



# **“Arbitration in M&A Disputes”**

**Keynote Speaker: Dr. Hermann Knott, Partner at KUNZ Law  
Member of the German and New York Bar, FHKI Arb, FCI Arb**

**Date: 26 August 2021**

**Time: 6:00 pm – 7:00 pm (HKT)**

# Speakers

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**Moderator:**  
**Wilson Lam**

Council Member, Construction and  
Adjudication Committee Chair,  
Hong Kong Institute of Arbitrators



**Dr. Hermann Knott**

Partner of KUNZ Law;  
Head of the Firm's International  
Business Department

# Arbitration in M&A Disputes

# HKTDC - Hong Kong Means Business – 17 August 2021

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Jumping into market gap – A Hong Kong environmental technology firm and a German company are set to roll out innovative Personal Protective Equipment in Germany as demand spikes



Source: HKIDC



BillionGroup Chairman Steve Wong (left) and  
Bridge2Culture Managing Director Olivia Merz-Fischer

Dr. Hermann Knott  
Partner  
KUNZ Law

# AGENDA

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- Timeline and types of Disputes
- Current Status of M&A Arbitration and International view on HK
- Place of Arbitration and Arbitral Institution
- Multi-tier Dispute Resolution Clause: Pre-Arbitral Mediation and separate expert determination procedures
- Consolidation and Joinder
- Impact of W&I Insurance on Arbitration

# Advantages of Arbitration for M&A Disputes

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- Confidentiality (vs. transparency)
- Expertise and experience of arbitrators
- Bridging common and civil law background of the parties  
Convergence of practices in terms of pleading, document requests, witness and expert testimony

# Timeline and Types of Disputes in M&A Transactions



Confidentiality, Exclusivity  
 Break-up of negotiations  
 Duty to 'negotiate in good faith'  
 Pre-contractual failure to disclose information

Material adverse change  
 Fulfilling closing conditions

Violation of reps & war  
 Fraudulent concealment  
 Price adjustment

# Current Status of M&A Arbitration

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- Unparalleled for cross-border M&A disputes
- Costs and duration have increased significantly over the last decade
- Major institutions: - mean duration around 17 months  
- mean costs around US \$ 135,000
- Throughout this discussion we want to watch out for ways to improve this status
- 2018 ICC Report on Techniques for Controlling Time and Costs in Arbitration
- Impact of Warranty & Indemnity (W&I) Insurance



# Hong Kong as Preferred Center for M&A Disputes

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The International perspective:

- Independent judiciary with long-standing history, tradition and experience
- Arbitration Ordinance (Cap 609) based on 2006 version of UNCITRAL Model Law
- Arbitration-friendly jurisprudence: 97.2 % enforcement rate
- Pilot scheme allowing certain arbitrators, experts and factual witnesses, counsel in arbitration parties to the arbitration to participate in arbitral proceedings in Hong Kong (until June 2022)
- Review of outcome-related fee structures for arbitration (consultation period expired)

# Hong Kong as Preferred Center for M&A Disputes

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## Judicial assistance in arbitration matters with the Mainland:

- Interim Measures Arrangement for mutual assistance in court-ordered interim measures
- 2020 Supplemental Arrangement concerning mutual enforcement of arbitral awards

# The Arbitration Agreement ('AA')

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The Arbitration Agreement – The basic document for the jurisdiction and powers of the Tribunal

- Often neglected in negotiations with a standard clause being used at the last minute
- The arbitration clause or separate arbitration agreement will ideally be tailored to the specific elements of the transaction
- Therefore, it is proposed to discuss many facets relating to arbitrating M&A disputes in the context of the arbitration clause. Not all of them have to be addressed, but should be taken into account.

# AA cont'd - The Place / Seat of Arbitration

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- Should be favorable to transaction or be a neutral place, *e.g.* not in country X if government has potentially reservations against transaction
- Procedural law of the seat (beyond the rules of the institution which the parties may choose) applies to (among others)
  - Document production, but reference to specific rules possible, *e.g.* IBA Rules on the Taking of Evidence, revised in 2020
  - Role of experts (Quantum)
  - Rules on Evidence (burden of proof)
  - Interim measures granted by courts supporting arbitration

# AA cont'd - Choosing Arbitral Institution

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- Should have a link to the seat selected
- **Emergency arbitration** (seeking interim measures prior to the constitution of the Tribunal), *e.g.* transaction involves competitors; covenants not to compete, confidentiality (major institutions achieve median duration of about 15 days)
- **Fast-track or expedited arbitration** (mean duration of about 9.3 months with mean costs of US\$ 51,000)
  - A good way to proceed in disputes in which both parties have an interest in fast resolution of difference (pre-signing and pre-closing disputes);
  - Transaction not consummated due to alleged MAC event or other reason to withdraw from the transaction;
  - Consequence: Lol should also contain arbitration clause

# AA cont'd - Choosing Arbitral Institution

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- **Interim Measures** after constitution of Tribunal prevent violation of confidentiality, exclusivity covenant or prematurely calling up bank guarantees securing the applicant's obligations

- **Arb-Med**

Singapore: Arb-Med-Arb Protocol with Arb-Med-Arb Clause: parties “will attempt in good faith to resolve dispute through mediation at the SIMC ...”

Hong Kong: Art. 33 AO: Arbitrator as mediator – if mediation fails: disclosure of information obtained by arbitrator to all parties

# AA cont'd – Multi-Tier Dispute Resolution Clause

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- Pre-arbitral mandatory mediation?
  - Loss of time – better Arb-Med (see above)
  - Discussion whether failure to complete pre-arbitral requirement affects jurisdiction of Tribunal and award may be set aside (position of Swiss Federal Supreme Court, decision dated 16 March 2016, conciliation under the 2001 ICC ADR Rules)
  - Same true for ‘elephant clauses’
  - If there is room for mediation, it will be conducted independently of such mandatory requirement

# AA cont'd – Multi-Tier Dispute Resolution Clause

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- Expert Determination clause for issues of fact (price adjustment, Closing Accounts, working capital)
  - Expert determination either *ad hoc* by the parties or institutional process
  - Intention is to accelerate resolving items of facts, see above
  - Expert determination is final and binding
  - Issues to be taken into account:  
If the expert determination becomes later subject to review in arbitration, then in fact no time and costs were saved



# AA cont'd – Multi-Tier Dispute Resolution Clause

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Examples are:

- 1) Cour d'Appel de Paris, 17 September 2004, Nr. 2003/10700: Parties wanted fast decision on price, allowed expert to 'appreciate', not 'interpret' relevant contractual (accounting and valuation) provisions  
To what extent is expert entitled to address legal issues related to his engagement (application of accounting principles)?
- 2) Swiss Federal Supreme Court, 1 February 2016: Expert determination on price adjustment – buyer did not accept report for lack of seller's prior notice of objection to buyer's purchase price calculation. Arbitral Tribunal sided with buyer, Supreme Court confirmed jurisdiction of Tribunal to decide about validity of objection.

# AA cont'd – Multi-Tier Dispute Resolution Clause

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Separate expert determination procedures in fact prolong process:

- Not enforceable
- Qualification of expert
- Subject to review for manifest errors
- Delimitation legal-factual issues
- Procedural issues

Conclusion: Expert determination procedure better embedded in arbitration procedure, unless parties agree at the onset to waive all possible objections (some may, however, only arise during the process)

# AA cont'd – Consolidation and Joinder in M&A Disputes

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Select arbitration institution with flexible rules

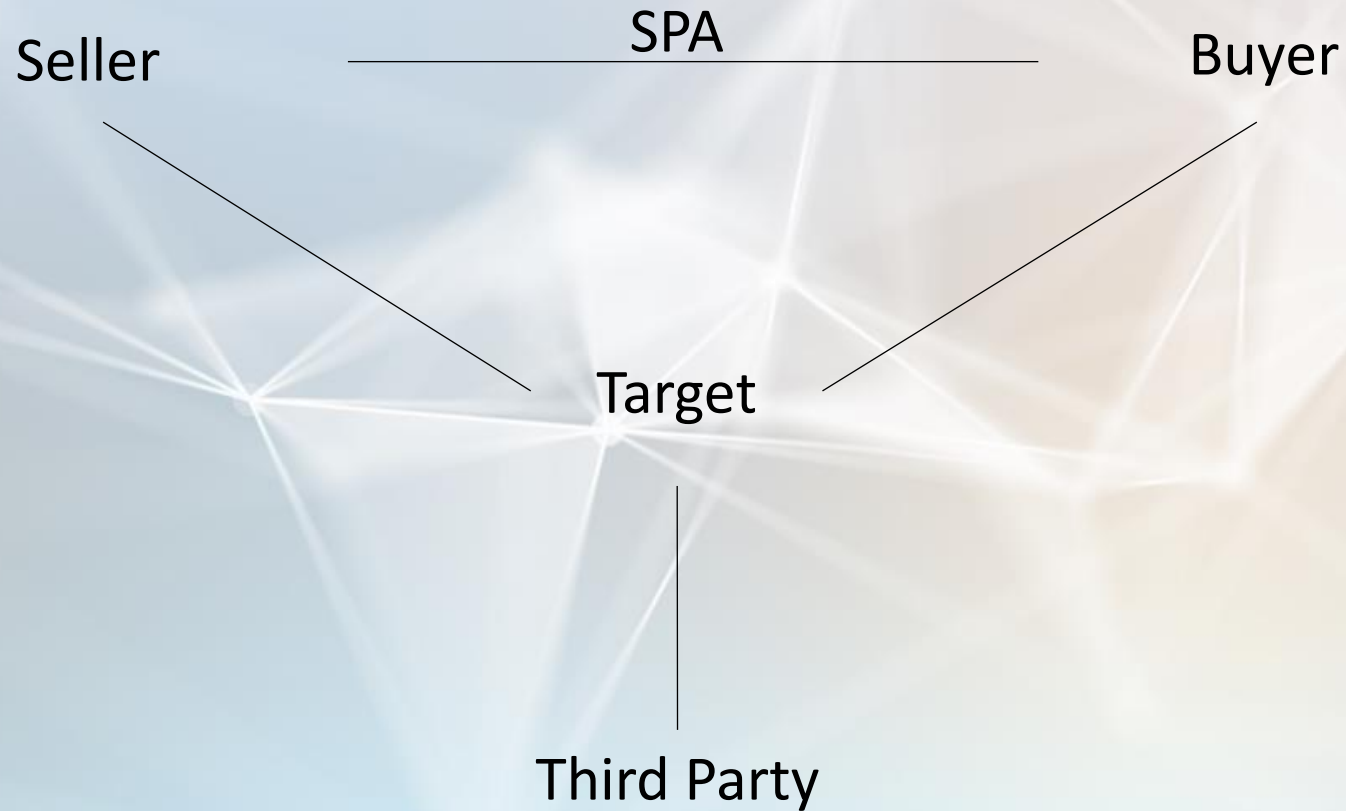
## Definitions

- Joinder: Third party will be bound by the results of arbitration proceedings (by joining or being requested to join)
- Consolidation: Two or more arbitration proceedings between the same parties or relating to similar issues are combined

Relevance for M&A disputes: Indemnity provisions and W&I insurance

# AA cont'd – Consolidation and Joinder in M&A Disputes

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# AA cont'd – Consolidation and Joinder in M&A Disputes

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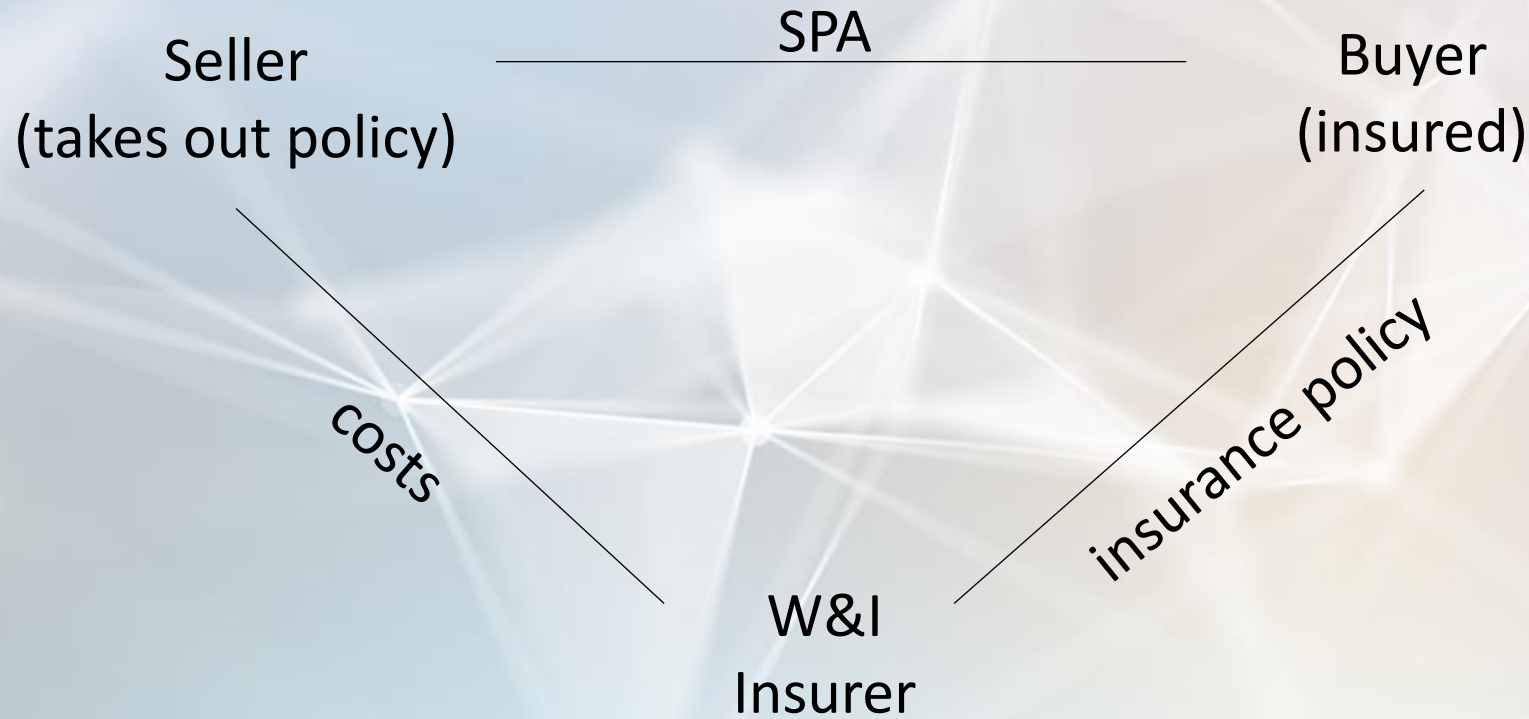


## Advantages of W&I insurance

- Review and decision making procedures faster, more extensive risk coverage, lower costs, lower or no deductible
- Synthetic policies: R&W are set forth in insurance policy (not SPA) and directly raised by buyer against insurer
- Impact on arbitration: Consolidation of SPA and insurance arbitration?

# AA cont'd – Consolidation and Joinder in M&A Disputes

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# AA cont'd – Consolidation and Joinder in M&A Disputes

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- Options to handle SPA / insurance arbitration:
  - Synthetic policies: only W&I arbitration
  - Parallel insurance and SPA arbitration if own responsibility of seller
  - Insurance policies are structured in layers (like a tower, see below) of claim amounts: lower layers more interested in coverage, higher in quantum – higher layers may first hold observer status in arbitration

3 million
4 million
2 million
1 million

# AA cont'd – Consolidation and Joinder in M&A Disputes

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- Options to handle SPA / insurance arbitration (cont'd):
  - Asymmetrical consolidation: insurers have option to join SPA arbitration
  - Insurers are less interested in consolidation than the insured (buyer) is
  - For insurers litigation is also an option, *e.g.* easier to summon witnesses
  - Choose same seat of arbitration for M&A and insurance arbitration



# AA cont'd – Consolidation and Joinder in M&A Disputes

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- Impact of W&I insurance on choice of arbitration institution
  - Flexible rules on consolidation and other provisions regarding multi-contract arbitrations, joinder, concurrent proceedings and policy for appointment of arbitrators (availability of arbitrators, conflicts of interest – see *Halliburton v. Chubb*, judgement of 27 November 2020, [2020] UKSC 48)



# Q&A



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