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FROM CONFLICT TO CONSENSUS: NAVIGATING CROSS-BORDER M&A DISPUTES THROUGH ARBITRATION

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Abstract

The COVID-19 pandemic disrupted mergers and acquisitions (M&A) transactions, causing significant deals to collapse and giving rise to disputes regarding due diligence, contractual obligations, representations, warranties, and purchase price adjustments. With a much-needed push from the side of the pandemic, arbitration, renowned for its confidentiality and efficiency, has become indispensable for handling such disputes. Within cross-border M&A, arbitration has firmly established itself as the favored means of resolving disputes stemming from these intricate transactions. This paper explores the growing prominence of arbitration in the context of M&A, highlighting the impact of legal technology on this trend. Despite its costs, arbitration offers advantages such as speed, privacy, and cost-effectiveness, making it the go-to choice for dispute resolution. Parties involved in M&A, whether listed or non-listed, value arbitration for its autonomy in selecting arbitrators, providing greater control compared to other dispute resolution methods. The paper also delves into the role of arbitration at different stages of M&A transactions, from pre-closing disputes involving preliminary agreements, due diligence, and purchase price agreements to post-closing disputes concerning representations, warranties, indemnity insurance, and earn-out clauses. Furthermore, recent trends in arbitration disputes are examined through real-world examples, showcasing the importance of clear contractual provisions and effective dispute-resolution mechanisms. The paper concludes by discussing how technology is transforming M&A deals and dispute resolution, ushering in a data-driven and objective approach to conflict resolution. It established that arbitration remains a vital tool for navigating the complexities of cross-border M&A transactions and safeguarding the interests of the parties involved.

Keywords: *Mergers and Acquisitions (M&A), Arbitration, Earn-out, Due Diligence, Warranties, Pre-closing, Post-closing, Cross-border*

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I. Introduction

In the world of commercial law, the principle *caveat emptor* or "buyer beware" has long been hailed by lawyers.[2] The maxim places the onus on buyers to thoroughly assess goods before purchasing.[3] However, in the intricate landscape presented by cross-border mergers and acquisitions ("**M&A**"), due diligence and contractual safeguards have traditionally been employed to cleverly mitigate buyer risks.[4] M&A transactions commonly involve meticulously negotiated representations, warranties, and post-acquisition price adjustment mechanisms to protect purchasers from undisclosed issues. All M&A transactions, but especially those crossing borders, involve consolidating companies within the same industry, fostering market growth. However, these complex transactions often lead to disputes related to due diligence, contractual obligations, breaches, representations, warranties, and purchase price adjustments.[5]

To efficiently address these issues while maintaining confidentiality, international arbitration has become the preferred and predominant method of dispute resolution. In today's globalized M&A landscape, arbitration clauses have become integral to M&A agreements. Despite its costs, parties increasingly favor arbitration due to its speed, privacy, and cost-effectiveness.[6] Arbitration grants companies, whether listed or non-listed, the autonomy to select arbitrators, offering greater control compared to other dispute resolution methods.[7]

The surge in cross-border M&A transactions and the reliance on arbitration underscore the importance of understanding international arbitration's role in M&A, both pre-closing and post-closing, as a viable alternative to litigation.[8] This paper explores the growing prominence of arbitration as the preferred method for resolving disputes arising from these contractual safeguards. The scheme of this paper is as follows. Section II of this paper analyses the burgeoning demand for arbitration to resolve M&A disputes. Section III deals with the evolution

[2] 'Caveat Emptor' (*Legal Information Institute*) <www.law.cornell.edu/wex/caveat_emptor> accessed 7 September 2023
[3] Ibid.
[4] Gregory DW, 'International Mergers & Acquisitions' (1993) 2(2) International Review of Economics & Finance 207 <http://dx.doi.org/10.1016/1059-0560(93)90024-k> accessed 07 September 2023.
[5] Ibid.
[6] LAF, 'Arbitration In Cross-Border Merger & Acquisition Transactions: An Advantage?' (*American Review of International Arbitration*, 23 April 2023) <https://aria.law.columbia.edu/arbitration-in-cross-border-merger-acquisition-transactions-an-advantage/> accessed 02 September 2023.
[7] Ibid.
[8] Gregory (n. 3).

of arbitration in the domain of cross-border M&A. Section IV analyses the reasons for the preference of arbitration over traditional means of dispute resolution. Section V describes the two-stage involvement of arbitration in M&A and analyses the varied forms of its incorporation into the M&A process. Section VI analyses the recent trends of arbitration preferred in M&A disputes in light of the Twitter-Elon and Reliance-Future-Amazon cases. Section VII tackles the future trends of technological advancement of arbitration and its impact on M&A. Ultimately, the paper renders the analysis and conclusion in Section VIII.

II. Surging Demand: Tracing the Rise of Arbitration in M&A Dispute Resolution

The M&A market rebounded well from the Global Financial Crisis in the past decade, with a resurgence of deal activity driven by factors like ample cash reserves, emerging market opportunities, and favorable credit terms.[9] In 2019-20, M&A transactions were affected adversely all over again with the advent of the COVID-19 pandemic and subsequent global restrictions, most notably in aviation, tourism, retail, and food and beverage sectors. [10] The year 2020 witnessed significant M&A deals falling through, including Sycamore's aborted acquisition of Victoria's Secret[11] and the near collapse of the Tiffany-LVMH deal, only resolved after price concessions were agreed upon. [12] In the pandemic-driven M&A disputes emerged arbitration as a light at the end of a dark tunnel of troublesome litigation. M&A arbitration has gained traction in tandem with the expansion of these deals and now encompasses various facets of M&A transactions. This trend is underscored by the remarkable growth of cross-border M&A, which surged from $31 billion in 1985 to over $1.2 trillion in 2019 and has remained involved in an uphill movement ever since.[13]

[9] Grave K et al., 'The Global Financial Crisis and M&A' (2012) 7(11) International Journal of Business and Management <https://doi.org/10.5539/ijbm.v7n11p56> accessed 06 September 2023.
[10] Kooli C, 'Impact of COVID-19 on Mergers, Acquisitions & Corporate Restructurings' (*MDPI*, 2021) <www.mdpi.com/2673-7116/1/2/8> accessed 04 September 2023.
[11] 'L Brands, Sycamore Agree to Scrap Victoria's Secret Deal' (*WSJ*) <www.wsj.com/articles/l-brands-sycamore-agree-to-scrap-victorias-secret-deal-11588633861> accessed 05 September 2023.
[12] 'LVMH & Tiffany & Co: Collapsed Merger — The Corporate Law Journal' (*The Corporate Law Journal*, 9 September 2020) <www.thecorporatelawjournal.com/finance/lvmh-amp-tiffany-amp-co-collapsed-merger> accessed 07 September 2023.
[13] 'Global mergers and acquisitions decrease in 2020, but 2021 is looking favorable for M&A' (*Ernst & Young*, 26 July 2021) <https://taxnews.ey.com/news/2021-1421-global-mergers-and-acquisitions-decrease-in-2020-but-2021-is-looking-favorable-for-m-and-ampa> accessed 01 September 2023.

While parties entering M&A deals aspire to seamless transactions, the reality often introduces disputes. Consequently, parties need to carefully weigh their options between national court litigation and arbitration when structuring these deals. Hence, even in the post-pandemic corporate arena, arbitration has solidified its position as the preferred mechanism for resolving a broad spectrum of disputes stemming from M&A transactions. Arbitration clauses have become standard in M&A contracts, particularly in international contexts, as parties increasingly opt for arbitration to resolve disputes arising from M&A transactions. High-profile cases, such as the €480 million dispute between Philips and Funai Electric, exemplify this trend, where companies turn to arbitration when acquisitions sour.[14] Hong Kong, for instance, witnessed a significant rise in M&A disputes administered by the Hong Kong International Arbitration Centre ("**HKIAC**").[15] Many cases, however, are resolved through *ad hoc* arbitration in Hong Kong, suggesting that the actual number of disputes may be higher.

Furthermore, statistics from various arbitration institutions confirm this trend, with shareholders' agreements, share purchase agreements, and joint venture agreements accounting for a substantial portion of their caseloads. For instance, the London Court of International Arbitration ("**LCIA**") reported that such agreements constituted 14% of its cases in 2019.[16] The Singapore International Arbitration Centre ("**SIAC**") similarly recorded corporate disputes as the most prevalent sector, representing 29% of all disputes in 2019.[17]

The popularity of arbitration in the M&A realm is well-founded, given its alignment with the structure of these transactions. LCIA arbitration offers a unique advantage in M&A disputes by explicitly incorporating confidentiality obligations into its rules.[18] This feature holds significant appeal since transaction parties often prefer private dispute resolution, especially in cases related to purchase price disputes that may arise long after a deal becomes public. Additionally,

[14] Staff R, 'Court orders Japan's Funai to pay Philips 135 mln euros over failed 2013 deal' (*Reuters U.S.*, 26 April 2016) <www.reuters.com/article/us-funai-m-a-philips-idINKCN0XN0HY> accessed 07 September 2023.
[15] 'International arbitration law and rules in Hong Kong | CMS' (*CMS in Germany - International Law Firm*) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/hong-kong> accessed) 07 September 2023
[16] HSF, 'An "exceptional Year" For The London Court Of International Arbitration' (*Herbert Smith Freehills*, 20 May 2021) <https://hsfnotes.com/arbitration/2021/05/20/an-exceptional-year-for-the-london-court-of-international-arbitration/> accessed 7 September 2023
[17] Marie Alexander N et al., 'International Dispute Resolution Survey: 2020 Final Report' (*SSRN*, 12 January 2021) <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3765115_code115218.pdf?abstractid=3742583> accessed 08 September 2023.
[18] HSF (n. 15).

arbitration empowers parties to select arbitrators, allowing for the customization of tribunal expertise to match the specific facts in question.[19] Post-closing disputes, which frequently revolve around factual, accounting, or technical issues, benefit from this flexibility, as they often require specialized knowledge beyond purely legal matters. In M&A contexts, parties often include provisions for expert determination in their transaction documentation, either as a preliminary or parallel step to arbitration.[20] While determinations by experts may be contractually binding, they lack the enforcement power of judgments or arbitration awards, necessitating separate legal actions if not voluntarily complied with.[21] Moreover, arbitration continues to adapt to the evolving needs of its users, as exemplified by recent amendments such as the introduction of injunctive relief in the International Chamber of Commerce ("**ICC**") rules, particularly pertinent in M&A disputes where urgent actions may influence the target's valuation.[22] Section IV will delve deeper into the advantages that arbitration offers in comparison to traditional litigation.

III. From Simple Origins to Modern Practices: The Evolution of Arbitration

Arbitration, once hailed solely for being a shorter and cost-effective dispute resolution alternative for minor private disputes, has witnessed remarkable success in handling mammoth commercial conflicts.[23] However, its proliferation, especially in the realm of cross-border commercial cases, has necessitated gradual adaptation to meet the demands of increasingly convoluted legal and factual circumstances.[24] Notably, significant strides have been made by leading arbitral institutions to maintain arbitration's flexibility and effectiveness in addressing such complex corporate disputes.

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[19] Gregory (n. 3).
[20] D. Ehle B, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (*Comparative Law Yearbook of International Business*) <www.lalive.law/wp-content/uploads/2019/10/beh_arbitration_as_a_dispute.pdf> accessed 06 September 2023.
[21] Ibid.
[22] Mullin CL et al., 'Injunctive Relief Pending Arbitration: The Evolving Role of Judicial Action' (*American Bar Association*) <www.americanbar.org/content/dam/aba/publications/franchising_law_journal/spring_2019/fr_pending.pdf> accessed 2 September 2023.
[23] NDA, 'Resolving Disputes Between Foreign Investors & The Indian State / State Entities' (*Nishith Desai Associates*, January 2023) <www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Resolving-Disputes-Between-Foreign-Investor-and-The-Indian-State-States-Entities.pdf> accessed 4 September 2023
[24] Ibid.

Modern M&A transactions often involve an array of transaction documents among multiple parties. These parties can include the buyer, seller, target company, shareholders, guarantors, suppliers, subsidiaries, and other stakeholders. The traditional arbitration framework, typically designed for a simple 'claimant versus respondent' scenario, seemed ill-suited for disputes arising from multi-party, multi-contract situations, especially when each transaction document contains its own arbitration agreement. This structure risked the initiation of multiple parallel proceedings concerning the same set of facts.

Numerous institutions, such as the ICC, have introduced explicit provisions on consolidation and joinder into their procedural rules to tackle this issue.[25] By incorporating these rules into their arbitration agreements, parties generally provide prior consent for the possibility of consolidating proceedings and adding third parties with compatible arbitration agreements.[26] Nevertheless, determining what qualifies as a compatible arbitration agreement and ensuring clear consent from all parties remains a complex task. Drafting arbitration clauses with consolidation or joinder provisions is notoriously challenging, often requiring highly specific or extremely general language.

Furthermore, in response to concerns about time and cost, many institutions have introduced or clarified rules for expedited arbitration, featuring streamlined procedures and strict timeframes. For instance, the ICC expedited procedure rules eliminate the 'Terms of Reference' stage and aim for a paper-based case resolution, minimizing documents, pleadings, and final evidentiary hearings.[27]

These expedited elements can be customized, with Article 22 of the ICC Rules emphasizing the tribunal's duty to manage the case efficiently and the discretion to decide how proceedings are conducted.[28] This duty extends to the parties, who must ensure proceedings progress

[25] Menon S, 'Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes' (*Kluwer Arbitration Blog*, 3 January 2021) <https://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/> accessed 07 September 2023.

[26] Ibid.

[27] 'Expedited Procedure Provisions' (*International Chamber of Commerce*) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/expedited-procedure/> accessed 04 September 2023.

[28] ICC Arbitration Rules, 2017, art 22.

expeditiously but proportionately.[29] Beyond saving time, the expedited procedure also proves cost-effective, with the ICC estimating approximately 20% lower arbitration costs compared to the standard procedure.[30]

Lastly, M&A disputes often require urgent interim measures, particularly during the period between signing and closing transactions. These measures may be necessary to compel or prevent actions that could impact the target's value. While arbitral rules have long recognized the option for parties to seek interim relief from local courts on an urgent basis,[31] the introduction of emergency arbitrator provisions has strengthened the ability to obtain swift relief within the arbitration framework. Emergency arbitrator provisions allow for the appointment of a sole arbitrator to grant interim relief promptly, following which the arbitrator is barred from participating in the primary dispute on the merits.[32]

A notable example of this shift can be seen in the English High Court's decision in *Gerald Metals SA v. Timis Trust*.[33] The decision highlighted that by opting for emergency arbitrator relief within their arbitration agreement (by referencing institutional rules containing such provisions), parties may limit the English court's jurisdiction to grant interim relief. These trends underscore arbitration's continued preference as a forum for resolving corporate disputes, showcasing its adaptability and effectiveness in meeting the evolving demands of complex corporate scenarios.

IV. Preferring Arbitration: The Choice of Dispute Resolution in M&A Transactions

The surge in M&A activity has inevitably led to increased disputes at various stages of these complex transactions. Disputes are an inherent aspect of deal-making, and they can emerge

[29] Ibid.
[30] Expedited (n. 26).
[31] 'Chapter 17: Provisional Relief in International Arbitration', in Gary B. Born, International Commercial Arbitration (Third Edition), 3rd edition (Kluwer Law International 2021) pp. 2601-2758, <https://icsid.worldbank.org/sites/default/files/parties_publications/C9734/B%20-%20Request%20for%20Interim%20Measures%20%E2%80%93%2012.14.2021/Claimants%27%20Legal%20Authorities/CL-0001-ENG%2C%20Born%20-%20Provisional%20Relief%20in%20International%20Arbitration.pdf> accessed 04 September 2023.
[32] Ibid.
[33] *Gerald Metals SA v. Timis Trust* [2016] EWHC 2327 (Ch).

during pre-closing or later stages of an M&A deal.[34] Arbitration has emerged as the preferred method of dispute resolution in M&A transactions to safeguard the interests of parties and mitigate the risks associated with undisclosed information. Several compelling reasons underscore why arbitration is chosen over other dispute resolution mechanisms in the context of M&A:

A. Freedom to Choose Specialized Arbitrators

Arbitration grants parties the unparalleled advantage of selecting arbitrators who possess specialized expertise in the relevant field. This freedom of choice is mutually beneficial and enhances the attractiveness of arbitration.[35]

B. Confidentiality

While court proceedings are typically public, arbitration offers the advantage of maintaining strict confidentiality. This aspect is particularly crucial in M&A deals involving sensitive information and trade secrets.[36]

C. Amicable and Business-Like Environment

Arbitration fosters a more amicable and business-oriented environment compared to litigation, promoting better relationships among the involved enterprises. Furthermore, the practice demonstrates that most M&A parties favor and consent to arbitration as the preferred dispute resolution mechanism, especially in high-volume cross-border transactions.[37]

D. Cross-Border Transactions

In cross-border M&A transactions where parties speak different languages, arbitration facilitates the drafting of contracts in both the parties' native languages and a pre-agreed language, often

[34] Liu J, 'Use of Arbitration in Cross-Border M&A disputes' (*Bar and Bench*) <www.barandbench.com/columns/use-of-arbitration-in-cross-border-ma-disputes> accessed 06 September 2023.
[35] LAF (n. 5).
[36] Meza-Salas M, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?' (*Kluwer Arbitration Blog*, 23 September 2018) <https://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/> accessed 07 September 2023.
[37] Ibid.

English, for conducting proceedings. This flexibility is not readily available in traditional court litigation.[38]

E. Impartial and Efficient Dispute Resolution

Arbitration provides parties with an impartial and efficient means of settling disputes. This is particularly valuable in cross-border M&A deals where parties may come from diverse legal systems with varying laws and regulations, offering a neutral forum to resolve disputes without foreign court litigation.[39]

F. Enhanced Privacy and Anonymity

Arbitration offers greater privacy and anonymity than court-centric litigation processes, safeguarding sensitive information and trade secrets in M&A deals.

G. Flexibility and Cost-Effectiveness

Arbitration is more flexible and adaptable to parties' specific needs than court processes, allowing for efficient and cost-effective dispute resolution. Parties can customize the process, including selecting arbitrators with expertise in M&A transactions and industry-specific knowledge.[40]

H. Enforceability of Awards

Arbitration awards generally enjoy stronger enforceability across international borders than court judgments, providing parties with greater predictability in cross-border M&A transactions.[41]

[38] LAF (n. 5).
[39] Georgia A, 'The 'Arbitralization' of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts' (*OUP Academic*, 13 March 2023) <https://academic.oup.com/jids/advance-article/doi/10.1093/jnlids/idad007/7076733> accessed 06 September 2023.
[40] Gregory (n. 3).
[41] Meza-Salas (n. 35).

I. Party Autonomy

Parties in cross-border M&A transactions benefit from significant autonomy in arbitration. They can select arbitrators with expertise in the dispute, choose the language of proceedings, and tailor the arbitration's scope to suit their specific requirements.[42]

J. Efficient Document Production

Parties can negotiate the scope of document production in arbitration, increasing efficiency by reducing time and expenses. In contrast, court litigation places document scope in the hands of the court, potentially leading to more costly and time-consuming proceedings.[43]

K. Customized Rules and Procedures

Arbitration allows parties to tailor various aspects of the process, including location, duration, and the use of technology. This flexibility can result in a more efficient procedure, saving time and money on travel, which is typically less feasible in court litigation.[44]

Despite these advantages, parties should carefully consider certain factors when selecting arbitration as a dispute resolution mechanism in M&A transactions. Key considerations include the wording of the arbitration provision, the choice of arbitration rules, the applicable laws, the selection of arbitrators, the enforcement of arbitral awards, and the associated costs.[45] Crafting a clear and comprehensive arbitration clause in M&A agreements is essential to fully harness the benefits of arbitration and navigate the complexities of high-volume cross-border M&A transactions.

V. Stages of M&A transactions involving arbitration

In the realm of M&A transactions, arbitration stands out as the preferred choice for resolving disputes, particularly in cross-border scenarios. However, arbitration application may vary depending on whether it is utilized in the pre-closing or post-closing stages of these transactions.

[42] LAF (n. 5).
[43] Gregory (n. 3).
[44] Meza-Salas (n. 35).
[45] 'Experts explain: Arbitration clauses in M&A transactions' (*Rödl & Partner*) <www.roedl.com/insights/ma-dialog/2022-05/ma-vocabulary-experts-explain-arbitration-clauses-ma-transactions> accessed 06 September 2023.

The following discourse explores the different stages of M&A deals where disputes may arise, and arbitration can come into play.

A. Pre-Closing M&A Disputes: Navigating the Negotiation Stage

a. Memorandum of Understanding and Letter of Intent

When parties involved in a transaction reach a mutual understanding of its essential terms, they often proceed by drafting and signing a memorandum of understanding ("**MOU**") or a letter of intent ("**LOI**").[46] These preliminary agreements, even when expressly labeled as non-binding, establish a quasi-legal relationship that imposes certain obligations on the parties.[47] One such obligation is the duty to act in good faith, and failing to do so can lead to disputes.[48] The question of whether these obligations are legally binding and how to enforce them can prompt the involved parties to seek legal counsel. However, for such disputes to be resolved through arbitration, the MOU or LOI must include an arbitration agreement, which is not always the case.[49] Alternatively, parties may choose to submit a dispute to arbitration after the initial conflict arises, expecting that any subsequent contract they enter into will include an arbitration clause.[50]

b. Confidentiality and Exclusivity Agreements

MOUs and LOIs often encompass agreements related to exclusive negotiation periods and confidentiality.[51] These agreements entail commitments to maintain confidentiality about ongoing negotiations and protect exchanged information, particularly during due diligence procedures, especially when the potential buyer is a competitor.[52] These clauses frequently

[46] Fouret J et al., 'Pre-closing disputes' (*Pbookshop*) <www.pbookshop.com/media/filetype/s/p/1390127546.pdf> accessed 05 September 2023.
[47] *A.J. Richard & Sons, Inc. v. Forest City Ratner Cos., LLC*, 2019 N.Y. Slip Op. 30215(U) (Sup. Ct. Kings County Jan. 28, 2019).
[48] Ibid.
[49] Fouret (n. 45).
[50] Fouret (n. 45).
[51] 'Binding Agreements - Confidentiality and Exclusivity in a Merger and Acquisitions Transaction - Raleigh Estate Planning and Corporate Law Attorneys' (*Raleigh Estate Planning and Corporate Law Attorneys*, 31 August 2018) <www.wrlaw.com/2018/08/binding-agreements-confidentiality-and-exclusivity-in-a-merger-and-acquisitions-transaction/> accessed 8 September 2023
[52] Ibid.

involve penalties, leading to disputes that primarily concern the injured party's right to claim damages or seek prompt resolution.[53]

c. Pre-closing covenants

Pre-closing covenants are often at the center of disputes over deal completion. They govern a target company's operations between deal signing and closing, assuring buyers that the seller will continue regular business operations. Pre-closing covenants outline how the seller must conduct business from the agreement's signing to closing.[54]

The pandemic period gave rise to several cases where agreements were terminated due to violations of specific clauses, particularly pre-closing covenants.[55] Pandemic-period instances have portrayed sellers citing the pandemic as justification for not adhering to these covenants.[56] Buyers argued that cost-cutting measures by sellers breach these covenants, while several others claimed that the failure to take such measures constitutes a breach.[57]

Given the pandemic's disruptions, various arguments emerged, with buyers seeking ways to exit pre-pandemic deals.[58] Sellers, in turn, initiated proceedings to enforce these deals. There have been numerous deals where buyers opted to exit due to such violations while sellers strive to complete the transaction. To resolve these disputes, parties have popularly opted for emergency arbitration or traditional arbitration. Interim relief options and the potential appointment of emergency arbitrators, available in institutional rules, made a compelling case for arbitration in light of such events.[59] It has been witnessed that more issues arose from pre-pandemic deals and fewer from those signed afterward as parties become more cognizant of pandemic-related concerns during the drafting process.

[53] Binding (n. 50).
[54] Hall R and Pitkowitz MM, 'Tailor-Made—Unique Dispute Resolution Clauses in M&A Agreements' (2012) 5(2) NYSBA New York Dispute Resolution Lawyer 29 <www.cravath.com/a/web/510/3376762_1.pdf> accessed 08 September 2023.
[55] *Akorn, Inc. v. Fresenius Kabi AG,* C.A. 2018-0300-JTL, 2018 WL 4719347 (Del. Chancery Ct. Oct. 1, 2018); *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, C.A. No. 8980-VCG (Del. Ch. Oct. 25, 2013).
[56] Ibid.
[57] Hall (n. 53).
[58] Harroch R, 'The Impact Of The Coronavirus Crisis On Mergers And Acquisitions' (*Forbes*, 17 April 2020) <www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/> accessed 07 September 2023.
[59] Ibid.

d. Due Diligence Investigation

Due diligence entails a comprehensive examination and investigation of a company, its assets, and financials as a preliminary step in business transactions. In M&A transactions, due diligence investigations serve as the initial phase to assess the target company's business, legal, and operational aspects.[60]

Following this assessment, parties may encounter unexpected findings that lead to deal termination, potentially resulting in disputes. Arbitration, as the chosen dispute resolution mechanism, offers a swifter, more adaptable, and more confidential means of resolving these disputes than litigation.[61] It safeguards sensitive information and enables parties to tailor the process to their specific requirements.[62]

e. Purchase Price Agreements

In M&A transactions, parties often finalize the purchase price in a purchase agreement. However, issues can arise during due diligence when examining the target company's legal, financial, and operational aspects. These concerns may lead to disputes over adjusting the purchase price.[63]

To navigate such disputes efficiently and without jeopardizing the transaction, parties can turn to arbitration rather than litigation. Arbitration offers a faster way to reach a resolution, providing both sides with an opportunity to swiftly determine a suitable solution, especially when discrepancies emerge in calculating the adjusted purchase price.[64]

[60] Harroch R, 'A Comprehensive Guide To Due Diligence Issues In Mergers And Acquisitions' (*Forbes*, 27 March 2019) <www.forbes.com/sites/allbusiness/2019/03/27/comprehensive-guide-due-diligence-issues-mergers-and-acquisitions/> accessed 03 September 2023.
[61] Ibid.
[62] Harroch (n. 59).
[63] Özdem BH and İnce İ, 'Purchase price adjustment disputes in mergers and acquisitions: an intersection of different dispute resolution procedures and a war of jurisdictions' (2019) 35(4) Arbitration International 419 <http://dx.doi.org/10.1093/arbint/aiz019> accessed 02 September 2023.
[64] Ibid.

B. Post-Closing M&A Disputes: Addressing Disputes Arising from Agreements

a. Representations and Warranties

Disputes in M&A transactions often result from breaches of fundamental representations and warranties regarding the target company and the transaction. Representation and warranty clauses involve promises and assertions about past or existing facts. Misrepresentation allows the buyer to cancel the contract, while a breach of warranty enables them to seek damages without rescinding the agreement.[65] These clauses also serve as closing mechanisms when disputes arise between signing and closing.[66] Additionally, they may become the focal point of arbitration proceedings, significantly post-COVID, when the world has once witnessed the pandemic-driven disrupted the *status quo* or financial projections initially presented by the seller at the signing.[67]

These clauses have become increasingly comprehensive to mitigate buyer risk and offer extensive protection. Nevertheless, sellers aim to limit their liability through disclaimers, exclusions, contractual limitation periods, and thresholds for claims. For such conflicts, arbitration is advantageous for efficiently resolving these disputes, offering a quicker solution than litigation and preserving the transaction and business relationship.[68]

b. Indemnity Insurance Clause

Following the representations and warranties clause, a widespread practice in M&A transactions involves securing insurance. [69] In essence, the buyer seeks indemnity from the insurer in case of a breach of the seller's representations and warranties. In these cases, the insurer understandably desires comprehensive access to all available information to fully assess the risk of indemnifying the buyer.[70] During the pandemic, insurers crafted these agreements seeking to absolve themselves of risks directly linked to COVID-19. However, it is important to note that in the

[65] Radjai N, 'Claims for breach of representations and warranties' (*LALIVE*) <www.lalive.law/wp-content/uploads/2020/03/NORADELE-FIRST-EDITION.pdf> accessed 1 September 2023.
[66] Ibid.
[67] Radjai (n. 64).
[68] 'Deloitte Forensic: Post-Closing M&A Disputes' (*Deloitte France*) <www2.deloitte.com/afrique/fr/pages/fusions-acquisitions/articles/deloitte-forensic-post-closing-m-and-a-disputes.html> accessed 05 September 2023.
[69] Risse J and Haller H, 'Post-M&A Arbitration: Warranty & Indemnity Insurance Changes the Scene' (*Global Arbitration News*, 12 January 2017) <www.globalarbitrationnews.com/2017/01/12/post-ma-arbitration-warranty-indemnity-insurance-changes-the-scene-2/> accessed 07 September 2023
[70] Ibid.

event of a default, the arbitration request will be directed at the insurers rather than the defaulting party. In these arbitration proceedings, the primary focus is on dissecting the technicalities of the insurance policy, which require meticulous examination and determination.[71]

c. Earn-out Clauses

Business valuation is crucial in M&A. Earn-outs are a critical mechanism in M&A deals for determining the price of asset and share acquisitions. They hinge on post-acquisition target company performance, incentivizing seller commitment to post-sale success.[72] These provisions entail additional payments to sellers based on future earnings, potentially leading to disagreements when evaluating future performance objectively.[73] While the locked-box mechanism fixes the price at the deal signing date based on past performance, buyer caution, especially amid and after the pandemic, has elevated the importance of Earn-out clauses.[74] An Earn-out involves future compensation for sellers if the business achieves specific financial milestones.[75] These metrics may involve Earnings Before Interest, Taxes, Depreciation, and Amortization ("**EBITDA**"), net income, or other financial and non-financial factors, leading to disputes due to their intricate implementation.[76]

However, disputes often arise when parties struggle to agree on Earn-out calculations, causing potential transaction delays.[77] Typical disputes involve selecting performance indicators and seller allegations of buyer manipulation, such as post-purchase changes in accounting or business operations.[78] This is exacerbated when purchase agreements, very often, outline provisional prices with open-ended adjustment mechanisms.[79] In international settings, differences in

[71] Risse (n. 68).
[72] 'Understanding Earnouts In Mergers And Acquisitions' (*Forbes*, 26 June 2021) <www.forbes.com/sites/allbusiness/2021/06/26/understanding-earnouts-in-mergers-and-acquisitions/> accessed 02 September 2023.
[73] Ibid.
[74] Brewis T and Cornelius E, 'Practical M&A: Locked box mechanism explained' (*Lexology*, 7 February 2018) <www.lexology.com/library/detail.aspx?g=07f72bba-9f63-408b-b219-843d44746e7f> accessed 07 September 2023.
[75] Ibid.
[76] Brewis (n.72).
[77] Understanding (n. 71).
[78] Brewis (n.72).
[79] Jhunjhunwala S, '[Opinion] Earn-out Arrangements in Mergers and Acquisitions – A Burnout?' (*Taxmann Blog*, 21 July 2023) <www.taxmann.com/post/blog/opinion-earn-out-arrangements-in-mergers-acquisitions-a-burnout/> accessed 08 September 2023.

cultural backgrounds and accounting/reporting practices among parties can complicate matters further.[80] Arbitration can resolve such disputes more efficiently.

d. Material Adverse Effect clauses

Material Adverse Effect ("**MAE**") clauses are commonly present in acquisition agreements, serving as a condition precedent for finalizing the transaction.[81] These clauses allow one party to reject the deal if the other experiences an MAE between agreement signing and closing, rendering the agreement null and void.[82] Consequently, MAE clauses frequently emerge as critical concerns in arbitration disputes. Many clauses now specifically mention pandemics or public health crises as MAE events. Typically, contracts include carve-out provisions that assign general market risks to one party.[83] In simpler terms, these provisions stipulate that changes or events agreed upon by both parties do not qualify as an MAE and, therefore, do not excuse the buyer's performance.[84]

e. Integration and Synergy Mismatch

Post-closing disputes often involve integrating the target company into the acquiring entity or achieving expected synergies.[85] Utilizing arbitration can effectively resolve these issues, enabling both parties to focus on realizing the transaction's full value.[86] Therefore, arbitration proves valuable for settling disputes in both the pre-and post-closing phases of M&A deals.[87] It promotes a better working relationship, ensures compliance with agreed-upon terms, and facilitates a smoother transaction conclusion.[88]

VI. Recent Trends in Arbitration Disputes: A Spotlight on Contemporary Cases

[80] Ibid.
[81] Talley EL, 'On Uncertainty, Ambiguity, and Contractual Conditions' (2009) 34 Delaware Journal Of Corporate Law 755 <https://core.ac.uk/download/pdf/230172432.pdf> accessed 08 September 2023.
[82] Ibid.
[83] Talley (n. 80).
[84] Talley (n. 80).
[85] Sengupta S, Integration in Mergers and Acquisitions: Bringing Together Type of Diversification, Synergy Potential and Cultural Distance' (2020) 13(2) NHRD Network Journal <https://doi.org/10.1177/2631454120922729> accessed 04 September 2023.
[86] Ibid.
[87] 'Information Asymmetry and Host Country Institutions in Cross-Border Acquisitions' (*PubMed Central (PMC)*) <www.ncbi.nlm.nih.gov/pmc/articles/PMC7790036/> accessed 07 September 2023.
[88] Sengupta (n. 84).

A. The Reliance, Future & Amazon Conflict

A notable dispute involving Reliance Industries Limited ("**RIL**"), the Future Group, and Amazon exemplifies the role of arbitration in international M&A transactions.[89] In 2020, the Future Group agreed to sell its retail, wholesale, and logistics business to RIL for $3.4 billion. However, Amazon acquired a stake in one of Future Group's subsidiaries in 2019, with a contractual clause preventing Future Group from selling assets to certain listed companies, including RIL, to prevent competition.

Amazon asserted that this deal breached its rights as a shareholder and constituted a contract violation.[90] Subsequently, Amazon initiated arbitration proceedings in Singapore, which ruled in its favor, effectively blocking the Future Group-RIL deal. Both RIL and the Future Group contested the decision in the Indian Supreme Court, which ultimately upheld the Singaporean arbitral award.[91] This case underscores the importance of arbitration in resolving disputes arising from international M&A transactions.

B. The Twitter-Elon Tussle

In December 2021, Twitter filed a lawsuit against Elon Musk, CEO of Tesla and SpaceX, alleging that he violated terms by posting content on Twitter without consulting Twitter's legal representatives.[92] Eventually, Twitter and Musk opted for arbitration to settle the dispute, with JAMS, a prominent alternative dispute resolution service provider, selected as the arbitrator.[93]

This case highlights the significance of contractual details in M&A deals, explicitly focusing on the MAE clause. Musk invoked the MAE clause, claiming that Twitter's inaccurate representations, especially regarding fake Twitter accounts, triggered adverse events. In

[89] *Amazon.com v. Future Retail Ltd*, SLP(C)1669-1670/2022.
[90] Ibid.
[91] 'Amazon-Future-Reliance Dispute - Supreme Court Observer' (*Supreme Court Observer*) <www.scobserver.in/cases/amazon-future-reliance-dispute-amazon-com-nv-investment-holdings-v-future-retail-ltd/> accessed 07 September 2023.
[92] 'Explained: Elon Musk's Legal Battle Against Twitter And The 'Indian Government' Connection' (*https://www.outlookindia.com/*) <www.outlookindia.com/national/elon-musk-refers-to-indian-government-and-local-laws-of-india-in-legal-battle-over-twitter-news-214597> accessed 05 September 2023
[93] Ibid.

response, Twitter contested Musk's claims, attributing his desire to exit the transaction to market downturns and stock price declines.[94]

These recent disputes illustrate the complexity and intricacies of M&A transactions, emphasizing the need for clear contractual provisions, effective dispute resolution mechanisms, and a much-required impetus to cross-border arbitration.

VII. Emerging Directions: Technological Transformations in M&A Arbitration

Technology is rapidly reshaping the landscape of M&A transactions and their dispute resolution. Automated legal processes have emerged as powerful tools in streamlining the fulfillment of conditions precedent, a pivotal step in completing M&A deals. These automated procedures are becoming increasingly standardized to seamlessly integrate with computer systems, resulting in more consistent and structured data sets.[95] The interaction of consistent data and machine learning is unlocking the potential for various artificial intelligence applications, including precise data analysis and predictive outcomes.[96]

Many M&A disputes hinge on accounting data, with the final purchase price often tied to a company's financial reporting, closely scrutinized against contractual reference dates. Traditionally, resolving such disputes involved the painstaking work of accounting or valuation experts who would meticulously review data and documents.[97] They would then filter and analyze this information, providing their expert opinions in written reports, which would subsequently be subjected to rigorous cross-examination.[98]

Today, leading legal and accounting teams harness various cutting-edge technology tools to streamline this process.[99] These tools encompass e-disclosure systems that leverage predictive

[94] Explained (n. 91).
[95] '(M)ergers & (A)rbitration: an increasingly popular choice for deal disputes?' (*DLA Piper*) <www.dlapiper.com/en/insights/publications/arbitration-matters/2023/mergers-arbitration-an-increasingly-popular-choice-for-deal-disputes> accessed 7 September 2023
[96] Ibid.
[97] 'The Rise of M&A Arbitration' (Kluwer Arbitration Blog) <https://arbitrationblog.kluwerarbitration.com/2021/04/06/the-rise-of-ma-arbitration/> accessed 08 September 2023
[98] (M)ergers (n. 94).
[99] 'M&A disputes: How the arbitration landscape has changed and where technology might take it next' (*Norton Rose Fulbright*) <www.nortonrosefulbright.com/en-pg/knowledge/publications/f06742e3/m-and-a-disputes-how-the-arbitration-landscape-has-changed-and--where-technology-might-take-it-next> accessed 07 September 2023.

coding to effectively organize large data sets and data visualization and analytics tools that clearly and persuasively present complex data to tribunals.[100] This underscores the progressive and evolving state of advocacy in M&A disputes.

However, as data continues to evolve into a more objective and structured form, especially with the integration of legal tech solutions into the early stages of transactions, the emergence of improved, innovative, process-driven solutions can be reasonably anticipated. These solutions will transcend mere enhancements to traditional dispute resolution methods, as disputes regarding condition precedent compliance, representation accuracy, or price adjustments increasingly rely on computers' interpretation of consistent and objective data.[101] This shift will minimize the need for subjective human interpretations.[102] Hence, technology is set to revolutionize the way M&A deals are managed and disputes are resolved, ushering in a more efficient, data-driven, and objective approach to addressing conflicts arising from transactional agreements.

VIII. Analysis and Conclusion

The recent surge in M&A arbitration's popularity appears poised for ongoing growth. Even before the COVID-19 pandemic, the clear advantages of arbitration over litigation were evident. With a continued increase in disputes, this trend has retained its momentum in the post-pandemic world. Considering this, arbitration is evident as an effective dispute resolution mechanism in all phases of M&A transactions. Arbitration stands out as an efficient dispute resolution tool in M&A agreements, offering distinct advantages such as confidentiality, efficiency, and flexibility. This holds true both domestically and in the international context.[103] However, cross-border M&A disputes have seen the greatest utilization of arbitration to settle concerns amicably.[104]

[100] Ibid.
[101] 'Gaining M&A Speed Through Technology Audio Brief' (*Harvard Business Review*) <https://hbr.org/sponsored/2023/07/gaining-ma-speed-through-technology-audio-brief> accessed 06 September 2023.
[102] Ibid.
[103] 'Arbitration of Cross-Border M&A Disputes' (*Kluwer Arbitration Blog*) <https://arbitrationblog.kluwerarbitration.com/2015/04/21/arbitration-of-cross-border-ma-disputes/> accessed 02 September 2023.
[104] Ibid.

Crafting arbitration clauses in M&A contracts, especially in complex multi-party and multi-contract scenarios, demands the dedication of special attention, diligence, and creativity.[105] Buyers and sellers should carefully contemplate potential disputes, the selection of arbitration seats and rules, and how arbitration clauses in related agreements interact. Ensuring that arbitration clauses align with the transaction's requirements is essential, ultimately promoting an efficient and cost-effective dispute resolution process. Therefore, parties involved in structuring M&A agreements should thoroughly assess the implications and prerequisites of arbitration, tailoring the procedure to their specific needs, and consider its use in the pre-closing and post-closing stages, where disputes may arise.

Two critical factors can contribute to successful M&A arbitration: *first*, the meticulous drafting of a well-crafted arbitration agreement, preferably a collaborative effort involving transactional and arbitration lawyers, or the selection of a reputable arbitration institution's model clause; and *second*, the careful choice of experts. The expertise and professional impression conveyed by these experts can be pivotal in shaping the outcome of a case.

The continued growth and adoption of arbitration in M&A transactions, careful consideration of arbitration clauses, and the selection of experts play crucial roles will ultimately contribute to more efficient and cost-effective dispute resolutions in this complex landscape. This gives a glimpse of hope that the commercial world of law will similarly ingrain the principle of arbitration over litigation globally, well expressed in the words of Sandra Day O'Connor, the first female justice in the United States Supreme Court:[106]

"*The courts […] should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried*."

[105] Experts (n. 44).
[106] 'Collaboration, Settlement, Resolution - Boston Law Collaborative' (*Boston Law Collaborative*) <https://blc.law/resources/quotes/collaboration-settlement-resolution/> accessed 03 September 2023.