases and, in 2016, 17.7%, spanning business sectors including energy, food, pharmaceuticals, metallurgy, finance, construction, telecoms and insurance.

Most such disputes relate to the "post-closing" phase of M&As, Ogunseitan said – concerning breach of representations and warranties, price adjustment, specific performance under purchase agreements, conditions precedent and parties obligations under non-disclosure and exclusivity agreements.

One of the common issues that arises in such cases is the existence of different dispute resolution clauses in the different instruments that make up the transaction, he said. Sometimes this problem is solved by an "entire agreement" clause which supersedes all others when a coordinated approach is required. Otherwise, the 2012 and 2017 ICC rules provide scope for claims under different instruments to be determined in a single case.

Another issue is that M&A agreements frequently provide for expert determination to settle factual or technical issues arising from the transaction – which can give rise to res judicata and enforceability problems.

If an expert determination and arbitration clause co-exist, parties may find themselves in a "chicken and egg" situation or unable to demarcate the tasks of the expert and arbitrators.

There's also the complication of parties raising claims related to the pre-closing phase of the M&A on the basis of preliminary agreements, alleging breaches of the general duty to negotiate in good faith.

The sexy world of M&A arbitration

01 June 2017

In one ICC case, the tribunal rejected the respondents' objection and upheld its jurisdiction over such claims, he recalled. The arbitration clause was not limited to claims "arising out of" the agreement but all disputes "in connection with it", the tribunal held.

Ogunseitan went on to speak of the importance of interim and conservatory measures to preserve the status quo – for example to prevent the seller from aggravating the financial situation of the target company before closing, to enforce confidentiality or exclusivity agreements pre-completion or to make a party abstain from disposing of the targets' shares.

Fast-track arbitration procedures are available, he noted – however, it is difficult to see how time limits can be significantly shortened in complex disputes where bifurcation of issues such as liability and quantum is common.

There is also a lack of clarity over whether confidentiality obligations surrounding the transaction itself extend to the arbitration proceedings – so parties should clearly indicate this when drafting them.

Later, **Patricia Shaughnessy** of Stockholm University led discussion about the effectiveness of declarations and specific performance as opposed to damages as remedies in cross-border M&A arbitrations, a subject on which **Gessel-Kalinowska vel Kalisz** is writing a book.

There was also a session on quantum led by **Paula Hodges QC** of Herbert Smith Freehills, which saw consensus regarding the challenge for arbitrators of evaluating damages in pre-closing disputes.

Disputes involving publicly-listed companies were the focus of a session chaired by **Wendy Miles QC** of Debevoise & Plimpton and featuring in-house counsel from Borris Hennecke Kenisel, PKN Orlan and Wintershall. The panel considered the information obligations imposed on companies operating on a regulated market, which sit uneasily with the principle of confidentiality in arbitration.

This was followed by a roundtable on the same theme featuring representatives of the ICC, VIAC, DIS, ICDR/ AAA and Lewiatan Court of Arbitration

During the course of the event, there were also case studies presented by the ICC, CMS, Alvarez & Marsal, Gessel and White & Case, showing M&A disputes in their most complex and multi-faceted form.

Closing the conference, the London-based head of international arbitration at Stephenson Harwood, **Louis Flannery**, noted how sophisticated the central European arbitration market has become – having moved far beyond discussing arbitration in generic terms.

"Here we are – in Warsaw – discussing not basic ideas of what arbitration is about but engaging in a deep discussion about the most technical, the most esoteric, the most advanced and complex and specialised notions within a specialised field within a specialised profession. It doesn't get much more microscopic," he said.

Flannery also noted the internationalism of the gathering – with delegates from 19 nations as far afield as Australia, Israel, Ukraine, Nigeria and Brazil – and joked about "how damn sexy we all are".

As with an M&A deal, the closing of the conference did not mark the end. In a post on LinkedIn, Gessel-Kalinowska vel Kalisz has since challenged Jagusch's assertion about the prevalence of corruption – saying that her own experience of handling more than 200 M&A transactions and more than 30 M&A arbitrations does not confirm it.

"Corruption exists everywhere and in every area and only a naive person would suggest otherwise," Gessel writes. "It is definitely more rampant where administrative powers of the state are excessive in regulating various segments of economic activity, and this can be tested against the M&A deals as well. But the generalisation proposed by Stephen that corruption taints most transactions aimed at acquisition of a business is much exaggerated [...] Maybe corrupt transactions are simply more visible and more sexy than plain vanilla, innocent ones, Stephen?"

The next conference will be held in Warsaw on 23 and 24 May 2019, marking 10 years since the first event.

- News, Conference Reports

Comments Add your comment

Add Your Comment

Anonymous ☐
Your Name Your Name
Your e-mail address
Email Address
Your Comment title Comment title
Your Comment Please place comments here

Não sou um robô
reCAPTCHA
Privacidade - Termos de Utilização

By submitting a comment you agree to abide by our terms & conditions

Submit your Comment

Sign up to GAR alerts

Most read

- Naftogaz declares win against Gazprom
- Trump risks claims through US climate change backtrack
- Cast list for East China gas dispute revealed
- The sexy world of M&A arbitration
- In-house counsel advise former "private practice" selves
- DIS claim goes down the tubes
- Taiwan faces first investor-state claim

More

- WARSAW: Dispute resolution in M&A transactions - tactics, challenges, defences
- Poland holds first major arbitration event
- Coming up with new ideas on Europe
- Procedural Issues
- Coming up with new ideas on Europe
- Gas Price Review Arbitrations: Certain Distinctive Characteristics

Latest Issue

Download as a PDF

WHO'SWHOLEGAL WWL

- Arbitration
- Commercial Litigation