Global Arbitration Review

The Guide to M&A Arbitration

Editor
Amy C Kläsener

Second Edition

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For further information please contact Natalie.Clarke@lbresearch.com

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to M&A Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the second edition of this guide on mergers and acquisitions within the world of arbitration. It is a practical know-how text in two parts. Part I identifies the most salient issues in M&A arbitration, while Part II surveys substantive principles from select regional perspectives.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to M&A Arbitration*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, mining, and challenging and enforcing awards in the same practical way. We also have books on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). Our thanks to the Editor, Amy C Kläsener, for her vision and energy in pursuing this project and to our colleagues in production for achieving such a polished work.

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Part II

Survey of Substantive Laws

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United Kingdom

Francis Greenway and Duncan Speller[1]

Frequency of M&A disputes

Despite a slowdown in activity from the second half of 2018 caused by actual and anticipated geopolitical, economic and regulatory challenges, global M&A has enjoyed one of the strongest and longest periods of growth in history. Announced transaction volumes in 2018 reached US$4.1 trillion, the third-highest year to date for M&A volumes, driven in large part by increased numbers of megadeals worth more than US$10 billion. Although 2019 volumes and values have decreased somewhat, the first half of the year still passed US$2 trillion – a figure, again, driven by a healthy share of megadeals. There are also signs that deal activity may well recover: capital remains available and cheap, and many sectors are restructuring to cope better with uncertainty, respond to activist investors and focus on core assets and operations.[2] Elevated deal volumes and values increase the likelihood of high-stakes disputes and highlight the importance of selecting the right governing law and dispute resolution provisions.

The available data suggests that M&A disputes are becoming increasingly frequent. AIG, one of the world's largest insurance providers, has published its fourth annual study of claims made under policies for warranty and indemnity (W&I) insurance, covering M&A deals with an aggregate value of more than US$1 trillion.[3] The study concludes that 20 per cent of deals insured by AIG result in a claim notification. Claim sizes also appear to be increasing, with the proportion of claims over US$10 million having nearly doubled year on year (from 8 per cent to 15 per cent), a trend AIG says it is seeing 'all over the globe'. Claim frequency remains highest for the largest and most complex deals, with

1 Francis Greenway is a counsel and Duncan Speller is a partner at Wilmer Cutler Pickering Hale and Dorr LLP.

2 See https://www.ft.com/content/68aa3d40-e2ce-11e9-b112-9624ec9edc59 and https://www.jpmorgan.com/jpmpdf/1320746694177.pdf.

3 https://www.aig.com/content/dam/aig/america-canada/us/documents/business/management-liability/aig-manda-claimsintelligence-2019-w-and-i.pdf.

the 2019 data indicating that 26 per cent of deals valued between US$500 million and US$1 billion resulted in a claim notification. In terms of subject matter, AIG's study finds that a target's financial statements give rise to the highest proportion of notifications, followed by tax, compliance with law and material contracts.

AIG's analysis is borne out by a steady stream of M&A-related cases governed by English law over the past four or five years. There has been a succession of high-profile, publicly reported M&A disputes in the English courts,[4] and there also appears to be a growing tendency for M&A disputes to be resolved under English law in international arbitration (particularly for cross-border deals).[5] With the heightened deal activity and large deal sizes we are seeing, there is every reason to believe that it will continue to be a busy time for M&A disputes.

English law remains popular with parties involved in cross-border M&A transactions, even where neither the parties nor the transaction has a connection to the United Kingdom. English law continues to enjoy a strong reputation for (among other things): being business-friendly; upholding party autonomy and freedom of contract; being supported by well-developed, efficient judicial and arbitral institutions; and being accessible to parties from other common law jurisdictions. English law generally seeks to hold parties to the agreed terms of their bargain, particularly where those parties are sophisticated and have the benefit of professional advice. The specific terms of the contract agreed by the parties are therefore of critical importance when seeking to determine the extent of any rights and obligations that exist between them. What may seem like minor nuances in the wording of the contract can have a significant effect in practice.

In contrast to some other jurisdictions, English law does not generally have an overarching duty of good faith in the negotiation or performance of a contract (although terms can be implied into a contract in some circumstances). This makes it all the more important that the contract of sale expressly and unambiguously sets out the intention of the parties. What was said in the course of pre-contractual negotiations (including the subjective understanding of the parties as to what was intended) is generally inadmissible as evidence of how a contract should be interpreted under English law.[6] Where pre-contractual

4 See, for example, *Starbev GP Limited v. Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm); *Shafi v. Rutherford* [2014] EWCA Civ 1186; *Heritage Oil and Gas Ltd & Anor v. Tullow Uganda Ltd* [2014] EWCA Civ 1048; *Ageas (UK) Limited v. Kwik-Fit (GB) Limited & Anor* [2014] EWHC 2178 (QB); *Treatt Plc v. Barratt & Others* [2015] EWCA Civ 116; *Ipsos SA v. Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm); *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67; *Hut Group Ltd v. Nobahar-Cookson* [2016] EWCA Civ 128; *Zayo Group International Ltd v. Ainger* [2017] EWHC 2542 (Comm); *Team Y&R Holdings Hong Kong Ltd v. Ghossoub* [2017] EWHC 2401 (Comm); *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24; *Kitcatt v. MMS UK Holdings Ltd* [2017] EWHC 675 (Comm); *Teoco UK Ltd v. Aircom Jersey 4 Ltd* [2018] EWCA Civ 23; *Tesco UK Ltd v. Aircom Jersey 4 Ltd & Anor* [2018] EWCA Civ 23; *Al-Hasawi v. Nottingham Forest Football Club Ltd* [2018] EWHC 2884 (Ch).

5 For example, Tunde Ogunseitan, counsel at the ICC International Court of Arbitration, has said that, in 2015, M&A disputes 'accounted for 13.6 per cent of new cases and, in 2016, 17.7 per cent'. See https://globalarbitrationreview.com/article/1142209/the-sexy-world-of-m-a-arbitration.

6 Other than in limited circumstances, such as for claims for rectification of a contract or where a collateral contract can be identified (although this possibility may be excluded by the terms of the primary contract).

statements are false and have induced a party to enter into a contract, they may give rise to liability for non-contractual claims for misrepresentation; liability for such claims can, however, be limited or excluded by suitably drafted contractual provisions.[7]

It is therefore essential that parties obtain proper advice on the governing law when documenting their agreement and make sure that they have allocated risk as comprehensively and effectively as possible.[8]

Form of dispute resolution

Both litigation and arbitration are popular dispute resolution choices in English-law M&A contracts and, in our experience, are frequently selected. Parties are, however, more likely to select arbitration when there is a greater international aspect to the deal. Where neither party has any connection to the United Kingdom, it is common to find dispute resolution provisions selecting English law alongside an arbitral seat other than England in a neutral jurisdiction (e.g., Hong Kong, Singapore or Switzerland). Practical advantages of international arbitration include confidentiality and the relative ease of enforcing arbitral awards across national borders under the New York Convention.

Expert determination is sometimes selected in English-law M&A contracts to resolve disputes involving disagreements on focused, technical questions that require specific expertise. Such disputes most often relate to accounting issues in post-completion price adjustment mechanisms that determine how those mechanisms work in practice.

Tiered dispute resolution provisions that provide for structured negotiations between the parties before arbitration can be commenced are also sometimes used. Other forms of alternative dispute resolution, such as early neutral evaluation, are more rarely selected by parties to M&A contracts.

Grounds for M&A arbitrations

'M&A arbitration' encompasses deal structures of all shapes and sizes, traverses industry sectors and has generated numerous high-value disputes of real factual and legal complexity. The nature of the relief sought by claimants and the legal grounds for obtaining it will vary from case to case and depend to a large extent on the terms, structure and commercial background of the transaction in question.

In general, however, an M&A transaction has several distinct phases, each of which can give rise to potential disputes.

The first is the contracting phase, in which the seller shares information about the target business with the buyer, and the parties negotiate the economic and legal terms of the transaction and allocate risk between themselves. Their agreement is documented in a contract, usually carefully negotiated with the help of advisers.[9]

7 Apart from fraudulent misrepresentation, as discussed in 'Fraud and failure to disclose', below.

8 Through warranties, other contractual protections or other means (such as warranty and indemnity insurance).

9 To (among other things) agree that the business will be sold at completion, put in place warranty and indemnity protection, limit the parties' liability, agree conditions precedent to completion and formulate a mechanism for the calculation and adjustment of the purchase price.

The next phase comes between the signing of the contract and completion, in which conditions precedent to completion must be satisfied.[10] During this period, buyers typically want to ensure that the business they agreed to buy does not lose value and continues to be run properly.[11] The contract therefore often contains express covenants as to how the target business will be conducted between signing and completion. Such covenants typically include a requirement that the target's business be conducted in the ordinary course, and require the seller to obtain the buyer's consent for certain corporate actions that might lead to value leakage from the target or the assumption of excess risk.[12]

Finally, the buyer pays the seller an agreed sum (specified in the contract) at completion, takes control of the business and implements any integration plans. The parties' contract will commonly provide for subsequent adjustments to be made to the sum paid at completion to reflect changes in value that have occurred since the economics of the deal were defined at the time of contracting.[13]

Typically (though not invariably) disputes arise after completion, once the buyer has taken control of the target and discovers issues impairing the target business for which the seller should bear liability. The types of claims that are most commonly encountered, along with their relative frequency are:

- Claims for breaches of contractual terms relating to warranties and indemnities. Such claims arise very frequently in English law arbitrations. They are usually based on there being a fact, matter or circumstance, not disclosed to the buyer, that affects the value of the acquired business.[14] AIG's study of claims under W&I insurance policies for global M&A deals suggests that the largest categories of breach relate to the accuracy of the target's financial statements, tax liabilities, compliance with law and material contracts.[15] Those findings are consistent with what we tend to see in English-law arbitrations.

10 These vary from case to case, but generally include obtaining corporate and regulatory approvals.

11 This is achieved by negotiating appropriate protections in the parties' contract, such as covenants from the seller, material adverse change clauses and granting rights of access and information to the buyer so that it can monitor the business during this period.

12 Such actions can be wide-ranging, but usually include the payment of dividends by the target to the seller, asset sales above a certain threshold and the agreement, amendment or termination of material contracts by the target.

13 Adjustments can be made by reference to financial metrics (which vary, but can include net assets, net debt or working capital) in 'completion accounts' that reflect the updated financial position of the business at completion, or by reference to an earn-out mechanism whereby additional amounts become payable if the business outperforms certain thresholds or is sold on by the buyer for an amount above a defined threshold. An alternative to these adjustment mechanics is the 'locked box' structure, which seeks to crystallise the price and prevent purchase price adjustments by reference to financial data relied on at the time of contracting.

14 These can include inaccuracies in the financial data provided by the seller (upon which the buyer based its calculation of the purchase price), the existence of litigation, the loss of material customers, compliance with laws and numerous other specific issues affecting any aspect of the target's operations for which warranty or other contractual protections are negotiated.

15 https://www.aig.com/content/dam/aig/america-canada/us/documents/business/management-liability/aig-manda-claimsintelligence-2019-w-and-i.pdf.

- Claims against the seller for misrepresentation.[16] These claims are also very common in English law arbitrations, although tend to be slightly less frequent than claims for breaches of contractual terms because parties sometimes exclude liability for non-fraudulent misrepresentation in their contracts. When such claims are made, they are often brought in parallel to claims for breaches of contract. A claim for misrepresentation is based on false statements, usually made during pre-contractual negotiations, that induced the buyer to purchase the target business.
- Claims for breaches by the seller of its contractual obligations to run the business appropriately in the period between contracting and completion. These claims are also relatively common in arbitration. Any failure to comply with those provisions can lead to value erosion in the business for which a buyer can seek compensation.
- Disputes also frequently arise where parties take a different approach to applying price adjustment mechanisms in the post-completion period. Although these can result in arbitration, in our experience such disputes are most commonly referred to expert determination and are therefore encountered less frequently than claims for breaches of other contractual terms.[17]
- Disputes arising out of a failure to complete. These are rarer in our experience,[18] and subsequent arbitrations (and court proceedings) are less common under English law.

There are of course plenty of exceptions to these general categories. Disputes may arise in relation to a variety of issues at any stage of the process, and the precise nature of the legal grounds will come down to the specific terms and relevant commercial context.[19]

Fraud and failure to disclose

In our experience, it is becoming increasingly common to see claims for fraud in M&A disputes. In many M&A contracts, the parties will have negotiated a cap on the parties' liability for breaches of warranties. They may also have sought to exclude liability for misrepresentation by using a suitably worded entire agreement clause. Under English law, however, a party cannot exclude liability for fraud (as a matter of public policy)[20] and it is common for

16 Generally, such claims are for damages for negligent misrepresentation under Section 2(1) of the Misrepresentation Act 1967 but can also be made at common law under the principle in *Hedley Byrne & Co Ltd v. Heller and Partners Ltd* [1964] AC 465. Claims for fraudulent misrepresentation are also becoming more common and are discussed further in 'Fraud and failure to disclose', below.

17 However, a determination by the expert is not always the end of the matter. Although courts and tribunals lack jurisdiction to overturn the expert's determination on the substance, disappointed parties do occasionally try to challenge the expert's decision by commencing proceedings in the courts or under an arbitration agreement on the grounds that the expert exceeded the scope of his or her instructions under the contract or misdirected himself or herself as to the task to perform.

18 Which could arise, for example, from an alleged failure to satisfy conditions precedent or alleged repudiation of the contract by one party, giving the other the right to walk away.

19 For example, disputes can arise where parties breach confidentiality or exclusivity agreements entered into as part of the contracting phase.

20 *HIH Casualty General Insurance v. Chase Manhattan* [2003] UKHL 6 at [16], [76], [121], [122].

contractual caps to expressly state that they do not apply where breaches of warranty result from fraud. Where the facts and evidence support it, a fraud claim will therefore provide a route to uncapped liability and increase the measure of damages available to the claimant.

Claims for fraud under English law are based on the tort of deceit. A party will incur liability where it intentionally makes a misrepresentation to another person, which induces that person to act in a way they would not otherwise have acted and they suffer loss as a result. The representation must relate to a matter that would influence a reasonable person deciding whether, or on what terms, to enter into a contract or complete a transaction.[21] To qualify as an actionable misrepresentation, a statement must be one of existing fact. Difficulties can occur when this is not the case, as in the following examples.

- Statements of opinion or belief: some kinds of sales talk are so vague as to have no legal effect. A statement of opinion or belief can, however, give rise to liability if the seller professes to have special knowledge or skill with regard to the matter stated,[22] or if the statement by implication contained a representation that the person making it held the belief stated.[23] A person who makes a statement of expectation or belief about future events may similarly by implication represent that he or she holds the belief on reasonable grounds,[24] or at least honestly.[25]
- Statements that become false: a representation may be true at the time it is made, but subsequently become false. If a person becomes aware of facts or circumstances that falsify the representation before it has been relied on, they must correct the representation or risk exposure to liability for misrepresentation.
- Where there is a positive duty to disclose a material fact, failure to do so can also constitute fraud. The English Court of Appeal has held that, when there is a positive duty to disclose,[26] non-disclosure is tantamount to an implied positive representation that there is nothing relevant to disclose. That implied representation can be used to found a claim for fraud.[27]

The key ingredient that sets fraudulent misrepresentation apart from other types of misrepresentation is dishonesty. That will be made out if the claimant can show that the person making the statement either knew that it was false or had no belief in its truth or made it

21 *McDowell v. Fraser* (1779) 1 Dougl 260, 261; *Traill v. Baring* (1864) 4 DJ & S 318, 326.

22 *Esso Petroleum Co Ltd v. Mardon* [1976] QB 801.

23 *Brown v. Raphael* [1958] Ch 636, 641.

24 *The Mihalis Angelos* [1971] 1 QB 164, 194, 205.

25 *Economides v. Commercial Union Assurance Co plc* [1998] QB 587.

26 Which may, for example, arise contractually after the contract is signed, in the period between contracting and completion.

27 *Conlon v. Simms* [2006] EWCA Civ 1749 at [130].

recklessly, not caring whether it was true or false.[28] They need not establish an intention to cause loss or other bad motive.[29] An 'intention to deceive' suffices even though there is no 'intention to defraud'.[30]

In the M&A context, examples of matters heard before the English courts include falsification of financial reporting[31] and the provision of sales forecasts to a buyer, which the seller's representatives learned could no longer be justified.[32]

The case of *Erlson v. Hampson*[33] is a good illustration of the principles set out above. In that case, the buyer was provided with financial information showing historic and forecast sales performance. Performance was broken down by customer, such that it was clear that a substantial proportion of anticipated future revenue was based on sales to a small number of material customers. The chief executive of the seller (who was also a director of the target) was told that a material customer intended to terminate its relationship with the target, but did not inform the buyer. The share purchase agreement contained exclusions of liability for negligent misrepresentation and the warranties were not engaged; however, the case for fraud succeeded. The forecasts were statements of opinion (because they represented expectations about future performance, not present fact), but the court held that they contained implied representations of fact that the seller had reasonable grounds for, or knew of facts that justified, the forecasts. When the chief executive learned that the material customer was terminating its relationship with the target, those implied representations became false and should have been corrected. However, the chief executive stayed silent and did not correct them. The court found he had been dishonest, the claimant succeeded, and the contract of sale was rescinded.[34]

Burden of proof

'Generally . . . a plaintiff or applicant must establish the existence of all the preconditions and other facts entitling him to the [judgment or] order he seeks.'[35] And so the basic rule is that the party who asserts a proposition bears the burden of proving that issue (this applies to both court proceedings and arbitration).[36] The standard of proof required in this context is proof on the balance of probabilities.

28 *Derry v. Peek* (1889) 14 App Cas 337.

29 *Polhill v. Walter* (1832) 3 B & Ad 114.

30 *Standard Chartered Bank v. Pakistan National Shipping Corp* [1995] 2 Lloyd's Rep 365, 375; *Standard Chartered Bank v. Pakistan National Shipping Corp (No 2)* [2000] 1 Lloyd's Rep 218, 221, reversed on another ground [2003] 1 AC 959.

31 *Hut Group Ltd v. Nobahar-Cookson* [2014] EWHC 3842 (QB).

32 *Erlson Precision Holdings Ltd v. Hampson Industries Plc* [2011] EWHC 1137 (Comm).

33 ibid.

34 As to rescission, see 'Remedies', below.

35 *Re H & R (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, *per* Lord Nicholls.

36 N Blackaby and C Partasides (eds), *Redfern and Hunter on International Arbitration* (6th edn, 2015) at para. 6.84. In other words, the burden will generally fall on the defendant to prove the elements of any defence relied on to defeat a claim.

Knowledge sharing

The circumstances when the knowledge of the management of a target will be attributed to the seller are complex, and it is difficult to provide guidance at anything other than a high level of generality; whether knowledge can be attributed is very much fact-dependent.

In sophisticated contracts there are sometimes clauses that expressly deal with knowledge sharing, attribution and disclosure. In such circumstances, this issue will be determined by the express terms of the contract. Otherwise, the inquiry is more subtle and fact-sensitive.

In *Meridian Global Funds Management Asia Ltd v. Securities Commission*,[37] Lord Hoffmann pointed out that the rules by which the acts and omissions of natural persons are attributed to a company depend on the proper interpretation of the policy underlying the substantive rules of law to which they relate. He said:

> *But there will be many cases in which . . . the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act, etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.*[38]

This discussion is framed in terms of the language of a rule, but a similar approach applies where the question of attribution arises in the context of a contractual clause.[39] The Court of Appeal considered the attribution question in *Jafari-Fini v. Skillglass Ltd*, in which Lord Justice Moore-Bick said:

> *In the context of an obligation which arises under a contract the task of identifying the natural persons whose knowledge or state of mind is to be attributed to the company for the purpose of that obligation can easily be identified as one of construing the contract. It is therefore necessary to ask who among PAL's directors, employees and agents did the parties intend should be regarded as the company for the purposes of acquiring information that must be disclosed.*[40]

That case concerned whether knowledge of a bribe paid by a third party, but known to a director at Phoenix Acquisitions Ltd (PAL), could be attributed to PAL for the purposes of a default clause under a lending facility. The capacity in which the knowledge was acquired is an important factor.[41] Several relevant principles can be gleaned:

37 [1995] 2 AC 500.

38 At 507D-F.

39 *Hut Group Ltd v. Nobahar-Cookson* [2014] EWHC 3842 (QB) at [226].

40 [2007] EWCA Civ 261 at [97].

41 *Jafari-Fini v. Skillglass Ltd* [2007] EWCA Civ 261 at [92].

- The role that the management (or employees of the target) take in the acquisition can be a material consideration in whether knowledge is attributed to the sellers. If the members of the management are active and involved, then attribution to the sellers will be more likely.[42]
- Similarly, the role the individuals play within the management of the company can be a material consideration. The more actively involved they are in the day-to-day management of a company (e.g., by nominating and receiving reports from people in key management positions), the more likely they are to be attributed with knowledge of the business.

Although the principles above are not derived from cases dealing directly with the attribution from target to seller, similar principles would apply when assessing whether such attribution should occur. In practice (and in the absence of any contractual provisions dealing expressly with knowledge attribution), the question will be determined by reference to the relevant contractual provision and the degree of the connection between the relevant target employee and the transaction.

Remedies

In the majority of misrepresentation or breach-of-contract arbitrations, the claimant will seek damages as the primary remedy.[43]

Where a misrepresentation has induced a contract, the contract can be rescinded (or unwound) at the election of the claimant or by order of the court or tribunal[44] (though, in practice, an order will usually be necessary).[45]

Rescission is barred where:

- the claimant has affirmed the contract by unequivocally manifesting an intention to continue with it after knowledge of the misrepresentation. Affirmation may be express or inferred from conduct;[46]
- a third party is a bona fide purchaser for value of property transferred under the contract without notice of the factor rendering the contract voidable;[47]
- restitution by the claimant to the counterparty of benefits conferred on the claimant by the counterparty is impossible;[48] or
- the claimant has delayed too long in seeking rescission. Where the representation is fraudulent, lapse of time is not itself a bar to rescission.

42 In the context of attributing knowledge of fraudulent activity by a director to the buyer based on this factor, see *Hut Group Ltd v. Nobahar-Cookson* [2014] EWHC 3842 (QB) at [282] (affirmed on other points [2016] EWCA Civ 128).

43 Measure of damages is considered in the next section.

44 Claims for rescission can be made alongside, or as an the alternative to, a separate claim for damages.

45 Rescission at common law may be effected by the claimant clearly communicating its election to rescind the contract to the defendant. If a claimant seeks rescission at equity, however, an order of a court or tribunal is necessary. The distinction between rescission at common law and at equity is largely academic since an order will generally be sought in any event where the right to rescind is disputed.

46 *Clough v. London and North Western Railway* (1871) LR 7 Exch 26.

47 *Cundy v. Linsay* (1878) 3 App Cas 459.

48 *Halpern v. Halpern* [2007] EWCA Civ 291.

Section 2(2) of the Misrepresentation Act 1967 gives the court or tribunal discretion to award damages 'in lieu of rescission'[49] where the misrepresentation is trivial, wholly innocent or rescission would cause undue hardship.[50]

Specific performance is also available, in theory, where damages would be inadequate to compensate the claimant. Whether damages are inadequate is highly fact-sensitive. For example, if the deal involves buying shares in a public company, then damages will generally be adequate as there is an available market. However, if the company is private, then the lack of a market may mean that damages are inadequate. The uniqueness and nature of the target business will also play a factor. An important point to note is that if the contract still has conditions precedent that need to be fulfilled (e.g., gaining regulatory approval), then specific performance will not be available.[51]

Injunctive relief is also available and can be ordered by tribunals on an interim or final basis, where appropriate.

Measure of damages

In the overwhelming majority of cases, damages awarded under English law are compensatory rather than punitive.[52] The extent of loss is, in practice, typically the subject of detailed expert evidence.

The measure of damages will differ depending on whether the buyer brings the claim in contract or in tort.[53] The basic principle for compensating losses caused by tort (which applies in cases of fraudulent or negligent misrepresentation) is that tribunals will seek to put claimants in the position they would have been in had the tort not occurred – for example, the position a buyer would have been in had it not been induced to enter the sale contract. Damages in that case would be assessed by calculating the difference between the amount the buyer paid for the business and its actual value. Contractual damages, on the other hand, are quantified by reference to the position the claimant would have been in had the contract been performed correctly. Where the claimant had a contractual right not to proceed with the transaction, this may involve an inquiry into what the claimant would have done instead and the claimant may be entitled to damages to put it into the position it would have been in had it not proceeded with the transaction. Conversely, if the claimant would have proceeded with the transaction, the inquiry will focus on the difference between the value the claimant would have received if the contract had been correctly performed and the value the claimant actually received.

49 In other words, to order that damages should be awarded in circumstances where the representee would be entitled to rescind a contract.

50 There are conflicting first instance authorities on the question of whether damages are still available even if rescission is barred by one of the four bars set out above. In favour of the view that a rescission bar also bars a s.2(2) claim, see *Government of Zanzibar v. British Aerospace* [2000] 1 WLR 2333. In favour of the opposite view, see *Thomas Witter Ltd v. TBP Industries* [1996] 2 All ER 573.

51 *Chattey v. Farndale Holdings* [1997] 1 EGLR 153.

52 Punitive damages can, in theory, be awarded under English law, but this only happens in very exceptional circumstances.

53 As noted in 'Grounds for M&A arbitrations', above, misrepresentation claims (whether under the Misrepresentation Act 1967, at common law or for deceit) are tortious claims.

Assessing the value of the target company is notoriously difficult and subjective, and requires expert evidence to assist the tribunal. A typical mechanism for identifying the value of a target company will be to look at the market price. In working out the actual value a tribunal may take into account the way the claimant itself valued the company, as that is evidence of how the market would value the property or business. English law does not, however, require the tribunal to adopt the method of valuation that the claimant actually adopted.[54] For example, where information that would have affected the value of the property is unknown by the market, the market value of publicly traded shares may not be a fair test of the true value because the market price only reflects the limited information available to the market.[55] In such cases the market price after the information becomes public may be better evidence of the real market value of the shares.[56]

English law imposes restrictions on the recovery of damages by reference to the rules of causation, mitigation and remoteness. In both contract and tort, the claimant must show that the breach of contract, or the defendant's wrongdoing, or both, were effective causes of the loss (they need not be the sole cause).[57] Similarly, in contract and tort, claimants cannot recover damage that they could have taken reasonable steps to avoid (or mitigate). However, the remoteness rules in relation to claims made for negligent or fraudulent misrepresentation are more relaxed than those for contractual damages and admit a higher level of recovery.[58] For the former, all damage directly flowing from the inducement (including consequential losses) is recoverable, regardless of whether the defendant would have foreseen it; contractual damages, on the other hand, are recoverable for categories of loss for which the defendant assumed responsibility.[59]

Special procedural issues

As M&A transactions will often concern multiple parties and multiple contracts, one question that often arises is how far third parties can be joined to an arbitration. Parties can make express provision for joinder or consolidation in the agreement to arbitrate.

In the absence of express provision, English law is more conservative than some other legal systems when it comes to engaging the liability of persons that are connected to the entity that is itself party to the relevant M&A contract (such as, for example, a parent company that may have more assets to satisfy an award of damages). In particular, it is relatively

54 *Senate Electrical Wholesalers Ltd v. Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 at [34]. The price the claimant itself would have paid if the proper accounts had been presented is good (but not conclusive) evidence of what the market would have paid, and factors such as competition for the business and how parties in fact pragmatically conduct bidding are to be taken into account. In this context, it will be relevant to look at not only the figure a pricing model produces, but also the demand and competition that there was in the market.

55 As explained in the deceit case of *Derry v. Peek* (1887) 37 Ch D 541.

56 A Kramer, *The Law of Contract Damages* (2017, 2nd edn), at para. 9.19.

57 *County Ltd v. Girozentrale Securities* [1996] 3 All ER 834.

58 For fraud, see *Doyle v. Olby* [1969] 2 QB 158. For negligent misrepresentation, see s.2(1) Misrepresentation Act 1967 and *Royscot Trust v. Rogerson* [1991] 2 QB 297 (by virtue of 'the fiction of fraud' wording in the statute).

59 *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48.

difficult to pierce the corporate veil under English law.[60] In some cases it may be possible to establish an agency relationship between the entity that is party to the contract and another person, but whether it is possible will depend on the facts of each particular case.

60 *VTB Capital Plc v. Nutritek International Corp* [2013] UKSC 5. English law is strict on these contractual mechanisms, as can be seen in its rejection of a purported doctrine that companies can bind other companies to arbitration if they form a 'group', see *Peterson Farms Inc v. C & M Farming Ltd* [2004] EWHC 121 (Comm).

Appendix 1

The Contributing Authors

Francis Greenway
Wilmer Cutler Pickering Hale and Dorr LLP

Francis Greenway is a counsel at Wilmer Cutler Pickering Hale and Dorr LLP in London. He has experience with all major arbitral rules in commercial and investment arbitrations seated primarily in Europe and Asia as well as extensive experience of litigation in the English courts. He has advised on M&A disputes across the oil and gas, telecommunications, media, insurance and other commercial sectors.

Duncan Speller
Wilmer Cutler Pickering Hale and Dorr LLP

Duncan Speller is a partner in Wilmer Cutler Pickering Hale and Dorr LLP's litigation and controversy department, and a member of the international arbitration practice group. Mr Speller is based in London, where he practises international arbitration and English High Court litigation. Mr Speller is an English barrister with more than 16 years' experience. He has represented clients in more than 100 institutional and ad hoc arbitrations, sited in both common law and civil law jurisdictions, including England, New York, Hong Kong, Singapore, France, Switzerland, Sweden, Austria and Germany.

Mr Speller also has substantial experience of international commercial litigation in both the English Court of Appeal and the Commercial Division and Chancery Division of the High Court. He has particular experience of litigation concerning aviation, oil and gas, insurance and reinsurance, telecommunications, banking and competition law issues. Mr Speller sits as arbitrator and is on the governing body of the Bucharest Court of International Arbitration.

In addition to his work as international arbitration counsel and as arbitrator, Mr Speller is a published author and has taught arbitration law, commercial law and private international law, including at the University of Cambridge and the University of Nottingham. He is co-author of *A Practical Guide to International Commercial Arbitration* (Sweet & Maxwell

2010, new edition forthcoming shortly), has written the chapter on England and Wales in the *International Arbitration Review* for the past six years and wrote the chapter on arbitration in England and Wales in one of the leading German publications on international arbitration (*Handbuch Internationales Wirtschaftsrecht* edited by Kronke, Melis and Kuhn).

Wilmer Cutler Pickering Hale and Dorr LLP

49 Park Lane
London, W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537
francis.greenway@wilmerhale.com
duncan.speller@wilmerhale.com
www.wilmerhale.com

M&A disputes can be unique in their hostility and complexity. *The Guide to M&A Arbitration* – published by Global Arbitration Review – is a 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 eight 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. The second edition of this guide is written by 36 specialists from a variety of backgrounds.

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