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SESSION 3

THE NEW DEAL DISPUTES: ARBITRATING HIGH-VALUE, TECHNOLOGY-DRIVEN M&A

SPEAKERS:

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ALISHA SHARMA: Ladies and gentlemen, we all know that technology is reshaping the M&A landscape and with it, the disputes that follow. An increasing proportion of high value transactions today involve technology driven assets, data and Intellectual Property often structured with mechanisms such as earnouts and post completion price adjustments. As these deals grow larger and more intricate, so does the disputes arising from them it is against this backdrop that we turn to our next session, hosted jointly by A&O Sherman and the Hong Kong International Arbitration Centre on the theme the "New Deal disputes" Arbitrating high value, technology driven M&A" The session will be moderated by Ms. Sheila Ahuja and she'll be joined by Edward Taylor, Heena Singh and Joanne Lau. I would now request the panellists and the Moderator to grace the stage. Thank you.

SHEILA AHUJA KC: Okay, good afternoon, everyone. Thank you very much for sitting here and listening to what I know will be a very promising session. And it'll be really interesting in terms of the topic, but also the panel that we have. And I'll introduce the panellists that we're lucky to have here in a moment. But the main reason I know you're going to have a good time is because you'll hear from me the least. And my only job is to ask questions, which is my favourite thing to do, and not have any answers to them. And I have the benefit of directing it to whoever I like. We have pre-agreed who I might ask questions of on what topic, but I just want to warn the panel that I might just change my mind as we go along. So, thank you in advance for dealing with me. Our panel today, as introduced to you is the New Deal disputes arbitrating. And I want to pause here to say of course, the premise of our sessions is arbitration, but there are actually three angles here that we're going to explore from all the dimensions that the topic involves. First of all, high value, secondly, technology and then M&A. All these components we have seen in terms of growth in very large numbers across basically, the region and the world. Bringing that together when you are doing what we call "New Deal disputes", what are the issues that we face when we're looking at arbitration from the angle of trying to resolve? Remember that the outcome is trying to achieve a resolution for your ultimate client, your ultimate user, of something that is high value, technology driven and in the situation, sometimes we'll use an M&A example, but we may go beyond that as well. So, I want to focus on this specifically today not only because technology is such a big part of our lives, and my children remind me of this all the time because I can no longer navigate anything. They changed my iPad settings to Chinese and I can't figure out how to make it in English again; so, I've printed my script instead. But I will say that technology is outdoing us even as we sit here and speak about it. What we can do is track where it's heading and then be prepared for what we can be prepared for; the known unknowns. So, I'm going to put, in the form of four different areas of questions, topics to this panel, of how we navigate these, what I would call, unique challenges.

Now, one of the problems is these assets are often hard to value because of the nature of them being intangible, technology not being ascertainable yet in terms of how to put numbers to it. The other aspect of course is wherever you have the traditional M&A dispute, everybody has a traditional mindset and then they have to switch it to what might be called, as we say, "The new deal." So, how do you evolve your thinking in terms of how you approached it from the traditional aspect. And I must say in terms of statistics the scale is significant. So, just to put a number to that, global M&A volume hit US dollars 4.8 trillion in 2025. That's the second highest year on record. And two-thirds of practitioners expect dispute volumes to rise even further in 2026. India alone, where we sit of course today, has reached approximately 115 billion USD with outbound deal value surging roughly three times and it's driven by acquisition of technology platforms and AI ready businesses. So, we're not talking about something hypothetical or something that is to come; we're talking about something that's already quantifiable and we're talking about how we're going to address that and how we are already addressing that in the context of arbitration and in the context of this platform. So, these three interconnected trends that I mentioned have certain aspects that drive these types of disputes. You've heard these terms a lot, but I'm going to cite them anyway. ESG, AI, misaligned valuations, that's a really big one. Some of you in the room have had to spend, you know, recent part of your careers looking at misaligned valuations as we were just discussing outside, but we're going to explore all three of these as we can touch upon them today.

Our discussion will be anchored around two particular aspects. One is earnouts. So, the deferred consideration mechanism and that is a bit specific. But what it does is, it bridges valuation gaps, and that's actually I would say, from our experience, but also from the market, it's becoming the single most dispute-prone feature of tech M&A. The second is a topic that is very familiar to this country, foreign fragmentation. But I don't just mean by that courts versus arbitration; what we mean by that is there are different fora specialized courts and Tribunals, different choices of arbitration within a set of contracts and then of course you have the existential dilemma of you have an arbitration clause but somebody in court, nonetheless. The reality is that when these disputes materialise, they rarely sit in one place. A single deal can just spread across. So, many of these angles that I've set out there. And don't ask me to repeat any of what I've said because there's so much in that in terms of content that there is a lot for us to navigate.

So with that, what I'm going to do is having set that scene is to move on to introduce the panel and then go straight into the four fragments of topics that I talked about. I'm Sheila, just to say. I sit in Singapore, but I cover the Asia Pacific network of A&O Sherman as we now are. I've also had the benefit of having a lot of experience with the… who we're very grateful to. Of course, for sitting here today and I've worked on MCIA matters, including as Arbitrator and there is a lot I would say that, you know, the MCIA has achieved over the years that enables us to sit down here and have this conversation. So thank you. But introducing the panellists first. Maybe I'll start furthest away. So, Joanne Lao is the Secretary General of the HKIAC, the Hong Kong International Arbitration Centre and she oversees operations across Hong Kong, Beijing, Shanghai and Seoul. The HKIAC recorded USD16.2 billion in total disputes last year, with nearly half of their arbitrations involving multiple Parties or contracts. And Joanne will talk to us today, but she's seeing these techs M&A disputes or tech related disputes arrive at the institution's door in real time. The institution itself is very long standing and has a great reputation. But just for a moment on Joanne, she's a market leading person herself and has been, over the years, in the region, an outstanding practitioner and leader, and we're very grateful to have her on stage sitting here with us today. And on my own part, I'll be writing down, as I always do, everything that Joanne says to me.

Heena Singh, to Joanne's right and my left, is a General Counsel of ArcelorMittal in India. She's at the sharp end of one of the most important questions in the global industry right now. How a major industrial company acquires and integrates technology to transform its operations, and what happens when those deals don't go to plan? Because I'm sorry, Heena, as much as... of course, as an organisation you want everything to go to plan, I think most of the room will agree with me, that some of us would like for some of them not to go to plan so that we can continue to have practices and continue to continue to talk to you; so, we'll be looking forward to hearing from Heena, and I've had the benefit of knowing a little bit about how deep your experience and vision is on this, and I'll be asking you some questions about that.

And then to my immediate left is Ed Taylor, Edward Taylor, Ed Taylor, who's a Partner in the International Arbitration practice of A&O Shearman based in Hong Kong. Ed acts in HKIAC, SIAC, ICC and LCIA arbitrations and sits as Arbitrator as well. And as Counsel in particular has, but also as Arbitrator has a particular focus on technology, private capital and also M&A disputes. So, it checks all the boxes that we're going to talk about today, no pressure. He brings the advisors' perspective to this, and as we'll hear shortly, some very current frontline experience that Ed has gone through with the disputes that he has done and is doing will be shared with you. Ed also has the downfall; what I call downfall; well, it's a benefit to me but a downfall for him of being my fellow partner at the firm; so, for that I apologize, but here we are.

With that, I'm going to move into our first subtopic of the four blocks; first of all, how technology has transformed the deal. So, we're first focusing on the deal and perhaps because you're closest to me, I'm going to start with you, Ed. I also know that you have a case that brings together many of the themes that I've set out here; AI due diligence, and I'd like to say less than ideal contract drafting, the challenge of finding multiple technical expert Arbitrators and ultimately, being able to create some kind of creative solution, for instance through mediation or other means than the full Dispute Resolution course. Can you, Ed, tell us about how these unique challenges involving such New Deal disputes are, and how do you deal with them? Obviously, I know that from my own experience, but I'd like for you to share that with the room.

EDWARD TAYLOR: Great. Thanks so much, Sheila, and thank you all for being here. It's a real honour to be here. So, before I get into the case that I've been dealing with recently, I just want to give a little bit of context about what we've been seeing in the tech M&A market recently. I think over the past few years there's been a real intense competition to invest in the best AI companies, and I think in a sense there's been a kind of FOMO, Fear Of Missing Out in the market. And practically what that's meant is there's been very significant investments and transactions taking place in the tech AI space that have happened. One, very quickly, two, at very high valuations, three, based on limited technical due diligence of the underlying AI technology, which is a big problem, that we'll come back to. And four, using contracts and deal structures that have been pulled together very quickly and are trying to allocate risks in relation to new and emerging technologies. And on top of that, we have an additional issue which is that, during this period some companies, not all but some companies have been very tempted to exaggerate their AI capabilities, because they know that if they say we're an AI-powered company, it may add a couple of zeros to their valuation. And then, if we add another layer on top of that, we've also seen an increase in regulation around foreign investment, national security legislation and other similar things. So, we mix all of those ingredients together in what is also a very fast moving market. It can not only be a recipe for disaster but also big disputes, because what can happen is purchasers feel that they've massively overpaid for a technology or they feel that the technology or business they've bought, rather than having proprietary technology that they can use, is actually really just based on third-Party platforms and technology that, you know, are difficult for them to monetise. So, what we've started to see, particularly in the past year or so is these... is disputes arising out of this heading into arbitration, whether that's HKIAC, ICC, SIAC or elsewhere, and in extreme situations we've also started to see insolvency proceedings as well. So, that's the general background.

Now moving to the specific case that Sheila mentioned earlier. So, this was a SIAC dispute and our client was a Singaporean company that had sold AI technology to a US company. Unfortunately, what happened is the US company tried to avoid paying for that technology. Now we think the real reason for that was it was having financial problems and it just didn't have the capital to make those payments. So, we, on behalf of our client, we started a SIAC arbitration seeking damages for non-payment, and what the US company did in trying to justify their conduct was launched this really expansive AI washing defence. And as you may know AI washing is where a company is accused of overstating, exaggerating or faking the role of Artificial Intelligence in its products or services. So, the US company's defence was that our client's AI technology was not actually AI at all; instead it was just a database. And they relied on this argument not only to ground their defence, but they also rolled it into a counterclaim. They said because of misrepresentations in relation to this AI technology, we're bringing 150 million USD fraud counterclaim against you. Now what sort of challenges did we face in that arbitration? Well, there are a few. The first was identifying a presiding Arbitrator that had this relevant technical experience and skills to actually understand these issues, because in a situation where, you know, one of the core points was, is this technology even AI at all, you need someone who is somewhat tech savvy to be able to grapple with that. The second point was also identifying experts with the relevant AI skills that would be able to present these issues to the Tribunal. That turned out to be quite difficult. The third was dealing with a contract where the key definitions, including the definition of AI, were not very well drafted. And the fourth was just evidentiary issues because our client, as part of this transaction had transferred all of, all of this AI technology to the US company. And so, it no longer actually had access to this technology. So, when these allegations were being made about what the technology could or couldn't do, it was very difficult for our client to actually test those. And that was compounded by the fact that all of the tech team who'd been working on this technology, they'd also been transferred over to US company. So, there wasn't really anyone left who could address our concerns or questions. But ultimately, we were able to work through those and we found a suitable presiding Arbitrator and expert and we were able to put together a compelling Statement of Claim in the arbitration, and we were able, through that Statement of Claim to apply enough pressure to create room for negotiation, and we're able to find a tech savvy mediator. And over the course of a two-day mediation, which was actually quite unpleasant because it was being done between Asia and the US; so, it meant that hours were awful. Lots of, lots of late nights, but that that opened the door to a to a settlement; so, we were able to ultimately settle it. But I think I'll pause there, but I just want to hopefully that gives you a bit of a sort of sense of the context, what's been driving these disputes and then the specific challenges that we were ultimately able to resolve in this tech arbitration.

SHEILA AHUJA KC: Thanks, Ed. And I would say that's not the only thing that... the US Asia region is not the only reason that Ed is often up all night on matters, but this was a particular example which of course led to a good outcome. That isn't always the case. And actually, it was interesting when you said you found an experienced Mediator. I do want to come, when I come to Joanne in a moment, but I want to ask Heena first. What we've talked about here is the underlying asset being an AI asset or a tech asset, and whether that was the

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case or not, was the issue at heart here, but of course there's another angle of AI disputes which is that the deal is done using technology as a means to get to a different type of deal that you would have done in the past. So, there are two different ways of looking at, is this a tech deal, I suppose, Heena. And so, that looked at against the challenges the due diligence challenge, how do you do your DD in those types of deals? As Ed said, often the allegations then become this was an overpaid transaction and I want to claw some of it back or I won't pay you the rest or often by the time you worked it all out, especially here in this form, we've seen insolvency come into play a lot while you're navigating the field. So, with that backdrop I'm trying to keep it as wide as possible because I know your world is very wide Heena, in terms of how much you have to oversee, what are the challenges that relate to these aspects that we're talking about that you see from your angle?

HEENA SINGH: Thank you. Thank you, Sheila, for that. There are two parts to it, as you rightly said. One is the usage of technology and AI tools in getting the deal done. There has been a significant increase in that aspect. We are increasingly using AI tools to get the deal done, which is, let's say, during the diligence stage or review of documentation or actually drafting of the documentation itself. Both, when we are doing something in-house or having to externalise it, these methods are being adopted too. So, it's great for process efficiencies and making sure that things are done in a... at a speed which is relatively faster than the traditional methods that were being adopted earlier but having said that, I think what we must always remember is that AI cannot really replace the human intervention. And when we look at AI, we should actually, for the lack of a better term, consider AI to be, let's say, perhaps a five-year junior law associate. And that work has to be monitored by somebody who's senior. So, complete elimination of human intervention, I think, would lead to big problems and may already be leading to problems. So, that is a fix that we need. If we don't do, then I don't think the situation is going to get any better, because like anything, everything else, if there is an increasing use of something, there has to be an equal amount of regulation or accountability for that.

The second part to it is the actual M&A deals, which also we are increasingly seeing more and more in the technology as a sector, *per se*. So much so that the businesses which are not even in the industry are showing keenness to explore these tech-related assets for the sake of their business efficiencies, because everybody wants to upkeep with the technology that will add to their business. And in that, I'm sure some of the aspects Ed mentioned about and there are far more, much more nuances when we are looking at technology deals. Because technology, unlike a traditional asset, is something which is not easy to identify. We don't know where it starts, where it ends, who's the owner, what value to attribute to the technology. So, these are some of the obvious challenges. And the most logical thing in terms of, when we are valuing a technology asset is, let's say, what it adds to the top line of the company, because those are numbers and those are tangible numbers. Actual revenue or something which promises for the years to come. And then we have different ways of dealing with that value discovery or, you know, realising that value and making the payment. So, I'm sure we'll talk about those aspects also. I don't want to deal with all of those upfront, but these are some of the key things in both sides where we, either using technology to get the deal done or doing a deal in the technology space. There is an excessive use of technology, but we must be mindful of regulating it appropriately.

SHEILA AHUJA KC: Thank you, Heena. And I just want to say that this point about regulating is something that I definitely want to pick up, but I think to... Go for it, Ed.

EDWARD TAYLOR: I just wanted to pick up on something that Heena said, which I thought was really interesting, which is the nuance around these AI transactions and how complicated they can be and so how carefully you need to document them. Because it reminded me of a conversation that I had with one of our partners in Singapore who's an AI expert and...

SHEILA AHUJA KC: Not me.

EDWARD TAYLOR: Yeah, and he's been dealing with some issues recently where there have been AI models that have been trained on kind of in a sense illegal data. They've been trained on data that was not lawfully obtained. Now the problem there is once a model has been trained on data, you can't untrain it. You can't take that data out. So, that model is then permanently based on, you know, unlawful data. And if you're trying to then sell that model to someone else, how would you allocate the risk? And those are really tricky issues that and, you know, that's just one example. But our partner in Singapore could probably give hundreds that he's dealing with in the middle documents in this sort of space. Sorry.

SHEILA AHUJA KC: No, and actually un-training is interesting, because I was going to say Heena, your comment about the two aspects and AI in deals being comparable to the five-year associate. I can remember at five years being told it's very hard to untrain you in this Sheila, and I'm like, yes, luckily, I'm well past that point, but it is an interesting comparison of how clients are actually looking at the value that we bring as lawyers to these types of deals. What's also interesting, Heena, about what you said is that not only is this not going away, but actually companies, large global organisations are looking at this as the way forward in terms of the types of transactions that they want to do, and what that means is, we need to be able to foresee for them how to do it when, you know, the seniormost client is saying, I don't know where it starts to finish, it's very difficult to work that out. So, of course, it's the same for us and how do we navigate that? Looking at it from then, the institutional perspective, and I should say in the region, the HKIAC has seen some of the earliest tech disputes actually go to arbitration and has been in the press a lot for that. Of course, we all read about arbitration at bedtime and during weekends as I do; so, I'm sure you're all familiar with the cases that I'm talking about, but the HKIAC has been at the helm of looking at a lot of these technology aspects. Both from looking at the types of deals and whether you classify them as tech disputes to be able to select, Joanne, the decision maker, whether that's an Arbitrator, Mediator or even expert determination, and then the other side, how do you classify cases that are tech cases or are you, as an offering, having to do something different as a result of technology being such a big part of disputes? So again, broad platform with two angles, but over to you on where the HKAIC stands on this.

JOANNE LAU: Sure. Hello everyone. First of all, a real pleasure to be here. Actually, HKIAC often gets the feedback that we're not here enough; so, really happy that we I get to meet many of you today. And also many congratulations to Neeti and MCIA for such a fantastic anniversary and conference. So yeah, maybe I'll start with... Yeah, just giving a bit of overview of what HKIAC has been seeing in terms of tech-related disputes. I know we focused just now a little bit on, like AI being a very prominent area right now. But if we look at our tech-related caseload, actually I think just talking about tech sector, it already encompasses a really wide range of subsectors. So, say for HKIAC in the past five or six years from 2021 to 2025, we've seen 391 tech-related cases. Not all of them are M&A, and if we have time later, I can talk a bit more about the sort of disputes we are seeing, but 391 tech related disputes. Total value amount in dispute is 13.6 billion USD. And I said just now, tech sector actually encompasses a wide range of subsectors. So, just to outline the different kinds of tech cases, tech disputes that we've seen, that includes, for example, cryptocurrency disputes. We've been seeing a lot of those at HKIAC. Biotechnology, Telecommunications, IT cases, disputes in relation to social media, E-Commerce, FinTech, electronic parts, gaming disputes and more recently, in relation to electric vehicles and green tech. So, I think actually once you look into these cases, it's really interesting to see how many deals and consequently, disputes are arising from this broad sector of tech.

And I think there's always a time lag as to what we see at an institution because at that point something has become a dispute already. So, if we're trying to predict what are the future new deals that are coming up, I can also share a bit about what I've been hearing from the market, people who are saying what sort of tech are interests... that they're interested in right now. We've been hearing a lot about quantum computing, and even though I tried many times and learning about quantum computing, I still can't really articulate what quantum computing means. But that is something a lot of companies are really interested in, especially from where I sit in Hong Kong and I've been hearing a lot in China as well. That is a really growing area where there's a lot of investment priority attention being given to it. Robotics is another area where people have been talking about a lot. 6G technology and more advanced forms of AI, I've heard the term ‘embodied AI’; so, I think that is something that will also continue to grow in terms of like new deals and potentially future disputes.

And back to Sheila's second question in relation to the HKIAC's approach when we're thinking about Arbitrators, I think certainly in tech-related disputes we... what HKIAC does if we have to appoint we would always ask Parties what are your preferred qualifications criteria, and very often in tech-related disputes they will say to us, we want someone with some experience in this area. Like, for example, cryptocurrency is one where we often get comments from Parties saying they want someone who have dealt with crypto disputes in the past. But I would also say that expertise can't be like, overstated because equally, I think just generally across arbitration, there are so much discussion about wanting Tribunals to be more procedurally robust; so, if I have to say what priority is being given by Parties, they would often express a preference for someone to have expertise in a certain area, but they would always, I think, not always, but they would often also prioritise, just generally speaking, that person being a very experienced and good Arbitrator on the understanding that of course, during an arbitration, if you have good Counsel and good experts, the Arbitrator, so long as they're a good Arbitrator, they would be able to pick up on the subject matter. But I think the other observation that I would make is that for HKIAC; so, say if it's, if Parties fail to agree on a presiding Arbitrator, the co-Arbitrators fail to agree, then HKIAC would directly appoint. But I think increasingly we've been seeing more Parties designing certain forms of bespoke procedure. For example, asking the institution to provide five names who would satisfy some or all of these criteria for them to then strike can rank; so, some kind of list procedure. And we've seen that in tech related cases too. So, I think that probably suggests to us that Parties perhaps want to have a bit more control in the profile of Arbitrator and some of these more specialised cases.

SHEILA AHUJA KC: Thank you, Joanne. And maybe sticking to you for a moment, if you don't mind, because what... some of what you said I want to pick up on and then take it into I think what's our second area, which is, when a deal is going south and from deal to dispute. But still sticking with the deal stage actually, perhaps telling this room what would be your advice on the back of, you know, hearing from the panel, deals are harder to diligence, harder to value and then operating in a regulatory environment that is either evolving or not doing enough, or should be doing more and watching it as Heena said, it's very difficult to know which way we are headed. But against that, earnouts are one of the, I guess from our perspective and you can correct us if this is a misstatement, but earnouts are sometimes the single most common reason for actually a deal to become a dispute. And what I want to ask you is I guess two aspects. One is to your point about qualifications. It was interesting to hear.

I'm sure many of us who sit as Arbitrators would be terrified if a deal on something like quantum computing or I think you said ‘embodied AI’, I'm sure I would decline that straightaway. But some people may think, how do I position myself to become an Arbitrator for those types of disputes? Would you recommend putting in the contract something to do to address a particular type of deal so far as qualification of Arbitrators is concerned? That's one. And the other one is interim measures. And I'm going to just warn Heena that I'm going to come to you next on this point, which is, because earnout is such a big part of it and urgency is usually important to act quickly to stop and preserve the management accounts to stop, as Ed said, you know, things moving too fast before you've worked out the realities. The second part of it is, should contracts actually say something about what interim relief mechanism can be available for this type of situation? Do you think an institution would be able to help facilitate that quicker, for instance, and should that be provided for?

JOANNE LAU: On the first question, whether to put in the Arbitration Clause, the qualifications of an Arbitrator, generally speaking, I would say, no. I can imagine there could be situations where like, Parties would think that is a good idea, but equally, we've seen so many cases where something goes wrong with it. For example, Parties put in something way too specific, then you end up limiting the pool of Arbitrator candidates who can do a case. So, for example, if you say, oh, I want someone who has... who has ten years of experience in sitting as Arbitrator in this sort of cases, then maybe across the whole pool you get two, or not even. So, I think it's quite hard to predict, like, the nature of dispute that would arise. And if it's an institution like HKIAC and I'm pretty sure other institutions might take a similar approach, they would ask the Parties at the point of dispute what qualifications do you want. I think that, at that point, if you express your preference, that would be a more appropriate time to do so. That said, I can imagine there could be some contracts where like Parties want that.

The second question in relation to interim measures and Emergency Arbitrator. From what we've seen, certainly in tech-related cases, we've seen Parties use that and has had the need to get urgent relief. And I think I might have some data on that too. So, I mentioned 391 tech related cases that HKIAC from 2021 to 2025, and of those, we've seen 53 applications for interim measures in those cases, and then 11 applications before Emergency Arbitrator. So, I think especially when it comes to like IP or some licensing issues, like, that could be situations where people need urgent relief, or if it's like proceedings in breach of arbitration contract, anti-suit injunction, that's another area where we've seen Parties make use of interim measures or EA procedure. I think if it's well drafted, there's no downside in putting in your contract saying oh, Parties are free to seek, for example, conservatory measures from competent courts. But equally, for a lot of these cases, even if Parties stay silent, so long as it's permissible under applicable law and under the relevant institutional rules, there's nothing stopping a Party from utilising those tools when the dispute arises, even if your arbitration clause itself does not provide for it expressly.

SHEILA AHUJA KC: Thank you, Joanne. And maybe Heena just picking up on that from your lens, from the ArcelorMittal lens and of course, from your view of the market generally, you know, when, as we were talking about disputes arising, actually sometimes, that can happen very quickly. In the old days we'd have a contract and ten years in the life of it, something will start going wrong. These days sometimes with these types of M&As you see between signing completion, something's already not going right, and then either there's some adjustment mechanism or a dispute has already created a deadlock situation so that completion can't even happen. Maybe from your perspective, Heena, and looking at you know, having to predict some of this when you're doing the deal documentation, do you actually think from that lens, you've got to be, or clients should be realistic about disputes may arise much earlier than they expected, just given the uncertainty in this landscape? Or do you actually still feel that, and again, not speaking to you personally, but of course, generally a user's perspective is they want the deal done and they want to resolve things commercially; is that still going to continue to be the lens even where it's very difficult to navigate the arena? Is it better to just try and find a commercial way through just so as to get the deal done? How have you seen deals transpire in your experience? As I say, not just from ArcelorMittal's perspective but just from the market more generally to give you the freedom to talk about whatever you like.

HEENA SINGH: No, I'm glad that you brought this up because...

SHEILA AHUJA KC: Nobody says that to me. Usually people are never glad that I've... whenever I say anything. So, thank you, Heena, because...

HEENA SINGH: I think that there are two things. Again, there are two. One is the haste to get the deal done, which is not necessarily a positive word and another is to make sure and that's how we can prevent disputes to make sure that the documents are drafted as clear as possible despite doing that. Yes, there will still be chances of disputes, but we try to minimise the disputes at the documentation stage and that is the endeavour that a good lawyer should work towards. We also seek to do that in our deals as well. To your limited point on whether the disputes are arising far more earlier than before, absolutely. And I don't think this is a recent trend. Because for a deal where it's essentially linked to valuation, where valuation is where the purchase consideration is deferred and that has to be paid, let's say one year after the closing happens when some control has been taken by the buyer, the dispute will arise within that year, right? The ways to fix this is, when... I'm going back a little to say that you make the documentation watertight. If we are talking about a valuation or an earnout

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mechanism, then possibly try to come up with some metrics of earnouts which is not much subjective but objective. Link it to things which are easier to determine as opposed to leaving it open ended. When you are, let's say, talking about an EBITDA, right down the line items as much as possible and try to eliminate the subjectivity or the vagueness around it. Also, another way to address this is to bring more balance... checks and balances in because more often than not in such deals, like I said, the buyer will end up assuming control, partly. And then, after it has come into the company, the payments is going to happen and the milestones are going to be checked. So, you need to ensure that you are giving equal amount of comfort to the counterparty, which is the seller by, let's say, give them an audit right or an inspection right, or make sure that you ring fence the rest of the businesses that you have. You ring fence the current business that you have against the rest of the businesses which may be there in the company. So, these are some methods which one can adopt to ensure that the disputes really don't arise. But yes, they will still arise, there will be some cases, some instances where you may forget to legislate at the documentation stage. But as long as we are broadly okay from a documentation perspective, I think we should be able to still minimise the disputes

SHEILA AHUJA KC: Thank you, Heena. And I should say that the point you made about the inspection rights, very interesting. From my perspective, one of the earliest emergency arbitration matters that I did was where we had to ask for a whole host of interim relief. But actually, the one we really hung our hat on was inspection rights, because we said, just tell us what's happening, give us the documents. And within about a week from getting an EA order, we got a settlement in our client's favour entirely because of course, you know, everything is the proof of the pudding is always in the eating. But I talk about my own EA experience, and when Ed talked about a Singapore technology partner, you can be sure he wasn't talking about me. But in terms of Emergency Arbitrator experience, actually Ed has had a significant amount of EA experience, you know, whilst we've been colleagues but also before. So, Ed, maybe from your perspective and picking up on what Heena mentioned about, disputes are happening earlier, using the forum, if it's provided in the contract or even if it's not of interim relief, can you really get success that early? Is it sometimes too early to get meaningful success where valuation is unclear, you have less visibility and also the leverage might not be exactly where you want it to be? And I know you've had significant experience, you know, looking at it from multiple angles; so, can you tell us a little bit about how you've seen that play out?

EDWARD TAYLOR: Yeah, certainly. So, I think Emergency Arbitration can be a very powerful tool early on in the dispute to get momentum. So, in that period before the Tribunal has been constituted, you can appoint an EA if you urgently need interim measures, and within 14 days typically, they need to issue an emergency decision. And in the HKIAC's latest rules they've made it even more pro-arbitration friendly, because they've expressly empowered

Emergency Arbitrators to give preliminary or interim orders immediately upon their appointment.

SHEILA AHUJA KC: You can talk to Ed about anything and he will end up making this comment about the HKIAC Rules, which I think is his favourite clause.

EDWARD TAYLOR: I was kind of partly involved in their consultation; so, I feel very, very happy about them. But basically under the new HKIAC Rules what once an Emergency Arbitrator's appointed they have the power to immediately issue interim or preliminary orders in that 14-day period before they issue their emergency decision. So, the long and short of it is, Emergency Arbitration can help you to get interim relief very, very quickly. And just like Sheila said, I mean, it depends on the situation, but if you need to secure, for example, information, that's key to the dispute that; otherwise is perhaps at risk of being destroyed. It can be a real game changer. And often an emergency decision, even though it doesn't really decide the merits of the case. But it's still can be very helpful in terms of motivating assessment because it's a third-Party and Emergency Arbitrators come in, looked at the facts, at least the initial facts, and given a sort of objective view on things. So, it can be a really useful driver for settlement in these complicated tech disputes. So, I'm very pro-Emergency Arbitration.

Just two other quick points coming out of the interesting discussion now. What Heena was saying about investing in drafting clear comprehensive robust earn out provisions, I could not agree more with that. It makes our lives as disputes lawyers so much easier when the earnout clause is being properly drafted, particularly in the context of these AI cases where AI valuations are just so volatile at the moment, that you know, that the market is moving so quickly. So, a well-drafted earnout clause could potentially be worth hundreds of millions or billions of dollars. So, it's really worth investing in getting that done properly when the agreements are being drafted. And equally having good audit and inspection rights is really powerful.

The third point, I just very briefly wanted to make is Joanne was talking about the importance of having procedurally robust Arbitrators. And that is obviously, extremely important. And my experience is that the HKIAC has a very good appointments committee who appoint very robust Arbitrators who have a lot of experience. So, I recently had a private equity tech case, and we had a Tribunal appointed there who were able to get the whole case dealt with in only seven months. And that wasn't an expedited procedure; that was just a Tribunal using their general case management powers. And that was a situation where the tech dispute needed to be dealt with quickly because there was an insolvency issue that could otherwise arise. So, that that was a really good example of how, when you have a motivated, or at least a motivated Claimant that we were and a good appointed Tribunal, you can get results very quickly.

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SHEILA AHUJA KC: Thanks, Ed, especially for that last point, it takes us to our penultimate area of discussion, and then we'll close after that with the final question. But this this third area, I mentioned it at the start, forum fragmentation is the headline. If you think about a typical technology M&A transaction it's never going to be a single contract, right? It's going to be a structure of contracts, there will be the SPA and the SHA and then there'll be IP licenses, there'll be Escrow arrangements, there'll be Transition Services Agreements and then there'll be all sorts of other... I guess, potentially finance related arrangements around it in your traditional sense. So, the plethora of documentation creates the problem that it's of course as good as the drafter and as good as the team of drafters. And often what happens is, people don't talk. And then what happens is what they put in their clauses doesn't always match. And that creates the fragmentation issue. Now the issue here is that the person seeking the relief, or being in the situation where they need to protect the company, for instance, wouldn't have been the one potentially to draft half of this. And so, they may not be in the room to even decide how it looks. And actually someone at a recent arbitration week, and I don't remember; it could have been anywhere, put it really well. They said cross-border M&A disputes are not resolved by choosing one perfect forum; they are resolved by designing a dispute architecture. And I think the question here is, how should practitioners actually design that architecture? How often is it that actually they do get it right and you're not looking at what is essentially just a hostage to fortune in terms of foreign fragmentation? And maybe I can start with Joanne, your view on when matters come through your door, do you look at it and say people still haven't learnt, or are you seeing that there is less fragmentation now?

JOANNE LAU: We still see resolution fragmentation. But I think sometimes it's... people have good intentions, they want to design something very bespoke, but somehow when the dispute arises something that doesn't go right. So, say for example, what we've sometimes seen is where you have a whole suite of transaction documents. They may all provide for say HKIAC arbitration but somehow there are minor differences in the Arbitration Clause. For example, in the appointment mechanism of Arbitrators, maybe they've specified that a certain company would get a designation right, and in each of those contracts they've designated a specific company with a destination rights. And say if a dispute arises and the Party wants to start a single arbitration or wants to consolidate multiple arbitrations, then the question might arise as to whether these Arbitration Agreements are compatible. So, we've seen this issue come up from time-to-time. And actually, HKIAC published a practice note specifically addressing the point on compatibility of Arbitration Agreements because I think this is something that might trip some Parties or Counsel unknowingly. I think the other thing I might mention is, sometimes even if it's just a single contract, you still get issues. For example, in expert determination. So, we've seen some clauses where Parties try to carve out certain types of disputes to be submitted to expert determination, and we've seen dispute arising,

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disagreements between the Parties as to whether that precludes those disputes from arbitration, whether the expert determination is final and binding. And then we've seen it play out in the courts and arbitration as well, like, for example, a Party going to court to challenge the expert determination. And then the question arises as to, can we still proceed with the arbitration in the meantime. So, different kinds. And we haven't even gotten into, you know, the whole thing about court versus arbitration and... yeah.

SHEILA AHUJA KC: Well, actually, you said the last few words were key actually of what you said, Joanne, which is court versus arbitration, I'm going to come to Heena with that. But just before that to say that in fact, when you are drafting clause and at least for us from the moment that MCIA for instance, became an option, we have seen clauses. Often people tie HKIAC to Hong Kong, SIAC to Singapore, but actually, we were seeing a lot of and advising on a lot of clauses that were say MCIA, but seated in Singapore or HKIAC but seated in Delhi. It really depends on your counterparty as well and what you manage to negotiate. But the lesson here may be to step back and also look at what type of dispute might arise. And when I tell my transactional colleagues that they still don't want to talk to me and that's okay, because then I email them. It is important to keep that in mind that it's not just about, you know, the Parties, but it's about the type of situation and what might go wrong. And if you are the one that has to respond first, how do you do that and what tools can you use to avail yourself of that? But can we ever escape the existential problem of whilst you're in an arbitration, somebody has gone to court? And this happens to us in many jurisdictions. But Heena, you can take it from us and you can tell us as well. I think India has... it hits India particularly hard, this particular aspect. And I know you're at ArcelorMittal but ***Anupam Mittal*** is a case that I think for two years or three years of my giving talks, even if I was talking about something entirely different like wine, ***Anupam Mittal*** would just come up and we would start talking about this case. So, it was very difficult to escape a discussion around there are fora that you can build around and there are fora that you can't escape. So, Heena, maybe looking at it from your lens, how do you view what we're saying in terms of control and drafting and getting it right, can we ever escape form fragmentation?

HEENA SINGH: Simple answer, I don't think we can escape. It is happening. It is... it has been happening. We can try to fix it as much as possible, and we must. That does not mean that we should not provide for it in the agreements. There should be consolidation, there should be a uniformity of forums across, I think sometimes it's again, because like you said, there are so many agreements in such deals. So, sometimes it's an oversight, which shouldn't be the case. So, we should definitely try to fix for it. But having said that despite making the effort to fixing for it, we do land up in situations like these where there are different forums which are invoked. Part of it is because, let's say, in an Employment Agreement which was also there, the promoter preferred to have Indian laws and Indian courts and he's not comfortable; so, you can't probably solve for that. Or part of it is also happening as a pressure tactic. And this is not, I mean, from my previous years, we... it was a very well drafted document. And again, the client wanted to take control of 50% and then get the rest of the 50%. But then something went wrong with the valuation in between and there were criminal proceedings, civil proceedings, all of these which were instigated at the same time. And pressure was used to essentially make sure that things get done their way. So, I don't think beyond the point we can really solve for it. And that's maybe a question also to my fellow panellists. If we provide for consolidation as well in the drafting stage, in case there were multiple proceedings which were happening at the same time where we actually require the Parties to even apply for consolidation where the need actually arises, probably that could solve for... to some extent, but I don't think we can eliminate the fragmentation and we have to deal with it as and when it comes.

SHEILA AHUJA KC: And you know, I think you're right, Heena. I mean there's a reality to that and then there's also, as you rightly say, we must try right and we must keep heading in that, I think what is agreed to be a commonly aligned direction. Ed I know you've had experience obviously of foreign fragmentation and having to navigate that I don't know whether you want to share your views before we go on to my final closing topic as well

EDWARD TAYLOR: Yeah, I think the point oh...The point has already been very well discussed by my panellists. And I agree, I think we can't avoid it completely, but we can try to limit its impact. So, in a simple transaction where you have one main document like an SPA, then obviously, this problem doesn't arise. I think where we have seen, and Sheila's dealing with a big case on this on a similar point at the moment, is when you have a huge M&A deal that's taking place across multiple jurisdictions, so you have perhaps a master seller business agreement between the main Parties, but then you have various other contracts between the subsidiaries in all sorts of different jurisdictions, and those agreements may not have all been entered into at the same time, they may have been entered into the course of several years. And ensuring alignment between those can be difficult when it comes to Dispute Resolution clauses. And also sometimes it's just not possible. In certain jurisdictions you may not be able to use the Dispute Resolution clause you want. So in certain jurisdictions, for example, if you're trying to deal with Intellectual Property issues, you may not be able to arbitrate that. So, you really need to look at it in a jurisdiction-by-jurisdiction basis. But with proper planning at the start, you should be able to minimise the potential for significant delay and cost and efficiency by ensuring that alignment as much as possible.

SHEILA AHUJA KC: And actually, Ed, what you said about it changes jurisdiction-by-jurisdiction, maybe that brings me to my closing topic. And this was unplanned; so, thank you for the segue. But I want to ask about and I think, Heena, you mentioned earlier the regulation angle. When you are looking at things, jurisdiction by jurisdiction is national security risk and the uncertainty of government regulation of AI something that is on your radar when structuring deals, maybe Heena from your perspective. And what... how do you address that risk? Are you mindful of it in a way that you can do something about it at the moment, or is it a "watch this space"?

HEENA SINGH: I think it's the latter. It is a "watch this space" kind of a thing because right now we don't really have much which is going to regulate. There are views which are expressed by various regulators. There is a new addition to the, I think the IT Act Intermediary Rules, which is the first ever sort of reinforcement of, towards regulating AI tools or AI content. But other than that I think there is still a long road to travel. We... It has to be wait-and-watch. There are talks of a single standalone AI regulation which will come in to regulate, but then I think minus that, we are struggling to see how and what. And there must be a single AI-focused law which is currently absent. So, that is extremely important because of, I mean, the excessive rapid usage of these tools, like I said in the beginning, there has to be accountability whether in the form of human intervention, which was a separate topic, or here, that is regulation, because if there is no accountability, then things are going to go haywire.

SHEILA AHUJA KC: Thank you. And maybe Joanne, just a quick follow up on that. Of course, a good part of what you do is, you know, represent a country or a type of deal or matter amongst governments and you're involved in discussions at that level, which actually not a lot of us have the benefit of. So, how much is it, do you think, just generally speaking, on the radar of governments that actually as private companies, private practitioners we are watching the space?

JOANNE LAU: Yeah, I think it's something that all governments are really paying attention to. But the biggest problem that a lot of states face is that it's developing so quickly that there's a concern that once you finish with all the consultation and put out a framework, it'll be outdated again. But I mean, going back to the individual deal level, I think looking at our cases, there are some takeaways. I think one is touching on what Ed said at the very beginning there's a sense of FOMO that everyone wants to rush into the new tech deal. But actually, due diligence is so important in this space. Because we've seen disputes arising because like, the buyer was under the impression that the company would definitely acquire a relevant license and operating a certain tech business, but in the end it wasn't the case. And then the other point I might mention is not just trust in the tech, but trust in the people who would be running the company as well because the other kind of dispute that we've seen is, you know, after the acquisition, people felt that, oh, we thought that this team would devote a lot of time and then we'll see results from the R&D very quickly, but that did not materialise. So, all of this suggests that there could be something more that can be done at the due diligence stage, even if there's no complete certainty on all the regulatory regime. But at least, you can trust that you have a good team who would be able to resolve the problems along the way

SHEILA AHUJA KC: Thank you, Joanne. And I have to say that this, I think, wraps up, what you said in particular wraps up very nicely. What I will take now into our closing remarks. But I am going to ask each of you to comment on any advice you have to give to this room. So, first of all, the front loading point just to summarise where we are. Whether it's technology, due diligence, ESG or the Dispute Resolution clause itself and how you navigate the intricacies of that. The investment when it's at deal stage, it is what determines how you can navigate the disagreement. And that won't change even if the landscape is evolving. And it's hard to navigate, even if you can't avoid form fragmentation. You can certainly improve the prospects of how you deal with those situations and how to come out on the right side. Second is the earnout paradox. So, earnouts although they're supposed to bridge gaps and align incentives, what we've heard today and Heena, you described is that it can just as easily create actually the conditions for the conflict situation. So, the separation of risk and control that is structural, it doesn't really help without good drafting, without actually bringing together what the deal is about and how to align those, I guess, competing objectives in a way that helps you through the deal. And finally, the dispute architecture. So, this is a phrase that has stuck with me throughout, which is, of course, as a result of what we do, but also as a result of hearing your different perspectives is, it never stops being relevant, right. We are very far away from the days where people called it "boilerplate", and today it is actually what decides how to navigate the deal itself. So, starting with the dispute architecture, we're past the point where you can look at a single clause, a situation and navigate it or a single document. But what I want to say is, of course, those are my takeaways what I also want to hear is your two cents that you might have to share. We have the private practitioner, we have the in-house GC and then we have somebody heading one of the key institutions in our region. Can I start with you, Ed, and then move down the line to share any final two cents with this room before we close?

EDWARD TAYLOR: I think my point is a very basic simple one, which is, our job as disputes lawyers is just so much easier when the front end work has been done properly when the contracts have allocated the risk clearly, when fundamental concepts like what is the technology that's being transferred, what is AI, these sorts of things have actually been dealt with. Because otherwise you can really open yourself up to enormous costs and wasted time later on when there are arguments around, for example, fraud, misrepresentation, all these sorts of things. And obviously you can never completely remove dispute risk, but in lots of cases where we've been instructed as disputes Counsel... the firms that originally drafted the contracts, which weren't... wasn't our firm, I should add, you know. There were things in there that perhaps could have been done differently that would have made things much easier to resolve the dispute.

SHEILA AHUJA KC: Thank you, Ed. And I should also add that when he said enormous cost, that's also not our firm. But maybe over to Heena?

HEENA SINGH: Thank you. So, my two cents would be that this is a space which is moving rapidly. Whether it's valuation disputes or disputes in the sense that volume of disputes are coming to be far more than the traditional M&A space. We need to also, on the other side of it, speed in and upkeep with the pace, which is accountability to be more specific and cautious at the time of drafting and not let it pass and slip, because an equal amount of upkeeping has to be done on the... to counterbalance it on the other side. Otherwise, we'll lose sight and there'll be more problems, more disputes, more lacunas.

SHEILA AHUJA KC: Accountability, that's a very... it's a very, actually operative word, isn't it, through all of this; it runs as a thread. But Joanne, over to you, please.

JOANNE LAU: From an institutional perspective, I mean like having a good well drafted dispute resolution clause across your suite of transaction documents is really important. And the final point I would make is even though I know in a lot of tech M&A deals and what we've been talking about just now sounds like, oh, there are lots of problems that may arise. But at the end of the day, I think this is a super exciting area, and it would be great to see, you know, more and more deals in this space coming out. So, really look forward to seeing more.

SHEILA AHUJA KC: Thank you very much. And I should say when you mentioned good Dispute Resolution clause, that is something we can take credit for as a firm finally. So, I will say on my own behalf, but I'm sure on behalf of you as an audience, thank you very much to our three panellists. There's a lot for us to take away. But actually also a lot of factors to think about as we navigate what a really, truly uncertain times. I don't know what all of you wrote down, but one of my first things is, I've got to work out how to switch the Chinese back to English on my iPad. And then also I have some other key takeaways from the three of you from your different aspects, which I'm very grateful for. So, let's get together, and thank you also to the audience of course, for listening to us today. But please let's come together and give them a big round of applause. And thanks everyone for your time.

ALISHA SHARMA: Thank you, Ms. Sheila for such a wonderfully moderated session, and to our panellists for this thoughtful conversation. The discussion certainly shed valuable light upon how technology driven M&A disputes are reshaping the disputes that follow and the arbitration strategies which are best suited to address them. With this, if I may, please request my panel to step ahead for a group picture. For the audience, we would now pause for a short break which has been graciously hosted by ADG Law and we'll resume the sessions at 02:30.

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