

ASA Conference: Quantifying Claims in Post-M&A Disputes Important Considerations with respect to the Selection of Arbitrators

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The selection of arbitrator(s) is the most significant decision to be made during an arbitration proceeding.

What do the arbitration rules say?

- Most rules (only) cover
 - the number of arbitrators
 - the nomination / appointment mechanism
 - impartiality and independence (IBA Guidelines on Conflicts of Interest in International Arbitration)

Other important issues to be considered

- Experience with arbitration and as an arbitrator
- Legal background
 - Understanding of pertinent legal issues
 - Approach to exploration of facts i.e. document production, witnesses and experts,
 - Approach to interpretation of contracts
- Language skills
 - Briefs and oral hearing, contractual agreements, correspondence and other documents, legal literature

Other important issues to be considered

- Experience with the relevant industry sector
- Understanding of economics and legal concepts
- Open-minded versus adherence to preconceptions?
- Case management skills (→presiding arbitrator)
- Assertiveness, ability to convince fellow arbitrators
- Roles and dynamics within the arbitral tribunal
- Availability

Issues to consider in connection with post-M&A disputes (1/2)

- Approach to interpretation of contracts
 - Black letter lawyer or good faith approach?
- Understanding of pertinent legal issues?
 - People sometimes think that a good understanding of the applicable law should be less important as many M&A contracts are self-contained; however, an impeccable assessment often requires superior knowledge of the law
 - » Scope of guarantees and warranties
 - » Indemnities
- Understanding of economics and legal concepts
 - Is the arbitrator capable of interpreting balance sheets?
 - Is the arbitrator capable of forming a view on differing expert opinions?
 - Does he or she have sufficient experience and expertise to understand the economic implications of a certain conduct / breach of contract?
 - Is he or she familiar with the legal concepts of M&A transactions?

Issues to consider in connection with post-M&A disputes (2/2)

- Procedural issues
 - What is the likely approach to expert evidence (tribunal-appointed or party-appointed experts)?
 - Is the arbitrator capable of handling complex expert evidence?
 - What is the likely approach to document production?
 - » In particular, the seller may be interested in obtaining access to documents
 - » The buyer may also want to understand what the seller knew at the stage of signing and / or closing
- Approach to confidentiality issues / business secrets

Methods for gathering information about the arbitrator

- Research publications, conference materials, and former decisions (if publicly available)
- Obtain internal and external feedback about the arbitrator candidate
 - Talk to colleagues
- Conduct a short interview with the arbitrator candidate as to
 - Experience as an arbitrator/ with post-M&A disputes
 - Availability
 - Willingness to consult parties regarding the appointment of the chairperson



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