7. Mergers and Acquisitions. Dispute Resolution

7.1 M&A Phases

Any M&A process may be conventionally separated in following phases:

a) Preparatory phase;
b) Negotiation phase;
c) Prior Approvals from State Entities;
d) Closing Phase;
e) State Registration Phase.

a) Preparatory phase

(1) Corporate approvals by the correspondent corporate bodies of each participant involved. In some cases, articles of incorporation of entities involved in a M&A transaction (seller, buyer, target in case of takeover bids) the intention to initiate discussions on a potential merger or acquisition requires approvals by boards of directors or general meetings of shareholders, as regulated by the articles of incorporations and by-laws of the involved entities.

(2) Performance of legal, financial, operational due diligences. Due diligence is a thorough review of the target and target's books, records, inventory, contracts and more. The goal of due diligence is for the purchaser to confirm the target's financials, contracts, customers, and all other pertinent information. For due diligence purposes, online data rooms are usually used acting as central depositary of documents and information. Considering that due diligence implies the transfer of sensitive information of the target, correspondent non-disclosure agreements need to be in place.

b) Negotiation phase: this phase is specific for private M&A that do not require a mandatory bidding process. At this phase, parties usually perform the necessary evaluations, agree on the main terms of the transaction and execute preliminary contractual documentation such as letters of intent, heads of agreements or term sheets. The preliminary contractual documentation represents the roadmap for the transaction and lays out the intent of the parties to sell and purchase the stock or assets for the proposed terms. The preliminary contractual documentation usually does not bind the parties to the deal and any party can still walk away for any reason.

c) Preliminary approvals of State Authorities

(1) Competition clearance by the Competition Council:

Under the Competition Law, the Competition Council of Moldova must be notified of any concentrations of undertakings including mergers and acquisition of control, provided that in the year preceding the concentration the undertakings concerned reported:

a) a combined aggregate worldwide turnover of at least MDL 25 million of all the undertakings concerned;

b) at least two of the undertakings concerned reported an aggregate turnover in Moldova of at least MDL 10 million.

The acquisition transactions are subject to competition clearance when the direct or indirect control in an entity is changed. Under the Competition Law, the "**control**" exists when an entity directly or indirectly:

a) owns more than half of the capital, or

b) has the power to exercise more than half of the voting rights, or

c) has the power to appoint more than half of the members of the supervisory board, the administrative board or bodies legally representing the entity; or

d) has the right to manage the entity's affairs.

For the purposes of thresholds calculation, the parties to an M&A deal need to consider the turnover of all merging parties and their affiliates (in case of merger); turnover of the purchaser and its affiliates, and turnover of the target and its affiliates (in case of acquisition of control).

When thresholds are cumulatively met, all merging entities (in merger deals) or the purchaser (in acquisition of control) should file a notification in the form approved by the Competition Council, together with the required supporting documentation.

The notification of the economic concentration (merger or acquisition) should be submitted prior to reorganization or closing of the transaction. In case of public takeover bids, the notification should be filed prior to the announcement of the public offer.

Depending on the complexity of the economic concentration, its evaluation by the Competition Council may take from 30 to 120 days as of the date of effective notification.

Parties are generally prohibited to put into operation a notifiable economic concentration in the absence of the Competition Council decision. If parties close the deal or put into operation a notifiable concentration, Competition Council may initiate an investigation, and the responsible entities may be subject to fines of up to 5% from their turnover in the precedent year.

(2) Approvals of markets regulators

M&A deals involving shares or assets of businesses operating on regulated markets may require preliminary approvals from correspondent market regulators. For instance,

a) direct or indirect acquisition of:

- 1% and more in the capital of a Moldovan bank requires prior approval of the National Bank of Moldova;

- 10% and more in the capital of a Moldovan nonbanking payment service provider requires prior approval of the National Bank of Moldova;

- 10% and more in the capital of a Moldovan insurance company requires prior approval of the National Commission for Financial Market;

b) merger of:

- Moldovan banks - prior approval of the National Bank of Moldova;

- Moldovan nonbanking credit organizations - prior approval of the National Commission for Financial Market

- Moldovan insurance companies - prior approval of the National Commission for Financial Market;

- Moldovan entities registered in the form of joint stock companies - prior approval of the National Commission for Financial Market;

- Moldovan entities operating on Moldovan power sector require prior approval of the National Agency of Energy Regulation.

d) Closing Phase

At closing, parties execute the purchasing agreement, which is often referred to as the SPA (stock purchase agreement) or APA (asset purchase agreement), or merger agreement.

The form of the purchasing agreement will depend on the subject matter thereof. For instance, acquisition of stocks in a Moldovan LLC or of real estate requires notarial authentication as a form of validity.

e) State registration phase

Most M&A deals performed with stocks in Moldovan companies or their assets require registration in public registries.

Thus, all mergers are subject to mandatory registration in the Register of Legal Entities maintained by the Public Services Agency.

Acquisition of stocks in LLCs are subject to mandatory registration as a change of shareholders in the Register of Legal Entities maintained by the Public Services Agency.

Acquisition of shares in JSCs are subject to mandatory registration as a change of shareholders in the Register of Shareholders maintained by the Central Depository, or by the independent registrar of the respective JSC.

Acquisition of immovable property is subject to mandatory registration in the Immovable property Register maintained by the National Cadastre Agency of the Republic of Moldova.

7.2 Price and Key Costs

The price to be paid by the purchaser and key costs in an M&A transaction are always subject to agreement between parties.

There are no statutory requirements or restrictions as to minimum or maximum level of price to be paid by the purchaser, unless it is unreasonable and lower than the market value, in which case there may be tax implications.

Depending on the type of transaction, the following charges or fees may apply:

(a) purchase of shares in a JSC is subject to a transfer stamp duty of 0.5% of the shares price to be paid to the National Commission for Financial Market;

(b) purchase of shares in an LLC is subject to a state fee of 0.1% of the shares price to be paid to the State budget;

(c) notary fees for authentication of the purchase agreement in transactions where shares in LLCs or immovable property are involved depends on the value of the subject matter of the agreement and may be up to 0.1% of the price of the agreement.

(d) competition clearance of the economic concentration is subject to a fee of 0.1% of the combined aggregate turnover of the undertakings concerned in the Republic of Moldova, but not exceeding MDL 75,000;

(e) registration of amendments in the Register of Legal Entities in relation to the merger or acquisition of shares is subject to State fees depending on the legal transaction (reorganization or change of shareholder).

7.3 Arbitration

General Overview

The Government of the Republic of Moldova is crafting a modern and robust arbitration system, promoting the alternative dispute resolution methods. Since the first piece of legislation on arbitration dates to 1994, the number of arbitration institutions has increased a lot. Based on a list published by the Supreme Court of Justice of Moldova, there is a rather extensive number of arbitration courts in Moldova organized within various NGOs and associations, with 30 arbitration courts in total.

Legal framework

There are two main laws governing arbitration in Moldova:

- Law No. 23 on Arbitration of 22 February 2008 applicable to arbitration where the arbitration forum is in Moldova and the dispute is not subject to the Law on international commercial arbitration; and

- Law No. 24 on international commercial arbitration of 22 February 2008 applicable when (i) the arbitration forum is in Moldova, (ii) the parties have their residence in different states, (iii) the place of arbitration is designated by parties; (iv) most of the envisaged assets or company's focus of main interests are in another state; or (v) the parties have expressly agreed that the subject matter of the arbitration agreement shall relate to at least two states.

The two arbitration laws contain most of the provisions relevant for the resolution of disputes. The Republic of Moldova is among the countries, which transposed the UNCITRAL Model law in its legislation. Although Moldova has chosen the path of adopting two arbitration laws, international and domestic arbitration procedures are not much different. Special rules regarding the recognition and enforcement of foreign arbitral awards are established by the Moldovan Civil Procedure Code.

Arbitration Clause

An arbitration clause may be a clause within a contract or a separate agreement between the parties.

As a general rule, the validity of the arbitration agreement is regarded separately from the validity of the contract in which it is included. For the validity of the arbitration agreement, the legislation establishes formalities regarding its form. The arbitration agreement shall be concluded in writing, failing which will make it null and void.

Any of the disputes to be examined in arbitration, shall fall under those „capable of settlement by arbitration".

The legislation establishes the type of claims that cannot be resolved in arbitration, namely: family disputes, claims arising from leases or other lease rights, limitation in exercise of capacity, liquidation of the legal entity or any other cases exclusively assigned to ordinary courts.

Arbitration Tribunal

Parties to an arbitration clause are free to determine the number of arbitrators. In the absence of such an agreement, the tribunal consists of three arbitrators. Each party is nominating its arbitrator and the two appointed arbitrators shall appoint the third presiding arbitrator (super-arbitrator). The parties or the appointed arbitrators may decide that one of them, shall be appointed as the super – arbitrator.

Any individual with full capacity, who has agreed to arbitrate and who, according to the party's opinion, is competent to arbitrate may act as an arbitrator. Under Moldovan legislation there are no direct provisions on qualifications for arbitrators, however the categories of individuals having no right to arbitrate are clearly defined.

Arbitration Procedure

(1) Terms

The case shall be examined in the timeframe agreed by the Parties. In case such term is not established, the dispute shall be resolved in no more than **six months**.

The parties may agree, at any time during the proceedings, to extend the duration of arbitration, either in writing or by verbal agreement, made before the arbitral tribunal and recorded in the minutes of hearing. As an exception, the arbitral tribunal may establish, by means of an order, a longer period of time for conducting the arbitral proceedings or to extend the proceedings, considering the complexity of the dispute, when it is determined that one of the parties directly or indirectly obstructs the conduct of the arbitral proceedings or for other justified reasons.

(2) Costs

Arbitration fees depend on whether the dispute is international or local. Fees are stipulated in the court rules. The fees of the Arbitration Court within the Chamber of Commerce and Industry of Moldova are as follows:

For international arbitration, the fee for the registration of the application is USD 200.

The arbitration fee depends on the value of the claim, for instance for actions with the value up to USD 50 000 – 5%, but not less than USD 500, for actions with the value USD 50 001 to USD 100 000 – USD 2500 + 3% from what is higher than USD 50 000.

The full list of arbitration fees may be consulted, following the link: https://arbitraj.chamber.md/arbitraj-international/normele-privind-taxele/.

To get acquainted with the list of fees to be paid for a specific dispute, follow the link: https://arbitraj.chamber.md/arbitraj-international/calculator/.

For domestic arbitration, the fee for the registration of the application is MDL 1000.

The arbitration fee depends on the value of the claim, for instance for actions with the value up to MDL 50 000 – the arbitration fee is 3% but not less than MDL 1000, for actions from MDL 50 001 to MDL 100 000 – the arbitration fee is MDL 1 500 + 2,8% from what is higher than MDL 50 000.

The full list of arbitration fees may be consulted, following the link: https://arbitraj.chamber.md/arbitraj-intern/normele-privind-taxele/.

To get acquainted with the list of fees to be paid for a specific dispute, follow the link: https://arbitraj.chamber.md/arbitraj-intern/calculator/.

Particular rules on arbitral fees and costs may be established for different arbitration institutions.

Award

The award shall follow special requirements related to the form established by the legislation in force.

The award shall be made in writing and signed by the arbitrator or arbitrators. In arbitration proceedings with more than one arbitrator, the signatures of the majority of the arbitration tribunal shall suffice, provided that the reason for any omitted signature is stated.

The award shall state the reasons on which it is based, unless parties have agreed that no reasons are to be given or the award is an award on agreed terms. The award must further state the date and place of arbitration, as determined, and will be deemed to have been made at that place. After the award has been made, a copy signed by the arbitrators shall be delivered to each party.

Regarding the confidentiality of the award, the legislation is silent in this respect. Usually, the rules of the local arbitration institute will provide clear rules on confidentiality.

Enforcement

(i) Enforcement of domestic arbitral awards

A specific feature of the examination of civil cases in arbitration is the fact that parties agree to voluntarily execute the final jurisdictional act – the arbitral award, immediately or within the time limit indicated in the judgement.

If the parties does not execute voluntarily, the interested party can proceed with forced execution by addressing the court the issuance of the Enforcement Writ and submit an application for enforcement to the bailiff.

(ii) Enforcement of foreign arbitral awards

By recognizing a foreign arbitral award, the authority of the judgment is confirmed and the foreign award is assimilated, by naturalization, to the national award. After the recognition of its effects on the territory of Republic of Moldova, the award shall be recognized as enforceable.

The arbitral awards issued outside the country, become available on the territory of Republic of Moldova, only if duly approved by Moldovan authorities

A foreign arbitral award can be recognized and enforced in Moldova if (i) it is issued in line with an arbitration agreement on the territory of a foreign state that is party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards; (ii) if its recognition and enforcement is governed by an international treaty to which Moldova is party; or (iii) if the recognition and enforcement is allowed on the basis of reciprocity as regards the effects of foreign arbitral awards.

The enforcement of foreign arbitral awards is performed in accordance with Code of Civil Procedure, that prescribes the rules and principles established by New York Convention.

7.4 Mediations

Rather than going to court, one can solve disputes through Mediation. Mediation is a form of alternative dispute resolution (ADR) where a mediator will assist disputants in reaching an agreement.

The Moldovan Government and justice practitioners understand the advantages of mediation and encourage parties to mediate their disputes.

There are two forms of mediation in Moldova:

(1) Judicial Mediation;
(2) Voluntary Mediation

Judicial Mediation

Judicial mediation is a form of mandatory mediation that has been introduced for certain types of disputes.

Back in the spring of 2017, mandatory judicial mediation has been introduced for the following categories of cases:

a. consumer protection;
b. family disputes;
c. disputes related to ownership right between individuals and/or private legal entities;
d. employment disputes;
e. disputes resulting from tort liability;
f. disputes related to inheritance;
g. other disputes of a value lower than MDL 200,000 (about EUR 20,000) except those disputes where an insolvency initiation decision has been taken.

At the request of the party judicial mediation may take place in other cases than those described above.

Settlement is possible both, within voluntary or judicial mediation.

Judicial mediation is considered mandatory because the mediation procedure shall be mandatorily initiated by the court upon receipt of the claim. Thus, your dispute falls in one of the abovementioned categories of disputes the court will convene the parties and suggest them to mediate the case presenting the advantages of such a solution and possible drawbacks of continuing the judicial resolution of the dispute.

If parties agree to mediate the case will be mediated by the judge. If parties refuse to mediate, judicial mediation procedure is terminated, and the case is redistributed to another panel of judges for trial.

All discussions and documents executed within judicial mediation are confidential and without prejudice. So, neither the parties, nor the court or any other third party that have participated in the judicial mediation may use the information obtained within mediation or in relation to it.

Where parties reach an agreement within judicial mediation, a settlement will be drafted. Main terms of the settlement will be included in the Court Order on termination of case that takes the place of a court decision.

If parties fail to reach an agreement the judicial mediation procedure is terminated, and the dispute is distributed to be tried by another panel of judges.

Voluntary Mediation

(1) Notion of Voluntary Mediation

Mediation brings people in conflict together with a specially trained, impartial, third person who assists them in reaching a voluntary agreement.

The role of the mediator is to facilitate communication between the parties, assist them in focusing on the real issues of the dispute, and generate options that meet the interests or needs of all relevant parties to resolve the conflict.

- Mediation is not a court of law.
- Mediation does not rely on specific law issues, evidences and statements of facts.
- Mediators will not render decisions.
- Parties shall discuss to solve their own issues by looking to the future instead of finding the guilty party.

More information on mediation may be found
on the official web site of the Moldovan Mediation Council
https://mediere.gov.md/

(2) Legal framework governing voluntary mediation in Moldova

Mediation is a legal institution in Moldova, regulated, mainly by the Law on Mediation, adopted in 2007.

The law sets up the legal framework for the mediation in Moldova, provides for the conditions to become a mediator, rights of the parties implied in mediation, regulates the specifics of mediation procedure for different types of disputes and ensures confidentiality of the entire mediation process.

General provisions allowing the settlement of parties, including via mediation, are incorporated as well in the core material and procedural acts of Moldova – Civil Code of Moldova, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure and others.

(3) Advantages of voluntary mediation

Quicker: Mediation is usually quicker than a court or even arbitration examination. Years may pass before parties will get a final decision of the judge. Months will pass before an arbitration award is delivered. In contrast, a mediated agreement may be obtained in a couple of hours or in several sessions over a few weeks.

Less expensive: Mediation is very much less expensive than a typical lawsuit. Going to a court implies payment of state fees, lawyer's fees, expenses related to disclosure of evidence. Often costs exceed benefits. Getting a mediator is much cheaper and combined with the much quicker term of resolving the dispute, you'll be paying less money. If you can't agree, other legal options are still possible. Even a partial settlement can diminish later litigation fees.

State incentives for mediation: Parties that have resolved their disputes by mediation are free of state tax for confirmation or inserting the enforcement clause in their settlement agreement. Moreover, if parties, have participated in mediation before initiating a court trial but no settlement has been reached they are partially exempt from state tax. If parties settled their dispute during court examination the state duty is partially or totally returned depending on the circumstances.

Control over process: There are no strict rules of procedure. There is no judge that will oblige you to act as prescribed. In mediation, parties are in control. Parties are the decision makers; they decide the outcome of their dispute. Mediators will only help parties to discuss, will adapt the environment of the meeting to the case and needs of the parties. Efficient mediators use their skill and experience to influence progress and yet, importantly, leave it up to the parties whether to settle and on what terms. Mediators will not impose a solution or render decisions. Parties will agree on their own, unique solution.

Voluntary: Mediations are initiated by mutual agreement between parties in a dispute. Once mediation has started, parties' participation is always voluntary, meaning that any party can choose to leave mediation without any adverse consequences. Mediation is not binding unless and until an agreement is reached, when settlement terms become an enforceable contract. Until that happens, the parties may walk away from the mediation at any time.

Confidential: Unlike court cases, which are a matter of public record, mediation is confidential. This means that there is no record of the meeting, no transcript, no audience and any evidence introduced during mediation cannot be used later or revealed. Mediation is a private process and not subject to public knowledge and possible media attention, as the case with civil litigation can be.

Enforceable: If the settlement reached by mediation is breached the other party may confirm the settlement in court (an expedited procedure applies - 15 days, without party's participation) and obtain the enforcement order much cheaper and easier.

(4) Initiating a voluntary mediation

Voluntary mediation is initiated by mutual agreement between the parties in a dispute.

It is essential that the parties agree to settle the dispute (including a potential one) by mediation.

The agreement by which the parties agree to submit the dispute to mediation is called mediation agreement. It shall be agreed in writing and may take the form of a separate agreement between parties or can be expressed as the mediation clause inserted in the basic agreement of parties.

Mediation may be agreed upon, before, during or after the dispute arose. Mediation can be agreed as well when the dispute has been already submitted to court. Mediation can be agreed at different stages of examination in the courts of the first instance, in appeal, recourse or even during the enforcement procedure.

(5) Standard clause to refer disputes to voluntary mediation

All claims, disputes, and controversies arising out of or in relation to the conclusion, performance, interpretation, application, execution, termination or enforcement of this agreement, including but not limited to breach thereof, shall be referred to mediation before, and as a condition precedent to, the initiation of any claim in court of law. In this sense a party ("offering party") makes a written offer of compromise ("Mediation Request") to another party ("offered party") in which proposes three Moldovan licensed mediators to mediate the case.

Within 3 business days from the receipt of the Mediation Request offered party shall answer, in written, the Mediation request by choosing one of proposed mediators. The mediator that has been chosen by the parties shall mediate the dispute according to the conditions set in the mediation agreement to be signed with both parties. In the event parties are unable to agree on a mediator or terms of mediation agreement parties shall submit their claims to the competent courts of law.

(6) How can I choose a Mediator?

As of today, there are more than 177 licensed bureaus and mediators' offices in Moldova. Mediators associated in this bureaus and offices have been licensed by the Ministry of Justice and are trained to mediate different types of disputes.

The complete list of mediators' bureaus and offices may be accessed at: http://mediere.gov.md/sites/default/files/document/attachments/lista_birourilor_de_mediere_actualizata_la_data_de_12052020.docx.pdf