

# **IBA Conference: Mergers and Acquisitions in Russia and CIS**

M&A Disputes in Arbitration & Litigation – Trends and Developments

**What are the most common types of disputes  
that arise in M&A transactions?**

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# Overview

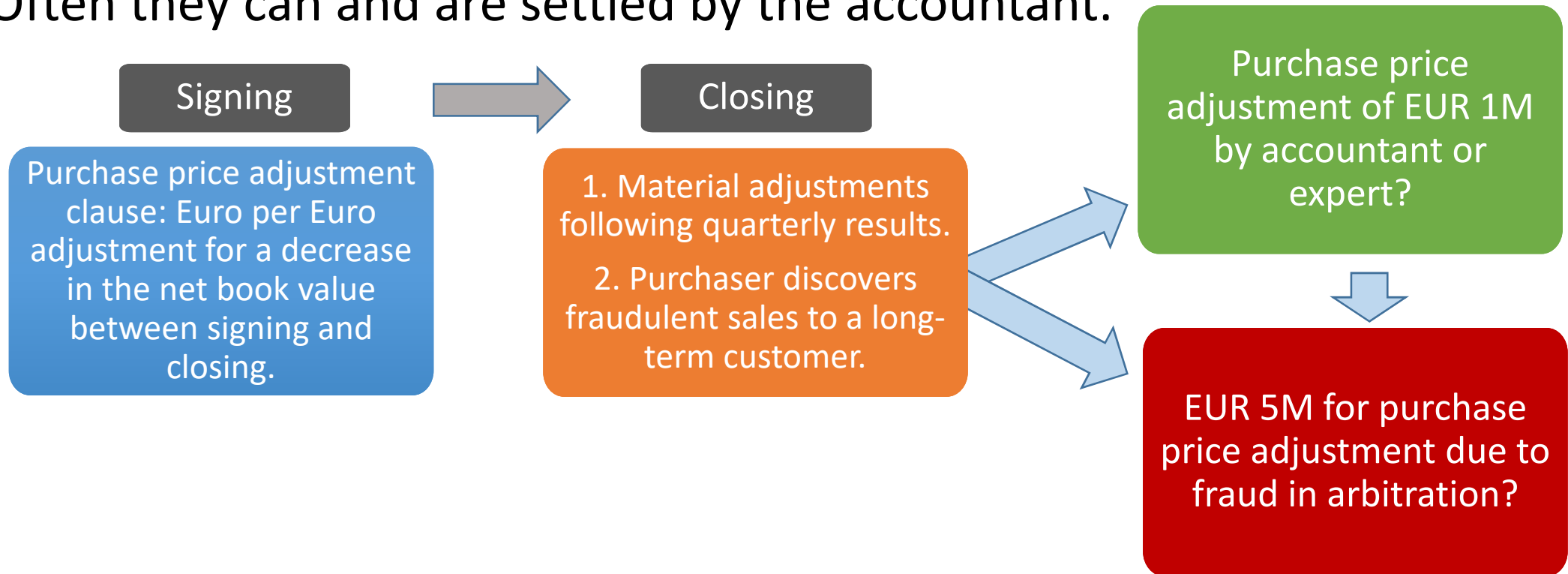
- We wish to discuss five issues that frequently arise in M&A.
  - **Amy** will comment on each of the issues from the perspective of counsel.
  - **Tom** will comment on the issues from the arbitrator's perspective.



- For several of the issues – which have been simplified – **you** will be asked to choose an option.
- References are provided for each example at the bottom of the slides.

# 1. Price adjustments disputes

- Facts: Price adjustments among the most frequent claims in M&A. Often they can and are settled by the accountant.



Question: Would **you** claim under the price adjustment, on the basis of fraud, or both?

*See, See, UDP Holdings Pty Ltd (subject to deed of company arrangement) (rec and mgr apptd) v. Ironshore; B v A (Rev 1) [2010] EWHC 1626 (Comm)*

## 2. Was the disclosure adequate?

- Facts: Issues as to whether there has been adequate data room disclosure are frequent.

### Transaction:

Seller provides only limited access to the data room.

Data room disclosure refers to hundreds of labour law disputes with very brief summaries (without amounts).

### After closing:

The purchaser discovers the potential impact of the labour law disputes and wishes to make a claim.

### Issues:

1. When has there been adequate disclosure?
2. How do you deal with the data room issues?

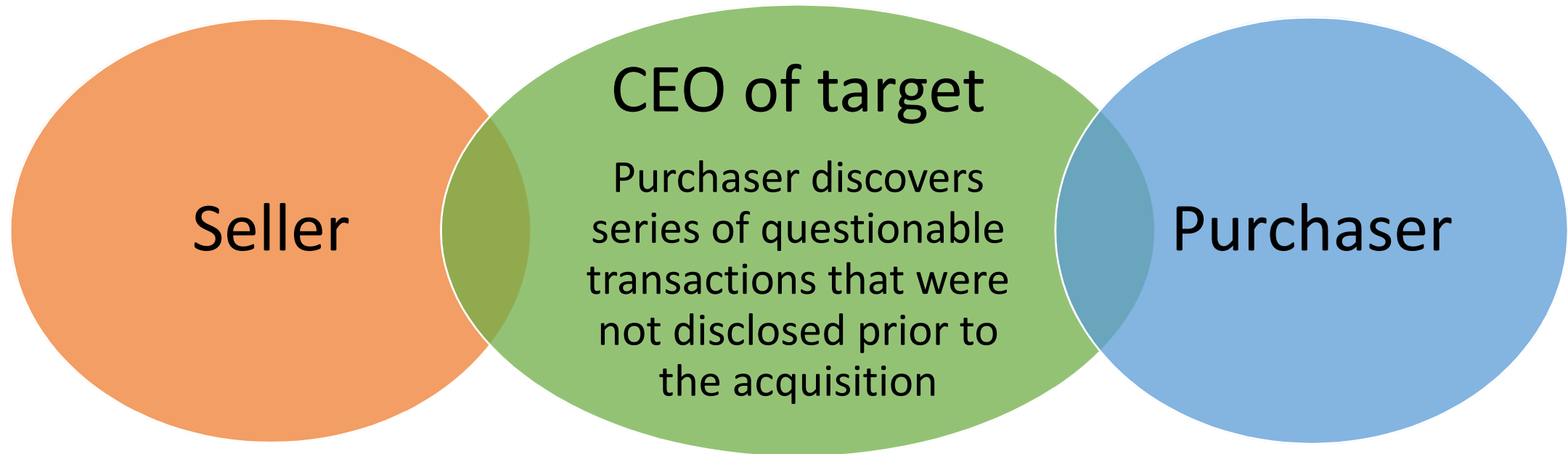


Question: Would **you** as arbitrator consider that the disclosure was (i) adequate, (ii) inadequate or (iii) there is evidence of intentional misrepresentation?

See, various unreported arbitrations.

### 3. Inside disclosure after the event

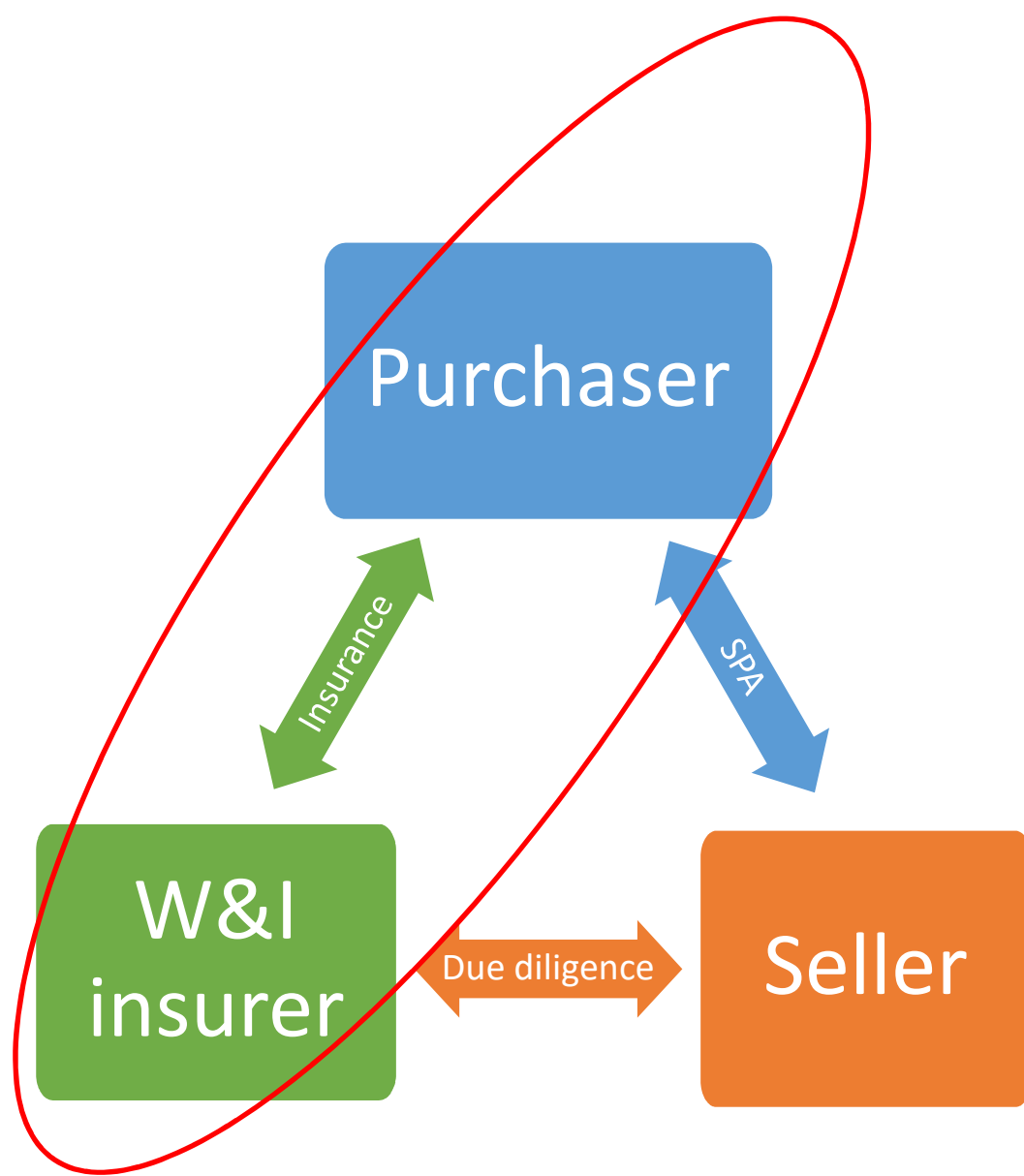
- Facts: Frequently, employees of the target remain (and it is a condition of closing that they remain).



- Question: As seller, would **you** seek to rely on prior confidentiality undertakings to exclude a witness statement submitted by CEO on behalf of Purchaser?

# 4. Impact of W&I Insurance

- Facts: Increasingly purchasers take out insurance regarding the representations and warranties.
  - The insurance policy mirrors some or all of the representations and warranties in the SPA.
  - The buyer will make most claims against the insurer under the policy.
  - Where the insurer denies the claim, arbitration will be between the purchaser and the insurer.
- Issues:
  - In many cases, the seller's knowledge and actions will be material evidence.
  - Mismatches between policy and SPA can cause problems.



Question: As arbitrator, what would **you** decide must be disclosed regarding the buyer's knowledge to the insurer? Just the data room information or all other knowledge the buyer may have had?

# 5. Disputes arising from changing market conditions

- Facts: We live in interesting times and the issue is when a change is material and adverse given the current circumstances.
  - By way of example, the pandemic and its possible resolution has rendered traditional forecasts difficult to follow up on. The swings in the market are substantial and unpredictable.
- Issues: At what point does a party have an out? What is the impact of a sudden improvement in the situation?

Question: The coronavirus crisis has struck. The details of the lockdown (or second lockdown have not been issued). As buyer do you withdraw or not?

