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Aspects of Disclosure in Post-M&A Arbitration:

Access to target company, privilege and confidentiality restrictions, etc.

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I. Typical Post-M&A Disputes

- Breach of representations and warranties
- Disagreements as to price calculation (earn-out etc.)
- Breach of non-compete agreement
- Breach of confidentiality agreement
- Etc.

II. In Particular: Price Calculation Disputes (1)

- Determination of final price after signing or closing (earn- out etc.); mechanism as to price determination in Share Purchase Agreement (SPA)
- Target company under control of buyer; key documents in possession of target company
- Contractual obligations in SPA as to disclosure of information?

II. In Particular: Price Calculation Disputes (2)

- Role of management after transaction; problem of "turncoats"
- Two alternative dispute resolution systems:
 - Expert determination to establish the fact (see presentation Balz Gross)
 - Arbitration

III. Disclosure in M&A Disputes: General

- Arbitration should be a transparent process with broadest possible availability of all relevant facts and information
- Exception to this rule: confidentiality and legal privileges; contractual limitations
- Dichotomy: Due process and access to the file vs confidentiality



IV. Disclosure in M&A Disputes: Legal Framework

- Lex arbitri / applicable law on the merits / (foreign) mandatory provisions (antitrust law etc.)
- Contractual obligations?
- Institutional Rules (see, e.g., Art. 24 (3) Swiss Rules; Art. 22 (3) ICC Rules)
- IBA Rules on the Taking of Evidence

V. Disclosure in M&A Disputes: Practical Solutions (1)

- Redaction of Confidential Information: Possible Solutions
 - Arbitral Tribunal is allowed to verify redacted documents against original ones; in case of particularly sensitive information: presiding arbitrator or administrative secretary shall review
 - Counsel for other party but no other representative of that party; confidentiality agreement
 - Delegation to third party (confidentiality advisor)
 - Etc.

V. Disclosure in M&A Disputes: Practical solutions (2)

- Restricted Access to Confidential Information
 - "Confidentiality Club" / "Clean Teams"
 - Possible combinations: arbitral tribunal and counsel and experts; counsel; experts and selected representatives etc.
 - Confidentiality undertakings; sanctions

V. Disclosure in M&A Disputes: Practical solutions (3)

- Data Rooms; return or destruction of documents
- Restricted inspection of confidential information; no or limited rights to take notes, make copies etc.
- Restricted references in written materials submitted in arbitration
- Etc.

V. Disclosure in M&A Disputes: Practical Solutions (4)

- Confidentiality Advisors
 - see e.g. Art. 54 (d) WIPO Rules; Art. 3 (8) IBA Rules on the Taking of Evidence
- Third Party Neutral or Expert
 - see e.g. Art. 54 (e) WIPO Rules

Thank you for your attention!

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