Global Arbitration Review

The Guide to M&A Arbitration

Editor
Amy C Kläsener

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Andrew Grantham, Kai Schumacher and Greg Huitson-Little[1]

Introduction

For many, the M&A transaction is a straightforward one. The price is agreed, contracts are signed, price adjustments are decided amicably between the parties, the keys are handed over and the newly combined businesses start working together successfully. Everyone is happy. However, this is not always borne out in reality. The price agreed may not necessarily reflect the value that, ultimately, was expected, and could at times be wildly different. Once in control, the purchaser may find that what they thought they had bought is not what they actually bought. Disputes can quickly arise, and the legal process soon follows.

There are a number of reasons why M&A disputes arise. Many will be familiar with disputes centring on incorrect purchase price adjustments, calculations of earn-out provisions, or breaches of warranty. But disputes may also arise from breaches of exclusivity, the failure to close transactions, directors' and officers' liabilities, 'unlawfully flattering' business plans, or the non-disclosure of information relevant to decision making.

M&A disputes can be of critical importance for the parties involved. The financial cost could be substantial: we have seen adjustments to the 'agreed' price of more than 50 per cent, worth millions. But they can also be extremely distracting to the newly combined/acquired businesses, especially in situations where key people within the business may have been a part of the M&A transaction and so have personal interests in the dispute.

In this chapter, our focus is on the quantum expert's role and the benefit a quantum expert can provide in an M&A dispute.[2] We consider how a quantum expert can assist the arbitral tribunal and ultimately the parties in dispute. We look at the types of expertise that

1 Andrew Grantham and Kai Schumacher are managing directors, and Greg Huitson-Little is a director, at AlixPartners.

2 Our perspective is that of financial experts: while we have an appreciation of legal matters and touch on some legal aspects (difficult not doing so when considering this topic), we are not lawyers and any comments on the law or legal aspects of M&A disputes are based on our experience and understanding.

a quantum expert can bring to M&A disputes. We also consider when the quantum expert can be used not as an expert witness but as an advisor. Finally, drawing on our own and our colleagues' experiences, we share some insights into ways in which a quantum expert can present evidence that is both compelling and understandable to the arbitral tribunal.

Identifying the expertise required: an underestimated task?

The consideration of what expertise is required of a quantum expert is a task often underestimated in M&A disputes. The potential variety of issues means that they can be rather complex, both legally and financially, compared with other commercial disputes. A variety of disciplines, skills and experience may be needed.

Broadly, there are three technical disciplines that the quantum expert may bring to M&A disputes: accountancy, investigation and valuation. Each has its place depending on the issue in dispute. In contrast to other commercial disputes, it is not uncommon to need a quantum expert skilled in all three disciplines. Identifying the expertise required early is important for the efficient running of the case, to provide focus, and to reduce the costs involved.

In some M&A disputes, one discipline may be all that is required. For example, completion accounts disputes will often turn on how the completion statements are drawn up from an accounting perspective. However, in many situations, a combination of disciplines may be needed. A breach-of-warranty case may need investigative and valuation expertise, to show the breach and to value the effect. If the warranty is an accounting one, then often all three disciplines will be needed.

This is also another key differentiator between M&A disputes and many other financial disputes: M&A disputes often include claims that are financially interdependent. The success of a claimant in an M&A dispute not only depends on whether the claimant is able to expose and prove the facts justifying its claim, but also how these interdependent claims are dealt with. For example, the breach of a balance sheet warranty and a breach of an information disclosure warranty may be two separate claims, but may both affect the purchase price agreed, the price adjustment claimed and the earn-out calculation. The interdependencies between the claims should be carefully analysed, so that there is no double-counting of the financial effect of the breaches.

In addition to the technical expertise, there are other areas worth considering. The quantum expert may also need to understand (and perhaps have direct experience of) the requirements and mechanics of due diligence exercises. Having direct experience in undertaking M&A transactions is another big plus. Appreciating the drivers of a transaction, the motives of parties and how deals are done in practice, may bring some useful insights to a dispute. Industry experience can also be helpful but is often less important when addressing the questions of loss and damage.

There is rarely an expert that can cover everything. Thus, identifying the key areas is important, and sometimes there is a careful balance to be struck. Unfortunately, especially in M&A disputes, experts often lack one or more of the skills or types of experience required. Frequently, the mandated expert is from either the transaction advisors involved in the M&A deal or accountants associated with the transaction. In M&A disputes, often an accounting background or company valuation expertise alone is insufficient. Furthermore, the interdependencies between the different claims and how to assess the underlying facts

for each claim is a characteristic that is relatively unique for M&A disputes. Mastering the interdependencies and finding, as well as assessing, the right facts distinguish the good quantum experts.

Financial experts may also be involved in M&A disputes as a member of the arbitral tribunal or, if the sale and purchase agreement so dictates, as the determining expert. Determinations are not uncommon in M&A disputes but can arise in other situations. As well as considering the matters in dispute, those who act as determining experts also run the dispute resolution process. This can add an interesting complexity: the formalities around the determination process can be tricky to manage. Occasionally, the determining expert has to consider legal points, and that may require the assistance of external counsel.

We now turn to the three main technical disciplines that the quantum expert may bring to M&A disputes: accountancy, investigation and valuation.

The expert's role in accounting elements of M&A disputes

It's no surprise that many M&A disputes have, at their core, an accounting issue. After all, for purchasers and sellers, the financial statements are the one 'certain' record of an entity's financial position and performance. In most M&A transactions, the purchase price and any adjustments are tied to some form of financial reporting. As a consequence, accounting expertise is a frequent requirement for quantum experts in M&A disputes, coupled with the need for investigative or valuation skills, as the case requires.

Generally, there are two commonly used mechanisms for agreeing the price to be paid: 'locked box' and 'completion accounts'. The quantum expert's role can differ significantly under each mechanism.

Under the locked box mechanism, the purchase price is set by reference to a set of financial statements at a certain date and fixed. Most often, the last audited financial statements are chosen for practical reasons. Between the locked box date and the closing date, the sellers retain day-to-day control of the business, although there is usually a process to reimburse the purchaser if there has been value leakage beyond that permitted under the sale and purchase agreement. In effect, the economic benefits transfer from the sellers to the buyers as at the locked box date.

The locked box mechanism is generally thought to protect the seller. While there may be debates around the preparation of the financial statements, once the parties enter into the sale and purchase agreement the locked box accounts (and so the price) are usually fixed. From an accounting perspective, unless the locked box accounts were manipulated in some way that could not have been identified during the financial, commercial or tax due diligence and so become the subject of a warranty claim, or unless there are disagreements as to the calculations under leakage provisions, there is little call for a dispute and an accounting expert.

By contrast, the completion accounts mechanism can be prone to accounting disputes. Under this mechanism, an initial price is agreed between the parties. However, the ultimate price is set by reference to a set of completion accounts to be drawn up as at the completion date, as set out in the sale and purchase agreement. The basis of preparation can be specified to be consistent with the business's annual or statutory financial statements, however, often they are not. Sale and purchase agreements often include a requirement for completion accounts to be drawn up according to (1) specific rules, (2) consistency

with prior sets of accounts and (3) generally accepted accounting principles. Despite best intentions, it is all too easy for ambiguity to be unwittingly introduced as the agreement is drafted. Agreements need to set out a clear order in which to apply these rules – sometimes described as a hierarchy – otherwise inconsistencies will immediately arise. Even then, if the specific requirements are not clear and unambiguous, or are too vague or generic in the way they are drafted, disputes can and will arise.

Here, the accounting expert is extremely important. He or she can assist the tribunal in interpreting financial language in agreements and, importantly, the implications of different interpretations. Often there is a range of accounting treatments permissible, particularly when it comes to consistency with prior sets of accounts or generally accepted accounting principles. The skill of the accounting expert is much more than a purely technical application of a set of rules; he or she will often need to draw on practical experience to use the facts and information before them to arrive at accounting judgements. An accounting expert who can explain clearly to the tribunal why a particular treatment is appropriate is invaluable.

It is worth remembering that the use of the accounting expert is not just confined to the role of expert witness. Wherever there is a pricing mechanism tied to some accounting measure (for example earn-out provisions), the skill of the accounting expert can be deployed in an advisory capacity to drive value for clients in all forms of dispute resolution. We also see clients and their legal advisers consulting accounting experts at the pre-contract stage to review the clauses in the sale and purchase agreement. It is not uncommon for an M&A dispute to be set in motion – inadvertently or otherwise – even before the contracts are signed, and for a dispute to be an inevitability. Using an accounting expert at this early stage can help clients anticipate and manage the risks of disputes arising.

The expert's role in investigative elements of M&A disputes

In many breach of warranty claims, the quantum expert is asked to consider both liability and quantum. The two aspects go hand in hand, particularly if the breach is of a financial warranty, such as those relating to the collectability of debts, the loss of significant customers or the valuation of stock. It goes without saying that an investigation of the facts is essential to both determining if there has been a breach and then what the damages might be. The nature of the breach might well determine what kind of investigation is required – establishing whether debts have been paid will be far simpler than whether there has been a misrepresentation or even fraud.

The investigation of the facts, more than with most other commercial arbitrations, can often be an iterative process requiring the know-how of accounting (for quite common representation and warranties related claims) and of valuation (for the likely quantification of a loss in value). If the investigation has been performed by another party, however, such as a forensic investigator or lawyer without involvement of the quantum expert, often the facts established do not include all aspects required for a full assessment of the damages. For example, the interdependencies often seen between the financial claims have not been entirely established and understood.

The investigation will undoubtedly require analysis of the accounting records, and particular attention will need to be given to key reference dates, especially if there is a locked box mechanism. This leads on to considering what information might have been given

during the due diligence phase, particularly if the buyer considers that not all information relevant to the price was provided. It could lead to a situation in which the buyer claims that they have been intentionally deceived by the seller. In many jurisdictions, such a claim may make a contractually agreed limitation of liability clause redundant.

The development of the factual matrix and a chronology of events will undoubtedly require a forensic IT exercise, whether that be in unstructured data (e.g., emails, documents, voice recordings, contracts, mobile phone data) or structured data, stored in databases (e.g., the accounting system, invoicing, money transfers). This presents the challenge of having to filter both sets of data and finding a way to bring these together to fully understand the event. Data convergence describes the process and technology that is now being deployed to automate the filtering and linking of relevant data from all relevant data sources, so that it can be presented to a reviewer on a single platform. Data-convergence tools reduce cost, speed up reviews, and minimise the risk of crucial evidence and context being overlooked.[3]

Where the fundamental focus of an investigation or dispute is concerned with the relationships between entities, especially those of money flows, or any sort of patterns in metrics over time (for example unit price changes) then data visualisation can be a powerful tool for exploring these and explaining these to the tribunal. Numerous data visualisation software packages are available on the market (e.g., Tableau, Qlik) that can offer relatively quick-to-build dashboards that allow a user to explore and understand structured data in a visual and intuitive way. Where more bespoke data visualisations are required, one solution is D3, which is a library of pre-made JavaScript, which allows a skilled programmer to develop visualisations quickly and efficiently. As D3-based visualisations are bespoke, quick to develop and easy to deploy, they are very useful for one-off investigations or analysis, where the sheer volume of data makes it difficult to interpret when shown as simply lines in a spreadsheet. This especially applies to M&A disputes, which more often than not relate to hundreds or thousands of contended accounting entries.

The expert's role in valuation elements of M&A disputes

In M&A disputes, valuation skills are more often needed than one might think. Even in M&A disputes that at first seem only to relate to an (alleged) breach of balance sheet representations and warranties, both accounting and valuation expertise is required. The skill in the valuation expert lies in the ability to ask broad, open questions to give a clear picture as to the effect on value, and so address how any breaches or harm would have affected the price paid.

Too often, a euro-for-euro award illustrates the frequent misunderstandings related to a balance sheet misrepresentation. Similarly, where a transaction has been valued by reference to a multiple of profits, that multiple might be used again in an assessment of damages, without due consideration as to whether the effect was long term or a one-off. Furthermore, interest rate effects, tax effects, interdependent damages and mitigation efforts (sometimes overlooked) have a bearing value of the acquired company.

3 At AlixPartners, for example, we have pioneered the development of a new system (SHARP), which presents unstructured and structured data (e.g., sales emails and related records from the sales database) alongside one another in a single application.

In the M&A context, sophisticated damages models including multi-period damages modelling may be required. Usually, quantum experts will deploy economic analysis that considers a counterfactual (but-for) world. The counterfactual is the heart of each damage assessment. Economic and financial analysis provides tools to understand how markets and commercial situations may have developed and translated into cash-flows. This involves analysing not just the outcomes, but also what drives those outcomes. From this understanding of the drivers, the quantum expert can infer on the outcomes in the but-for counterfactual world.

Two models, actual and but-for, are required to estimate the economic or financial harm. The modelling tries to explain complex interactions and behaviour. Invariably the model will depend on a combination of facts, assumptions, data availability, an appropriate methodology and a sound mathematical calculation. The facts and assumptions on which the calculation is based can be especially open to (1) individual interpretations, (2) different understandings, (3) errors and (4) different instructions. As such, the reliability of the modelling is a function of the strength of the methodology, the reasonableness of the variables and the input assumptions.

Often the damage or loss is tied to the effect on price paid or value assumed and being able to demonstrate this by reference to a financial model or calculation. There is no reason why the experts cannot be directed to meet and try to agree a financial loss model (or calculation). If such a model can be agreed, the tribunal will need only consider the major disputed assumptions that feed into the model. The submissions become far simpler: a list of alternative assumptions, together with each expert's view, can be provided for the tribunal to consider and rule on. Once the tribunal reaches a view on the alternative assumptions, the experts (or even the tribunal with an easy-to-use, well-designed model) can insert these into the model and thereby have an assessment of loss.

As with all expert evidence, the tribunal is often reliant on the parties' own appointed experts, their written reports, and the skill of the cross-examiners at the hearing. Valuation evidence tends to be relatively complex. By its nature, it draws together many threads running through other evidence, takes into account the various interplays and interdependencies, and ultimately distils everything into one number. For those not used to dealing with valuation concepts regularly, it can be very difficult.

One additional way in which tribunals can consider the experts' valuation evidence is through the use of expert conferencing, or hot-tubbing. In this way, the tribunal can ask its own questions (not that it cannot in any event) and explore together with the experts how the facts and assumptions feed into the calculations, the effects on value of the various claims, and where the differences lie between each expert's evidence and why they differ. In our experience, expert conferencing when used by tribunals can be very useful: it moves the examination of expert evidence away from a potentially hostile cross-examination of each expert, to be much more of a dialogue between the tribunal and the experts. Having the experts give their evidence concurrently and under the control of the tribunal allows them to provide real-time clarifications and responses to each other, and for points to be conceded or agreed as they are discussed. Seeing both experts together is also a useful way for the tribunal to test whether either expert is taking an unreasonable or unsustainable position.

We do not want to overlook the use of a single joint expert. This might suggest cost-efficiencies, but it can be difficult for agreement to be reached on appointment, and there are often procedural difficulties around instructions, scope of work, the information provided to the expert, and how the expert interacts with the parties if he or she needs more information or instruction. The use of a single expert also means his or her evidence is less likely to be challenged, and absent alternative expert opinions or evidence it can be difficult for the tribunal to move away from the evidence if it wanted to. This is particularly important in valuation work where the assumptions and calculations can be subjective, and where the issues can be complex. To address this, we often see parties appointing their own expert as an adviser, negating any cost benefit.

We have also seen cases where the tribunal asked the parties for permission to appoint its own expert to assist them in the valuation aspects – not as a witness, but as a behind-the-scenes adviser. This is especially useful in the larger and more complex valuation cases. Such advisers are themselves usually people who have acted as expert witnesses and so are fully used to the arbitral process. The expert adviser can help the tribunal to focus on the key aspects of the valuation evidence, and can be of real assistance in cases where the valuation aspects are particularly challenging and require deep technical expertise.[4]

The presentation of expert evidence

No one will disagree that expertise and experience are important for any quantum expert. But equally important is the ability to communicate and present evidence both written and oral to the tribunal.

Ahead of any hearing, the mainstay of expert evidence on quantum has been and remains the written report. With an expert for each party, this often runs to the rigid process of first reports and reply reports, and, depending on the arbitral institutions and the arbitrators, may include joint meetings and joint statements or further reports. We are also seeing experts being asked to meet ahead of preparing their reports, to agree information requirements, input assumptions and valuation methodologies, with a view to narrowing issues (and saving costs) ahead of initial reports.

When it comes to the expert's evidence, there is much talk about alternative methods of giving evidence, such as presentations, videos and animations. But there will be no getting away from written reports for the foreseeable future. The question is how to make written evidence more effective. We should not forget its primary purpose – to support the tribunal in matters outside of its own expertise. The expert and his or her evidence must be, of course, compelling, but also accessible. In written reports, based on our experience, a mix of written and visual evidence is powerful. Just as pictures speak a thousand words so graphs speak a thousand numbers. Graphs and diagrams, done well, make complex data accessible and intelligible. There is a balance to be struck here; graphs and diagrams must be relevant to the issues at hand and be part of the expert's discussion. But they can also help to focus in quickly on what really matters in a dispute and what is actually peripheral.

When it comes to presenting evidence before a tribunal, there are many ways to make that evidence memorable and educational. Each person understands best in a different way

4 This is a relatively unusual solution but one which one of the authors has close experience of.

– some understand best through reading, some through seeing, some through hearing and some through experiencing. The arbitral hearing is the first time that an expert can give evidence orally. More recently, hot-tubbing or expert conferencing has been used more frequently by tribunals to hear expert evidence, sometimes in place of cross-examination, sometimes in addition to it. As we discussed above, it is a useful way for the tribunal to hear directly from the experts on the differences between them, and may also be a forum in which the experts can reach consensus. We are seeing more use of presentations, where the experts are each given time to summarise their reports and identify the key aspects and differentiators for the tribunal. Being able to present well is becoming more important for the quantum expert. Today, the technology exists for more interactive presentations, and in some cases it may be possible to use visualisation tools to help demonstrate the effect of assumptions and inputs dynamically, which allows for the tribunal to comment and even contribute during the presentation.

Conclusion

M&A disputes, much more than commercial disputes, require quantum experts with expertise in multiple areas. This could include technical disciplines – accountancy, investigation and valuation – and it is not uncommon to need a quantum expert skilled in two, or even all three, of these disciplines. In addition, the quantum expert may need to understand the requirements and mechanics of due diligence exercises and in undertaking transactions. There is rarely an expert that can cover everything, so identifying the key areas is important for the efficiency of a case, and sometimes there is a careful balance to be struck.

Each discipline has its place: accountancy expertise is often at the core of a case; investigative expertise is required in determining if there has been a breach and then what the causes leading to damage might be; and valuation expertise will be needed to ultimately assess the effect on value and price, and so the losses suffered. While accounting issues are the basis for many M&A disputes, more often than not a pure accounting specialisation is insufficient for the quantum expert. In many instances, an investigation in the accounting records and business plan preparation process with particular attention to key reference dates is needed. A development of a factual matrix and a chronology of events will undoubtedly require a forensic IT exercise. We see new investigative IT systems, which present unstructured and structured data alongside one another in a single application. They make it easier to detect and communicate relationships and causation, especially in instances with numerous transactions. Moreover, data visualisations are becoming a powerful tool for exploring and explaining such relationships to the tribunal.

There are many techniques and tools that can be employed by the quantum expert in assisting clients, and the tribunal, in the resolution of M&A disputes. The role an expert can play is not just that of expert witness: experts can act as adviser to a party or even as adviser to the tribunal. Experts mandated to act as adviser are well placed to provide assistance and add value throughout the deal cycle.

Finally, when it comes to presenting evidence before the arbitral tribunal, the tried and tested written report is being supplemented by new ways of presenting evidence. Recognising how people understand – visually using graphics, aurally through presentations at the hearing, even tactilely through the tribunal exploring expert evidence and analysis – can in turn help to create compelling, but accessible, expert evidence.

Appendix 1

The Contributing Authors

Andrew Grantham
AlixPartners

Andrew Grantham has dealt with litigation matters and financial investigations since 1991. His experience as an expert witness covers many aspects of accounting, financial and damages matters, including breach of contract and loss-of-profits claims, claims arising following acquisitions and sales of businesses (including breach of warranty and completion account disputes) and business valuations.

He has given expert evidence in the English High Court and Crown Court, as well as in international arbitrations on over 30 occasions. He has given evidence in ICC, ICSID, LCIA, LMIA, UNCITRAL and various *ad hoc* arbitrations around the world. Andrew has acted as an arbitrator and regularly acts as a neutral determining expert on completion account disputes.

Andrew has received the following references in *Who's Who Legal*: '"a consummate professional" who is "greatly respected" by peers and clients alike.' 'Andrew Grantham is highly recommended by market sources, who praise his outstanding testifying work in arbitration proceedings, most notably those relating to the construction industry.' 'Andrew Grantham draws international praise for his strong expert witness practice and testifying experience before UK courts and international arbitral tribunals.'

Andrew is a fellow of the Institute of Chartered Accountants in England and Wales and a fellow of the Expert Witness Institute. He was a governor, chairman of the finance committee and treasurer of the Expert Witness Institute from 2007 to 2014.

Kai Schumacher
AlixPartners

Kai uses the power of facts and financial analysis to quantify damages in international arbitrations and litigations, to perform forensic investigations, to evaluate assets and businesses, to facilitate M&A transactions and to conduct monitorships. Having led more than

150 engagements with values of up to €170 billion and involving entities from 53 countries, he has successfully advised clients for about two decades. Since 2012, Kai has been one the world's leading experts in commercial arbitration, according to *Who's Who Legal: Commercial Arbitration*, and since 2015 he has been consistently nominated as one of the 10 'most highly regarded individuals' in this field. Kai has received the following references in Who's Who Legal: Kai is 'a first-class expert with the ability to convince a tribunal, even in very difficult circumstances'; he has an 'extremely responsive and proactive approach', complemented by 'creative ideas and a great communication style, as well as an excellent business understanding'. Kai holds an MBA from the HEC School of Management in Paris, and is a CPA and CFA.

Greg Huitson-Little

AlixPartners

Greg Huitson-Little works with clients on the financial aspects of litigations and disputes, both domestically and in international arbitration. He provides advice throughout the litigation process: during pre-action stages when considering whether to bring a case, an early assessment of where losses may lie, advice in relation to information and evidence that may be required, right through to detailed assessment of losses and the preparation of expert evidence for use in court or arbitration. Greg has a particular interest in matters relating to intellectual property and technology, but nevertheless maintains a broad, pan-industry practice. His M&A practice includes advice to clients during the completion phases, providing evidence in breach of warranty matters, and working in expert determination processes both as an advisor and as determining experts. Greg holds the degree of master of mathematics from the University of Oxford and is a fellow of the Institute of Chartered Accountants in England and Wales.

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M&A disputes can be unique in their hostility and complexity. *The Guide to M&A Arbitration* – published by Global Arbitration Review – is a new, practical guide intended to provide guidance on what merger parties should think about, when. It pools the wisdom of specialists who describe how to prevent these disputes arising and how best to resolve them when they do. The guide is structured in two sections. Part I consists of 10 chapters on planning and procedural issues, covering everything from drafting clauses to how to structure contracts to minimise the potential for disputes. Part II offers a geographical survey of important differences in national laws that may affect the outcome of a dispute. It is written by 39 specialists from a variety of backgrounds and takes a practical approach throughout.

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