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“GREEN CLAUSES, RED FLAGS: RETHINKING ESG DISPUTES IN CROSS-BORDER M&A THROUGH A SUSTAINABILITY MEDIATION ARCHITECTURE”

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ABSTRACT

As ESG (Environmental, Social, and Governance) considerations grow central to how cross-border mergers and acquisitions are structured and sustained, legal systems worldwide face increasing pressure to resolve ESG-related disputes with mechanisms that go beyond traditional adversarial frameworks. This paper identifies the proliferation of ESG disputes due to inadequate due diligence, vague contractual provisions, and jurisdictional regulatory divergence across India, the US, the UK, and the EU. It critiques the limitations of arbitration—especially its confidentiality, rigidity, and lack of ESG expertise—and examines why traditional frameworks fall short when addressing public-interest ESG concerns. Through doctrinal and comparative analysis, the research makes a compelling case for integrating pre-arbitral sustainability mediation protocols within M&A contracts. The paper further explores how frameworks like the Singapore Convention on Mediation can strengthen enforceability, transparency, and inclusivity in ESG dispute resolution. Finally, it proposes concrete reforms such as ESG-specific mediation clauses, a transnational ESG ombud body, participatory models in high-risk sectors, and regulatory incentives, aiming to align commercial certainty with sustainability values.

Keywords: *Cross-Border M&A, ESG Disputes, Sustainability Mediation, International Arbitration, Pre-Arbitral Protocols, Regulatory Divergence, Corporate Governance, Singapore Convention, Stakeholder Engagement*

INTRODUCTION

In light of increasing stakeholder activism, a global regulatory drive, and heightened reputational risks associated with non-compliance in environmental, social, and governance (ESG) areas, these factors have emerged as critical considerations in cross-border mergers and

acquisitions (M&A). With the growing dependence of multinational corporations on sustainability disclosures and responsible investment policies, the legal ramifications of ESG violations have become a focal point in cross-border disputes.

The Importance and Significance in Today's Context

Today, the significance of ESG in M&A transactions is highlighted by pressing global challenges, including climate emergencies, human rights abuses within supply chains, and issues of financial mismanagement. A 2023 report from McKinsey reveals that 74% of cross-border transactions now include ESG due diligence as a prerequisite before closing the deal. The rise in litigation and arbitration related to ESG disputes highlights the inadequacies of current dispute resolution mechanisms, which seem increasingly outdated and confrontational. The urgency for a transition to sustainability mediation protocols that emphasize the satisfaction of all stakeholders and ensure long-term compliance with ESG standards is more critical than ever.

LITERATURE REVIEW

The convergence of ESG factors with cross-border mergers and acquisitions (M&A) has attracted considerable academic interest, especially in relation to mechanisms for resolving disputes. This literature review brings together important insights from academic journals, legal analyses, and institutional reports, shedding light on the changing dynamics of ESG-related disputes in the realm of international mergers and acquisitions.

I. Journals Articles and Publications

- a. Cameron and Broom (2021) explore the intricate process of incorporating ESG considerations into cross-border M&A transactions, highlighting the difficulties that arise from varying ESG standards in different jurisdictions. The authors advocate for the creation of standardized frameworks aimed at reducing conflicts that may arise from discrepancies in ESG practices.¹
- b. Mills and Kelsey (2022) explore the integration of ESG clauses in M&A contracts, highlighting the challenges associated with enforcing these clauses, which often suffer from vague language and a scarcity of established legal precedents. They promote the

¹ Cameron & Broom, *Integrating ESG in Cross-Border M&A: Jurisdictional Challenges*, 45 J. Int'l L. 234 (2021).

importance of clear drafting and the incorporation of specific dispute resolution mechanisms that are specifically designed to address ESG issues.²

- c. Wang (2021) thoughtfully examines whether traditional arbitration is appropriate for resolving ESG disputes. The author proposes the creation of specialized ESG tribunals or the implementation of mediation protocols centered on sustainability to effectively tackle the distinct characteristics of these disputes.³
- d. Davos and Hume (2019) provide case studies that reveal the limitations of investor-state dispute settlement (ISDS) mechanisms when it comes to addressing environmental, social, and governance (ESG) issues, especially within the extractive industries. There is a call for reforms aimed at enhancing the alignment of ISDS with ESG objectives.⁴
- e. Kaufmann-Kohler and Potestà (2016) examine the legitimacy challenges encountered by ISDS, highlighting the importance of alternative dispute resolution methods that focus on sustainability outcomes and the involvement of stakeholders.⁵
- f. Bhattacharya in his 2023 study, explores the application of hybrid dispute resolution clauses within ESG-focused private equity transactions in India. He observes a growing inclination towards multi-tiered clauses that integrate negotiation, mediation, and arbitration, specifically tailored with ESG-related triggers⁶.
- g. Green and Smart (2023) critique the enforceability of ESG commitments under shareholder agreements, highlighting the growing demand for binding sustainability mediation protocols to ensure accountability.⁷
- h. Odeke (2022) conducts a comparative analysis of ESG arbitration enforcement trends in the UK, Singapore, and California, revealing a systemic reluctance to prioritize ESG non-compliance over contractual stability.⁸
- i. Kaushik and Rao (2022) examine Indian jurisprudence on ESG in investment arbitration, finding that courts are gradually recognizing pre-arbitral mandates as enforceable contractual prerequisites.⁹

² Mills & Kelsey, *Enforcing ESG Clauses in M&A Contracts*, 58 Bus. L. Rev. 347 (2022).

³ Wang, *Is Traditional Arbitration Suitable for ESG Disputes?* 48 J. Conflict Res. 399 (2021).

⁴ Davos & Hume, *Shortcomings of ISDS in the Extractive Industries: An ESG Perspective*, 31 J. Int'l Arb. 501 (2019).

⁵ Kaufmann-Kohler & Potestà, *The Legitimacy of Investor-State Dispute Settlement*, 90 (Oxford Univ. Press 2016).

⁶ Bhattacharya, *Hybrid Dispute Resolution in ESG-Centric Private Equity Deals in India*, 62 NLSI Rev. 510 (2023).

⁷ Green & Smart, *Enforceability of ESG Commitments in Shareholder Agreements*, 77 L. Soc. 338 (2023).

⁸ Odeke, *ESG Arbitration Enforcement Trends in the UK, Singapore, and California*, 38 Int'l L. Rev. 420 (2022).

⁹ Kaushik & Rao, *Indian Jurisprudence on ESG in Investment Arbitration*, 25 Ind. L. J. 196 (2022).

- j. Eldridge and Thompson (2020) argue that the private nature of arbitration undermines ESG transparency goals, advocating for open-mediation formats akin to public alternative dispute resolution forums.¹⁰

II. Reports and Supplements

- a) The UNCITRAL Working Group III Report (2023) proposes a model clause for integrating mediation in ESG-heavy ISDS disputes, specifically applicable in cross-border corporate transactions.¹¹
- b) The World Bank's ESG Risk Toolkit (2022) includes protocols for managing sustainability breaches in international infrastructure projects, including step-by-step pre-arbitral negotiation and mediation mandates.¹²
- c) The OECD's 2021 Responsible Business Conduct Guidelines recognize the critical role of non-adversarial forums in resolving ESG disputes and recommend mandatory grievance mechanisms at the transaction level.¹³

While this body of work has expanded our understanding of ESG dynamics in M&A and dispute resolution, none have proposed a holistic or pre-arbitral mediation structure specific to ESG, this paper aims to fill that gap.

COMPARATIVE ANALYSIS

Cross-border M&A negotiations now centre environmental, social, and governance (ESG) concerns. Jurisdictions including India, the United States, the United Kingdom, and the European Union approach ESG conflicts in M&A due diligence, dispute resolution, and post-acquisition liability in rather different ways. This comparative analysis endeavours to examine the nuanced approaches of each jurisdiction, grounded in their regulatory frameworks, jurisprudence, and enforcement trends.

INDIA

India's ESG framework in M&A is in a formative stage. Top 1,000 listed businesses must now report "business responsibility and sustainability" (BRSR) according to the SEBI.¹⁴

¹⁰ "Eldridge & Thompson, *Challenges of ESG Transparency in Private Arbitration*, 23 Arb. J. 132 (2020)".

¹¹ "United Nations Commission on International Trade Law (UNCITRAL), Working Group III: Investor-State Dispute Settlement Reform."

¹² "World Bank, *Dispute Resolution in ESG-Centric Investments*, ESG Legal Toolkit Series (2023)."

¹³ "Organisation for Economic Co-operation and Development (OECD), *Due Diligence Guidance for Responsible Business Conduct*."

¹⁴ "SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 34(2)(f)."

In landmark acquisition of Vedanta's Sterlite by Cairn India, environmental lapses and protests by indigenous communities over land acquisition sparked litigation and impacted stakeholder relations¹⁵. However, Indian courts have demonstrated reluctance to award significant ESG-based damages unless constitutional rights under Articles 14¹⁶ and 21¹⁷ are implicated¹⁸. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, encourage voluntary disclosure rather than strict enforcement.¹⁹

Moreover, ESG-related disputes in India are generally addressed via writ petitions under constitutional law rather than specialized clauses in Share Purchase Agreements (SPAs) or arbitration contracts, thereby reducing legal certainty for foreign investors.

I. ESG-Related Disputes Emerging from Cross-Border M&A in India

A. Parent Company Liability and Supply Chain Due Diligence

India's regulatory framework for ESG is evolving, with significant gaps in several areas. Although the SEBI has enforced ESG releases from the top 1000 companies listed by market capitalization from 2022-2023, many important areas of ESG remain underregulated. For instance, there are no specific national laws for greenhouse gas emissions targets, carbon pricing mechanisms, or comprehensive waste management and recycling standards comparable to those in more developed markets.²⁰

“SEBI urged the biggest 250 companies to start sharing sustainability data for 75% of their supply chains in July 2023” ... But capacity problems caused the deadline to be extended. SEBI seeks to guarantee accurate disclosures free from mere formality.²¹

B. Investor Litigation and Greenwashing Allegations

In India, investor-led litigation against ESG misrepresentations is becoming popular. In 2024 the Central Consumer Protection Authority (CCPA) published the "Guidelines for Prevention and Regulation of Greenwashing or Misleading Environmental Claims".

¹⁵ “Cairn India-Vedanta Merger: Environmental Concerns and Legal Roadblocks, Bus. Standard (Aug. 2011).”

¹⁶ “India Const. art. 14.”

¹⁷ “India Const. art. 21.”

¹⁸ “Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 S.C.C. 212 (India).”

¹⁹ “SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, ch. XI-A & ch. XII, § 102 (as amended Sept. 20, 2023) (India).”

²⁰ Ayush Patodia, Navigating the Global ESG Landscape: Lessons and Opportunities for India, AVALON CONSULTING (Jan. 27, 2025).

²¹ Jayshree P. Upadhyay & Ira Dugal, India to Review ESG Disclosures for Listed Firms, Market Regulator Says, REUTERS (Apr. 16, 2025).

²². These guidelines mandate that companies substantiate their sustainability claims with comprehensive and verifiable data, ensuring that ESG commitments are backed by hard evidence rather than vague assertions²³.

Furthermore, helping to avoid greenwashing in the financial industry is SEBI. By means of its circular on "Dos and Don'ts relating to green debt securities," SEBI has defined greenwashing and published recommendations for green debt securities' issuers.²⁴ These rules are meant to guarantee that, without dishonesty, organizations offering green bonds or other green financial products have clear, verifiable environmental claims to back up such claims.

C. Regulatory Divergence and Compliance Challenges

India's ESG regulatory framework highlights the need for significant improvements to align with global standards. In several areas, there are no regulations, while in others, regulations exist but enforcement and compliance are weak. For example, regulations on sustainable sourcing and supply chain transparency are largely absent, leaving a significant part of corporate environmental impact unaddressed.²⁵

Aiming to establish India as a worldwide hub for international arbitration, India have already made major progress in overhauling its ADR system despite these obstacles.²⁶. Another significant step in simplifying commercial conflicts is the 2021 Mediation Bill²⁷, and the favourable attitude of Indian courts has accentuated the results of the legal reforms.

UNITED STATES

The United States presents one of the most robust ESG litigation environments globally, especially in the context of M&A transactions. Courts, regulators, and shareholders alike actively scrutinize ESG disclosures and failures for potential legal liability.

In the landmark Delaware case *Marchand v. Barnhill*, the court found that board members of Blue Bell Creameries breached their fiduciary duties by failing to monitor food safety

²² Press Info. Bureau, *CCPA Issues Guidelines to Curb Greenwashing in Advertisements*, Gov't of India (Mar. 20, 2024).

²³ "Faraz Alam Sagar & Aditi Goyal, *Navigating ESG Compliance: Lessons from Recent Trends and the Santos Case*, Dispute Resolution Blog (Cyril Amarchand Mangaldas, Jan. 30, 2025)."

²⁴ Pooja Chatterjee & Aribba Siddique, *Addressing Greenwashing in India: Laws, Regulations, and Ethical Implications*, MONDAQ (Feb. 10, 2025).

²⁵ *Supra* Note 20.

²⁶ "White & Case LLP, *Indian cross-border M&A: High-valuation hurdles and the hopeful path ahead.*"

²⁷ "The Mediation Bill, 2021, PRS India."

compliance, an ESG failure that directly caused a listeria outbreak and undermined shareholder value.²⁸ The ruling confirmed that oversight failures on ESG matters can rise to a *Caremark* claim, potentially exposing directors to personal liability under Delaware General Corporation Law.

The U.S. Securities and Exchange Commission (SEC) enforces ESG disclosures through Rule 10b-5 under the Securities Exchange Act of 1934, it has also suggested guidelines for public corporations disclosing Scope 1, 2, and (in certain situations) Scope 3 greenhouse gas emissions in addition to climate-related financial concerns²⁹.

Though finally the court decided in Exxon's favour due to inadequate proof of investor dishonesty, the firm was accused in *People of the State of New York v. Exxon Mobil Corp.* of deceiving investors about the possible impact of climate policies on its business³⁰.

In M&A disputes, ESG misrepresentations are increasingly being litigated under Material Adverse Effect (MAE) clauses. In *Akorn, Inc. v. Fresenius Kabi AG*, the Delaware Chancery Court allowed Fresenius to terminate the merger based on Akorn's regulatory non-compliance and data integrity issues, illustrating how ESG-related compliance failures can justify MAE claims³¹.

Activist investors and institutional shareholders, particularly under Securities Exchange Act Rule 14a-8 are leveraging shareholder proposals and derivative actions to enforce ESG standards in corporate governance and mergers.³²

I. ESG-Related Disputes Emerging from Cross-Border M&A in the U.S.

A. Parent Company Liability for Environmental Misconduct:

In the landmark case *United States v. Bestfoods*, the U.S. Supreme Court decided under the CERCLA, A parent company may face direct liability if it is found to have actively

²⁸ *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

²⁹ "U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6, 2024)."

³⁰ "*People of the State of New York v. Exxon Mobil Corp.*, 2019 WL 6795771 (N.Y. Sup. Ct. Dec. 10, 2019)."

³¹ *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *47–48 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

³² Michele Vaillancourt et al., *Corporate Governance Comparative Guide: United States*, Mondaq (Oct. 18, 2021), <https://www.mondaq.com/unitedstates/corporatecommercial-law/1131672/corporate-governance-comparative-guide>.

been involved in and used authority over the activities of its subsidiary's facility.

This decision underscores the importance of parent companies maintaining appropriate oversight and control mechanisms, especially in cross-border M&A transactions where environmental liabilities may arise.³³

B. Supply Chain Liability and ESG Obligations:

Recent trends indicate an increase in ESG-related litigations involving supply chains. Companies are facing legal actions due to the misconduct of their subsidiaries and suppliers, emphasizing the need for thorough ESG due diligence in M&A activities. Driven by larger legal jurisdictions and more inclusive legal interpretations, (WBCSD) notes that lawsuits against corporations over ESG concerns have climbed by 25% over the last three decades.³⁴ This trend necessitates that companies evaluate their supply chain risks meticulously during M&A processes.

C. Investor Litigation and Greenwashing Allegations:

Investor-led litigation over ESG misrepresentations is gaining traction in the U.S. In *People v. Exxon Mobil Corp.*, the Attorney General of New York alleged that Exxon Mobil misled investors about the management of risks posed by climate change³⁵. This case emphasizes the need of honest and open ESG reporting in M&A transactions and the possibility for investor lawsuit based on ESG disclosures even if the court finally decided in favor of Exxon Mobil.

D. Regulatory Divergence and Compliance Challenges:

The U.S. exhibits a cautious approach to ESG regulations compared to the EU. With its limited focus on financial materiality, the Securities and Exchange Commission's (SEC) recommended climate disclosure regulations compel businesses to disclose climate risks most likely to influence their investor decision-making or bottom line. This runs counter to the EU's more all-encompassing approach, which calls for double materiality and mandates businesses reveal how their activities impact the environment

³³ “United States v. Bestfoods, 524 U.S. 51 (1998).”

³⁴ World Business Council for Sustainable Development, *The rise in ESG lawsuits highlights the need for companies to evaluate supply-chain risks*, Feb. 14, 2023.

³⁵ Supra Note 30

and society³⁶. For cross-border M&A, this regulation difference creates difficulties since businesses have to negotiate different ESG reporting criteria.

UNITED KINGDOM

I. ESG-Related Disputes Emerging from Cross-Border M&A in the U.K.

A. Parent Company Liability for Overseas Subsidiaries

UK courts have increasingly held parent companies accountable for the ESG-related actions of their foreign subsidiaries. Emphasizing the parent firm's duty of care when it exercises major influence over the operations of its Zambian subsidiary, the UK Supreme Court let Zambian villagers sue the UK-based parent business in *Lungowe v. Vedanta Resources plc* for environmental damage caused by its subsidiary³⁷.

Similarly, in *Okpabi v. Royal Dutch Shell plc and Anr*³⁸, the court permitted Nigerian claimants to pursue allegations directed at the UK parent company for oil spills by its Nigerian subsidiary, emphasizing the possibility that parent firms could face accountability for ESG shortcomings in foreign operations.

These cases illustrate the legal risks UK parent companies face when their overseas subsidiaries are involved in ESG controversies, particularly in jurisdictions with less stringent environmental and social regulations.

B. Supply Chain Accountability

Beyond subsidiaries, UK companies face ESG-related claims stemming from their supply chains. In *Begum v. Maran (UK) Ltd*³⁹, the Court of Appeal allowed a claim against a UK company for death of a worker in a Shipbreaking yard in Bangladesh, claiming that the UK company had a responsibility to ensure safety because of its role in the ship's sale and awareness of the dangerous conditions.

Similarly, in *Limbu v. Dyson Technology Ltd and ors.*⁴⁰, the Court of Appeal ruled that the UK was the appropriate jurisdiction for a lawsuit alleging forced labor in Malaysian factories supplying Dyson, emphasizing the company's group-wide supply chain policies produced and monitored in England.

³⁶ “The National Law Review, *ESG in 2024: Regulatory Divergence and Key Trends in the EU and U.S.*, Jan. 2024.”

³⁷ “*Vedanta Res. PLC v. Lungowe*, [2019] UKSC 20, [2019] 2 W.L.R. 1051.”

³⁸ “*Okpabi v. Royal Dutch Shell Plc*, [2021] UKSC 3, [2021] 1 W.L.R. 1294.”

³⁹ “*Begum v. Maran (UK) Ltd*, [2021] EWCA Civ 326.”

⁴⁰ *Limbu v. Dyson Tech. Ltd.*, [2025] UKSC 19.

These cases underscore the expanding scope of ESG liability, where UK companies can be held responsible for human rights and environmental violations in their supply chains, even without direct ownership or control.

C. Investor Actions and Misrepresentation

UK corporates are increasingly facing investor-led litigation over ESG misrepresentations, especially in cross-border contexts. A major instance is the Glencore case, where nearly 200 investment funds filed claims in the UK alleging that Glencore made false ESG-related disclosures in its prospectuses and financial reports, thereby misleading investors⁴¹. The lawsuit followed Glencore's 2022 guilty plea in the US and UK to widespread bribery and market manipulation.⁴²

The investors claim the misrepresentations led to inflated share values and subsequent financial losses, exposing the risks of greenwashing or ESG misstatements in cross-border transactions where investor due diligence is increasing.

D. Regulatory Divergence and Compliance Challenges

UK courts' willingness to assert jurisdiction over ESG claims involving overseas conduct sets the country apart. Post-Brexit regulatory frameworks continue to evolve, and the UK Modern Slavery Act, Climate-related Financial Disclosure Requirements, and Corporate Transparency laws mandate ESG compliance across borders.⁴³

This extraterritorial approach imposes a heavy compliance burden on UK companies acquiring foreign targets, as misalignments in ESG standards across jurisdictions can give rise to disputes. Even if the deal appears commercially viable, latent ESG liabilities can trigger lawsuits or arbitration years later.

EUROPEAN UNION

The EU exhibits the most mature ESG regulatory architecture. Harmonised reporting and ESG due diligence are mandated by the CSRD. In M&A, the Non-Financial Reporting Directive (NFRD)⁴⁴ and Sustainable Finance Disclosure Regulation (SFDR)⁴⁵ govern disclosures.

⁴¹ Jim Armitage, *Glencore Faces Lawsuit from Investors over Bribery Scandal*, Financial Times (Mar. 2023).

⁴² U.S. Department of Justice, *Glencore Entered Guilty Plea for Bribery and Market Manipulation*, DOJ Press Release (May 2022).

⁴³ U.K. Financial Conduct Authority, *ESG Disclosure Rules and Guidance*.

⁴⁴ "Directive 2014/95/EU of the European Parliament and of the Council of 22 Oct. 2014".

⁴⁵ "Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 Nov. 2019".

According to the French Duty of Vigilance Law, the Total-Uganda case⁴⁶ in France set a precedent whereby NGOs sued a parent firm over violations of environmental and human rights overseas.

The European Court of Justice, in *Krajowa Rada Sądownictwa v. European Commission*, has shown openness to interpret EU law to uphold fundamental rights and ESG considerations in cross-border contexts.⁴⁷

I. ESG-Related Disputes Emerging from Cross-Border M&A in the EU.

A. Parent Company Liability and Supply Chain Due Diligence

Holding parent firms responsible for ESG breaches carried out by their subsidiaries or within their supplier networks has evolved significantly inside the European Union. Large corporations, including those of subsidiaries and subcontractors, are mandated by the French Duty of Vigilance Law to follow vigilance plans to prevent violations of human rights and environmental damage throughout their activities. Non-compliance can result in civil responsibility, so parent firms run the risk of being sued for supply chain breakdowns⁴⁸.

Adopted in July 2024, the EU's CSDDD, requires businesses to identify and eliminate human rights violations, such as modern slavery, within their supply chains⁴⁹. Emphasizing the EU's will to enforce ESG criteria across borders, this directive affects both European and certain non-European corporations with significant EU turnover.

B. Investor Litigation and Greenwashing Allegations

Investor-led litigation around ESG misrepresentations is starting to gather steam in the EU. German authorities in April 2025, Deutsche Bank's asset management division, DWS, was fined €25 million for making false promises regarding its ESG investments. The investigation revealed that DWS had overstated its commitment to the principles of ESG has resulted in allegations of greenwashing⁵⁰.

⁴⁶ *Notre Affaire à Tous & Ors. v. TotalEnergies SE*, Tribunal judiciaire de Paris [TJ Paris] [Paris Judicial Tribunal], Feb. 28, 2023.

⁴⁷ “*Krajowa Rada Sądownictwa v. European Commission*, Case T-639/19, ECLI:EU: T:2021:702 (General Court of the European Union).”

⁴⁸ “Global Legal Insights, *Addressing ESG considerations in the M&A context.*”

⁴⁹ “Financial Times, *New rules sharpen investment focus on modern slavery.*”

⁵⁰ Virginia Furness, German Asset Manager DWS Fined €25 Million for Greenwashing, REUTERS (Apr. 2, 2025).

To combat such practices, the European Securities and Markets Authority (ESMA) finalized guidelines in May 2024, stipulating that funds using ESG-related terms must have at least 80% of their assets aligned with ESG objectives⁵¹. This move aims to enhance transparency and prevent greenwashing in investment products⁵².

C. Regulatory Divergence and Compliance Challenges

The EU's regulatory landscape presents challenges for cross-border M&A, particularly concerning ESG compliance. The CSRD, effective from 2024 financial year, expands reporting requirements to include non-EU companies generating significant turnover in the EU⁵³. This directive necessitates comprehensive ESG disclosures, potentially increasing due diligence costs and complexity for non-EU acquirers⁵⁴.

Moreover, the EU FSR, that came into effect in December 2022, mandates notification of certain M&A transactions involving non-EU subsidiaries. This regulation aims to level the playing field by scrutinizing foreign financial contributions that may distort competition within the EU.⁵⁵

CRITICAL ANALYSIS

Cross-border mergers and acquisitions (M&A) now heavily rely on ESG factors, which affect deal values, due diligence procedures, and post-merger integration.⁵⁶ As stakeholders demand greater accountability and transparency, ESG-related disputes have surged, exposing the limitations of traditional arbitration frameworks.⁵⁷ The rise of ESG conflicts in cross-border M&A, the shortcomings of current arbitration systems, and, the justification for implementing pre-arbitral sustainability mediation procedures.

I. Emergence of ESG-Related Disputes in Cross-Border M&A

A. Proliferation of ESG Disputes

The incorporation of ESG factors into corporate strategies has resulted in a rise in conflicts during M&A transactions. Buyers are increasingly attentive to the ESG

⁵¹ “Huw Jones, EU Finalises Investment Fund Labels to Combat Greenwashing, REUTERS (May 14, 2024).”

⁵² Virginia Furness, EU Watchdog Clarify ESG Fund Naming Rules After Backlash, REUTERS (Oct. 11, 2024).

⁵³ “Lorenzo Corte & Denis Klimentchenko, Addressing ESG Considerations in the M&A Context, in *Mergers & Acquisitions Laws and Regulations 2024* (Global Legal Insights 2024).”

⁵⁴ IMD, Concerns Over Impact of New EU Reporting Rules on M&A, I by IMD (July 2024).

⁵⁵ “Cooley, Beyond Borders: A Guide for Navigating the European Regulatory Landscape, COOLEY M&A (June 10, 2024).”

⁵⁶ “Berkeley Research Group, *M&A Disputes Report 2025* (Mar. 2025).”

⁵⁷ *Ibid.*

performance of target companies, carefully examining factors like environmental compliance, social responsibility, and governance structures⁵⁸. This increased attention has led to disagreements regarding supposed misrepresentations or shortcomings in adhering to ESG standards. A report from the Berkeley Research Group has pointed out that there is an increasing trend in ESG-related M&A disputes. These disputes cover a range of issues, including sale terms, greenwashing, data privacy, and employment-related concerns.⁵⁹

B. Inadequate ESG Due Diligence

Comprehensive ESG due diligence plays a vital role in uncovering potential risks and liabilities linked to a target company. Nonetheless, numerous M&A transactions continue to face difficulties due to insufficient ESG evaluations, resulting in unexpected challenges after the acquisition. The inconsistency in ESG measurements and reporting systems exacerbates this issue, creating difficulties for acquirers in fairly evaluating the ESG performance of a target. This shortcoming impacts valuation and raises the chances of disputes after a transaction, particularly concerning undisclosed or underreported ESG risks.⁶⁰

C. Ambiguities in Contractual Clauses

M&A agreements can consist of representations, warranties, and indemnities over ESG concerns. But the language employed in these sentences may be too wide or imprecise, which causes interpretational problems. For instance, words like "material adverse effect" or "compliance with applicable laws" could lack clarity about ESG problems, therefore generating differences on the scope and degree of responsibilities. Such uncertainty may cause protracted legal conflicts, therefore compromising the M&A process's efficiency and predictability.⁶¹

II. Inadequacies of Traditional Arbitration Mechanisms in ESG Disputes

A. ESG Issues: Complexity

⁵⁸ Boying Xu, Abay Mulatu & Tu Van Binh, *Through the Narrow Door: The Role of ESG in the Completion of Cross-Border Mergers and Acquisitions Deals* (Apr. 15, 2025).

⁵⁹ "Berkeley Research Group, *Embedded ESG Issues Driving M&A Disputes, BRG Report Shows* (Apr. 2024)".

⁶⁰ "OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018)".

⁶¹ "John P. Gaffney, *In Praise and Criticism of Arbitration as a Means of Resolving ESG Disputes*, KLUWER ARB. BLOG (Apr. 18, 2023)".

ESG conflicts frequently encompass intricate and specialized knowledge that intersects with environmental science, human rights legislation, and corporate governance. Conventional arbitration frameworks might struggle to address this complexity, as arbitrators may not possess the required expertise to fully understand and resolve issues related to ESG. The lack of understanding in this area can result in decisions that overlook the complexities of ESG issues, leading to outcomes that may be unsatisfactory or unfair for those affected.⁶²

B. Confidentiality vs. Public Interest

While confidentiality is a hallmark of arbitration, it can be problematic in ESG disputes where public interest is at stake. Issues such as environmental degradation or human rights violations have broader societal implications that warrant transparency⁶³. The private nature of arbitration proceedings may hinder public scrutiny and accountability, leading to perceptions of injustice or corporate impunity⁶⁴. This tension between confidentiality and the public's right to know challenges the appropriateness of traditional arbitration in resolving ESG disputes.

C. Enforcement Challenges

Enforcing arbitral awards in ESG disputes can be particularly challenging, especially when they involve non-state actors or transnational elements⁶⁵. The New York Convention facilitates the recognition and enforcement of arbitral awards; however, its application can be inconsistent in ESG cases, particularly when local laws or public policies conflict with the award⁶⁶. This mismatch compromises the dependability of arbitration as the means of conflict resolution for ESG concerns.

III. Advocating for Pre-Arbitral Sustainability Mediation Protocols

A. Benefits of Mediation in ESG Disputes

Mediation offers a collaborative and flexible approach to dispute resolution, which is

⁶² Kachwaha & Partners, *Cracking the ESG Conundrum: Is Arbitration the Key to Resolution of ESG Disputes?*, MONDAQ (Oct. 19, 2023).

⁶³ “Micha Bühler, Chloé Terrapon & Francesca Borio, *Arbitrating Corporate Governance Disputes*, in *The Guide to Climate Change and Related Disputes* (1st ed. 2024).”

⁶⁴ Diane Okoko, *Confidentiality and Transparency in Arbitration: Striking a Balance*, JICAM (Jan. 30, 2022).

⁶⁵ *Supra* Note 46

⁶⁶ “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 3”.

particularly suited to the multifaceted nature of ESG issues. Unlike arbitration, mediation facilitates open dialogue, allowing parties to explore creative solutions that address underlying interests and concerns. This process can lead to more sustainable and mutually beneficial outcomes, preserving business relationships and promoting long-term compliance with ESG standards.

Environmental impact, social responsibility, and corporate governance are among the several stakeholders involved in ESG disputes who have different issues. By engaging all pertinent stakeholders, such as communities, environmental activists, regulatory authorities, and companies, mediation helps to balance the complexity of these problems in the conversation. This inclusiveness guarantees thorough addressing of many issues.⁶⁷

B. The Mediation Convention of Singapore

Considered as the Mediation Convention of Singapore, the UN's Convention on Agreements of International Settlement made from Mediation offers a consistent framework for the execution of mediated settlement agreements. Entering into force on 12 September 2020, the Convention enhances the credibility and attractiveness of mediation by ensuring that settlements reached through mediation are recognized and enforceable across jurisdictions⁶⁸. This development is particularly relevant for ESG disputes in cross-border M&A, as it offers a reliable mechanism for enforcing agreements that address complex ESG issues.⁶⁹

The Convention covers agreements for international settlement resulting from mediation, finalized in writing by parties seeking a commercial resolution. It creates a harmonic legal structure for the right to call upon settlement agreements and also for their execution. By facilitating a negotiated settlement between parties, mediation can usually provide them with a faster, more cost-effective, and commercial method of resolving disputes than resorting to litigation and arbitration⁷⁰.

However, practical challenges remain, including the lack of uniform standards of practice and varying interpretations of public policy exceptions among signatory

⁶⁷ *Introduce the Concept of Mediation and Its Application in Resolving ESG Disputes*, Agile ESG.

⁶⁸ "United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), Dec. 20, 2018".

⁶⁹ "United Nations, *Singapore Convention on Mediation* (2019)".

⁷⁰ Gibson Dunn, *The Singapore Convention on Mediation: New Kid on the Dispute Resolution Block Now in Force*, GIBSON DUNN (Oct. 16, 2020).

states⁷¹. These inconsistencies can affect the predictability and effectiveness of the Convention in enforcing mediated settlements, particularly in complex ESG disputes.

C. Integration into M&A Practice

Incorporating pre-arbitral sustainability mediation protocols into M&A agreements can proactively address potential ESG disputes. By stipulating mediation as a first step before arbitration or litigation, parties can resolve issues more amicably and efficiently. This approach not only reduces legal costs and time but also demonstrates a commitment to sustainable and responsible business practices. Furthermore, mediation allows for the involvement of ESG experts who can provide specialized insights, enhancing the quality and relevance of the resolution process.⁷²

The rise of ESG disputes in cross-border M&A transactions underscores the limitations of traditional arbitration mechanisms in addressing the unique challenges posed by ESG issues. The complexity, public interest, and enforcement difficulties associated with ESG disputes necessitate alternative approaches.

FINDINGS

Disputes in cross-border M&A have clearly increased in response to the explosion in ESG scrutiny. Often resulting from regulatory differences, conflicting ESG criteria, and unclear contractual duties are these problems. From compliance with environmental regulations and abuses of human rights to governance shortcomings, worsened by jurisdictional variances, issues range.

Traditional arbitration lacks the flexibility and subject-specific insight needed for such disputes. Its confidential and adversarial structure limits public accountability, while arbitrators may lack ESG expertise, leading to decisions that fail to reflect evolving norms. Although the Singapore Convention on Mediation has advanced global mediation enforceability, challenges remain, including inconsistent mediator qualifications and procedural standards.

⁷¹ Jane Larner, *Insight: Challenges Facing the Singapore Convention on Mediation*, BLOOMBERG LAW (Nov. 19, 2019), <https://news.bloomberglaw.com/esg/insight-challenges-facing-the-singapore-convention-on-mediation>.

⁷² “UNCITRAL Working Group III, *Mediation in ESG and Investor-State Disputes* (2023).”

CONCLUSION AND SUGGESTIONS

In today's cross-border M&A landscape, ESG issues are not optional checkboxes—they are central to how deals are structured, evaluated, and sustained. From environmental liabilities and community rights to governance lapses and regulatory scrutiny, ESG failures can disrupt entire transactions, trigger public backlash, and cause long-term reputational damage. Yet, the frameworks we rely on, particularly arbitration, remain rigid, private, and often disconnected from the nuanced ethical demands that ESG conflicts raise.

What is most concerning is not just the procedural limitations of arbitration, but the broader disconnect it reveals: a process designed for contract enforcement, not for resolving disputes that are moral, environmental, or rights-based in nature. Confidentiality, lack of subject-matter expertise, and the exclusion of affected stakeholders make arbitration ill-suited for matters involving climate impact, indigenous rights, or governance failures.

A more responsive mechanism is needed, one that acknowledges ESG disputes not only as legal but also as societal conflicts, where values, communities, and long-term sustainability are at stake.

Strategies for Sustainable Dispute Resolution

1. Mandate ESG-Specific Mediation Clauses in M&A Contracts:

Parties should embed automatic triggers for mediation whenever ESG obligations, such as carbon targets, waste management, or labour rights, are violated. These clauses should specify dedicated ESG mediation panels composed of legal, environmental, and policy experts. By engaging in structured dialogue early, companies can prevent disputes from escalating to arbitration, while demonstrating good faith in sustainability compliance.

2. Establish a Transnational ESG Ombud Body:

Given the cross-border nature of many ESG disputes, there is an urgent need for an international ombudsman platform, perhaps under the umbrella of UNCITRAL, OECD, or similar multilateral institutions. This body could offer non-binding recommendations or settlement pathways for ESG-related claims and act as a soft law monitor for post-deal commitments.

3. Develop a Public ESG Mediation Settlement Index (EMSI):

A centralized, anonymized database of ESG mediation outcomes, outlining types of disputes, resolution models, and precedent strategies, can guide mediators, regulators, and M&A advisors. This would not only promote consistency in ESG dispute resolution but also create informal benchmarks for commercial best practices and sustainable conduct.

4. Offer Regulatory Incentives for Early ESG Dispute Resolution:

Governments and regulators should actively incentivize parties to resolve ESG disputes through recognized mediation frameworks. Potential benefits include carbon credit relief, tax deductions for mediation costs, or fast-track regulatory clearances for projects with strong sustainability track records. This aligns private incentives with broader public goals.

5. Adopt Participatory Mediation in High-Risk Sectors:

In sectors like mining, energy, apparel, and digital platforms, ESG risks often affect communities directly. Mediation models that allow for NGO involvement, local community voices, or independent observers can ensure the resolution process reflects ground realities. This not only builds legitimacy but also improves long-term deal resilience.

The image shows a large, light blue watermark of the IJLRA logo, which consists of a stylized 'A' shape with vertical bars inside, and the letters 'IJLRA' below it. The watermark is centered on the page and is semi-transparent.