

The best dispute resolution conference of this decade was held in Warsaw

‘The best dispute resolution conference of this decade’ as described by one of the participants. On May 13 and 14 nearly 300 legal and business professionals attended the ‘Dispute Resolution in M&A Transactions’ Conference in Warsaw. The conference was organized by the Lewiatan Arbitration Court and supported by the ICC International Court of Arbitration, ICC Polska, American Bar Association and ArbitralWomen. The idea of the conference belongs to **Beata Gessel-Kalinowska vel Kalisz**, managing partner of the GESSEL law firm and Vice-President of the Lewiatan Court of Arbitration, who together with **Yulia Andreeva of Debevoise & Plimpton LLP**, co-chaired the Conference. The Conference was co-financed by the European Union within the European Social Fund, as a part of a project promoting amicable methods of commercial dispute resolution, being carried out by the Lewiatan Arbitration Court. The honorary patronage over the Conference was bestowed by the Ministry of Foreign Affairs of the Republic of Poland.

The ArbitralWomen association, a large network bringing together women practicing international dispute settlement from all around the world, played a special role in organizing the conference. Mireze Philippe and Louise Barrington, co-presidents of the association, were instrumental in organizing and promoting the event from the very beginning. ArbitralWomen members, including Prof. Gabrielle Kaufmann-Kohler, Wendy Miles, Alice Broichmann, Viliija Vaitkute Pavan, Cristina Martinetti and Sophie Nappert, were involved in the conference as moderators, speakers and advisory board members.

The conference was the first international arbitration conference ever held in Poland. It served as an important platform for an exchange of ideas in a novel area of debate, arbitration of M&A disputes. The event had a truly global reach with participants from over 20 different countries, including France, Germany, Austria, Italy, Switzerland, Spain, Sweden, Czech, Romania, Bulgaria, Lithuania, Latvia, Russia, the United Kingdom, Pakistan, Turkey and USA. The Lewiatan Court’s website where the conference was broadcasted in real time counted nearly 600 hits over the two conference days. Even so, the size of the Conference was secondary to “the unusually high quality of the presentations and attentiveness and enthusiasm of the audience which was striking,” according to John Beerbower of Cravath Swaine & Moore LLP, who delivered the closing remarks. This opinion was shared by the audience, who filled the conference room up to the last chair throughout the two days of the conference.

On Thursday, 13 May, conference participants were greeted by Dr. Beata Gessel-Kalinowska vel Kalisz and Yulia Andreeva, conference co-chairs. Dr. Maciej Szpunar, Deputy Minister of Foreign Affairs of the Republic of Poland, Henryk Orfinger, President of the Board of the Polish Confederation of Private Employers Lewiatan, and Prof. Andrzej Szumanski, President of the Lewiatan Court of Arbitration, delivered opening remarks. They emphasized the increasing presence of Poland in the global markets and the need to educate users about the pros and cons of arbitration as a dispute settlement both in the commercial context and in disputes involving public interests.

The panel topics were built around the main theme of the conference, namely the role of arbitration in resolving disputes arising from international M&A transactions. The speakers covered a broad range of issues, from pre-closing disputes to protecting public interests in M&A transactions. A wide variety of perspectives – legal and business, corporate and arbitration, government and private, Polish and international – were heard and debated in the course of panel discussions and a Q&A with the audience.

The first panel, moderated by Prof. Dr. Gerhard Wegen, focused on the question whether arbitration has competitors. This question was answered with a definite “yes” by the panelists, who went on to describe the distinct features of proceedings before local courts of the United States, the United Kingdom and Poland. [ICC is NOT an alternative to arbitration. It IS arbitration] Simon Greenberg, the Deputy Secretary-General of the ICC, countered by sharing the institutional perspective on arbitration proceedings arising from M&A transactions administered by the ICC. The ICC statistics he offered demonstrated an increasing resort to arbitration in M&A disputes. The panelists debated the strengths and weaknesses of the various means of dispute settlement and discussed the potential for the greater use of mediation.

The second panel was chaired by Wendy Miles of WilmerHale in London and discussed the potential for fast track arbitration proceedings in connection with pre-closing M&A disputes, where speed of resolution can be essential to the viability of the transaction and even to the economic health of the parties. The panelists describe the types of pre-closing disputes that may arise, debated what one would expect as “fast” and outlined the potential options for “fast track” and expedited, emergency rulings in courts of Poland, Sweden, Germany and Switzerland and in arbitrations administered by the institutions in Sweden, Germany and Switzerland. The options under the ICC and LCIA were also described. In addition, the panel outlined some creative potential procedures to which the parties could agree for ad hoc arbitration in order to accommodate the needs of pre-closing dispute resolution. However, the panel also noted the tensions between speed and the need to satisfy a court asked to enforce the award that due process had been achieved.

During luncheon, Piotr Nowaczyk, Salans, Member of the ICC International Court of Arbitration, delivered his welcome speech, following his own guide lines for a good speech: ‘A speech should be like a mini skirt. Short enough to be attractive. Long enough to cover the essentials’.

The third panel, moderated by Dr. Karl Wach of Wach + Meckes LLP discussed arbitration in connection with post-closing disputes. The panel used a series of hypotheticals concerning a four party transaction. Based on those factual scenarios, the panel discussed issues of indemnification and third-party claims and the expected impact of the result of one arbitration on subsequent arbitrations involving a different array of parties to the arbitration. The panelists describe how certain legal issues concerning co-causation and mitigation of damages would be resolved if the laws of Poland, Spain or

Austria were to apply and what the situation concerning joinder would be under the rules of different arbitration institutions, including the Lewiatan Court of Arbitration.

The fourth panel, chaired by Dr. Beata Gessel-Kalinowska vel Kalisz, debated another post-closing hypothetical involving representations and warranties for a particular type of transaction involving the acquisition of shares representing a minority interest. Again, the panel described how different issues would be analyzed and potentially resolved under the laws of different jurisdictions, including the United States, Germany, Switzerland, France, Lithuania and Poland. Interesting controversy was raised between Siegfried Elsing, who presented the standpoint of German courts refusing claims for breach of representations and warranties concerning business of the target company in minority stake transactions, unless specifically provided and Beata Gessel, who defended the opposite opinion. The panelists also discussed issues of the calculation damages for such claims. The vibrant issue was an influence of EBIDTA or other multiples on calculation of damages.

Both panels identified the drafting of contractual clauses and arbitration provisions to achieve the desired results to be challenging.

The first day of the conference concluded with a lovely piano performance of Chopin's compositions by Joanna Lawrynowicz and a wonderful dinner in the green pavilion in Park Lazienkowski. The conference resumed on Friday morning with a presentation by Dr. Cristina Martinetti of Buffa Bortolotti & Mathis on the activities of the ICC in developing model contracts for various types of situations including M&A transactions.

The fifth panel, chaired by Dr. Philip Habegger of Walder Wyss & Partners in Zurich, featured a conversation with in-house counsel, who shared the perspective and expectations of users of arbitration.. The panel covered a broad range of issues, from selecting an outside counsel to cutting costs. Among other practical issues, the panelists stressed the need for better education of clients by their counsel of the benefits and pitfalls of arbitration and of the types of arbitration provisions that should be included in M&A contracts. The panel noted, in apparent agreement with some of the previous speakers, that the drafting of an arbitration clause in a typical M&A contract is often done at the "eleventh hour" by transactional lawyers with inadequate understanding of the issues and choices involved. Turning to increasing costs of arbitration, the panelists were unanimous that discovery has very little value in arbitration and must be avoided to reduce costs. A growing concern with the amount of time it takes to get to settlement was also prevalent in the discussion. However, the speakers agreed that at the end of the day, where local courts are not available, arbitration remains the main choice in business disputes.

The sixth and final panel, moderated by Yulia Andreeva of Debevoise & Plimpton LLP, was devoted to protecting public interests in M&A transactions, which are conceived as essentially private and contractual in nature, and disputes arising from them. The do's and don'ts of disputes involving states and state entities were at the center of the

debate. The panel looked at the topic from the various angles, including private practice, the arbitrator's perspective, and the government's point of view. Mr. Maciej Martynski of Poland's Prokuratoria Generalna, which defends the interests of Poland in litigations and arbitrations, argued that Polish courts provide the most efficient forum for resolving claims against the Polish state, which appears as respondent in 90% of disputes. In his view, arbitration lacks the simplicity and openness of litigation. Discovery, greater emphasis on the burden of proof, and a lack of success stories were also noted among the disadvantages of arbitration from the government's perspective. The issue of transparency and confidentiality of arbitration was further touched upon by the speakers, leading to a heated debate as to whether it is in the state's interest that arbitration remain confidential. While Professor Rajski maintained that it is, other speakers disagreed, noting that the state as defendant has an interest in keeping the details of its disputes behind closed doors. The panel concluded with a lively discussion about what arbitration practitioners can do to make arbitration more attractive to governments.

John E. Beerbower of Cravath Swaine & Moore LLP delivered closing remarks, dynamic, thoughtful and optimistic. Summarizing some of the main themes of the conference, he noted the apparent consensus that challenges and opportunities of arbitration could not be the concerns just of the arbitral institutions and professional arbitrators, but also needed the attention and participation of clients and of transactional lawyers who advise clients in connection with M&A transactions. Clients and their legal advisers have the potential to make arbitration the alternative dispute resolution mechanism of choice which delivers what they want and need in a wide variety of circumstances. Mr. Beerbower thus left us with the message that arbitration practitioners have all it takes to win the competition.

The conference was very highly marked by the attendees. The average of 4.54 points (of max. 5) were granted to the panels, while overall Conference received 4.81 as comes out of the evaluation questionnaires.

All the conference materials can be downloaded from the www.arbitrationcourt.org.pl and video recording from the Conference will be available on the Lewiatan Court website starting from Monday, May 24.