

Litigators of the Week: Sullivan & Cromwell Scores International Arbitration Win for Bayer Over Assets Sold to BASF

BASF paid €7.4 billion to purchase several assets carved out of Bayer’s crop science business. Last week an arbitration panel at the ICC turned back BASF’s claims that Bayer hadn’t properly disclosed certain costs for the divested businesses, including for personnel.

By Ross Todd
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The numbers will make your head spin.

BASF paid €7.4 billion to purchase several assets carved out of Bayer’s crop science business in 2017 and 2018—divestitures Bayer made to get antitrust clearance on its own \$66 billion takeover of Monsanto.

But BASF, claiming Bayer didn’t adequately disclose continuing costs of its seed businesses, filed arbitration proceedings in September 2019 at the ICC International Court of Arbitration.

Last week an ICC arbitration panel turned back BASF’s claims, which Dow Jones pegged at \$1.75 billion plus interest. Our Litigators of the Week, **Dustin Guzior**, **Rick Pepperman** and retired partner **Steve Holley** of **Sullivan & Cromwell** led Bayer’s defense before the arbitration panel during two weeks of in-person proceedings in Frankfurt last November.

Lit Daily: Who was your client and what was at stake?

Dustin Guzior: We were representing long-time S&C client Bayer AG. A very significant amount of money was at issue, but we also fought vigorously



Courtesy photos

(L-R) Dustin Guzior, Rick Pepperman and retired partner Steve Holley of Sullivan & Cromwell.

to defend the integrity of our client’s disclosures and auction process, which we firmly believed were correct and consistent with best practices. Some are calling this a “landmark” arbitration, and for the parties involved, it certainly was.

How did this matter come to the firm?

Guzior: S&C advised Bayer on global antitrust clearances for its acquisition of Monsanto Company. We were involved in crafting the divestments that were made from a competition law

perspective, and we also were involved in negotiating the divestment agreements between Bayer and BASF. It was natural for us to handle this matter.

Who was on your team and how did you divide the work?

Guzior: I worked on the dispute from its earliest days in 2019 and served as lead counsel, including “first chair” at the evidentiary hearing. The two-week hearing to be held in Frankfurt, Germany, was going to be a gargantuan undertaking, with 16 fact witnesses and four experts, so Rick and Steve became deeply involved at that point to divide direct, cross, and re-direct examinations, which ended up being critical to the outcome of the case. We were partners in that effort, and the three of us divided the vast majority of the hearing work. The in-house counsel at Bayer, **Thomas Reuter** and **Max Thümmel**, are extraordinary lawyers: They were very much part of the day-to-day team to push this to a successful conclusion.

We also had tremendous support throughout the case from **Akash Toprani** (now special counsel) and **Bill Wagener** (special counsel), and a small group of S&C associates (**Colin Hill**, **David Blackman** and **Michael Lemanski**). **Jones Day** in Germany served as local co-counsel, including **Ansgar Rempp** and **Johannes Willheim**.

You pushed to have this arbitration held in person last year at a time when nearly all international arbitrations were being conducted remotely. The ICC panel granted your request over the objections of BASF and opposing counsel at Freshfields. Why was it important to you and your client for this hearing to be in person?

Rick Pepperman: Given the nature of the allegations, we strongly believed that it was important to test the witnesses’ testimony with live cross-

examination. You can pressure test a witness far better face-to-face, and it is far more difficult for a witness to say something that is not accurate in person. The live hearing also enabled the arbitrators to assess better the witnesses’ credibility. The team felt strongly about this point, and the intuition ended up being correct.

What sorts of COVID-related precautions were in place? What was the hearing room set-up like?

Pepperman: We had to certify that all of our team members, including trial techs, were vaccinated, and everyone had to take a daily rapid COVID test. We had tight restrictions on the number of people who could be in the hearing room, with only six people per side at any given time, and everyone but the tribunal had to wear masks unless questioning a witness. We actually had a COVID incident the second-to-last day of the hearing, and we had to rapidly shift to a remote set-up for the final day and one-half of the hearing. The decrease in the quality of the hearing after we shifted to a remote set-up was noticeable, and for us at least, it showed that in-person hearings and trials are critical and you really lose something with the remote set-up.

Dustin, you previously worked with the anti-trust team at the firm that helped Bayer craft this deal to get antitrust clearance on the Monsanto acquisition. What advantage did that give you going into this arbitration?

Guzior: Steve Holley and I worked on the merger clearances together, along with many other colleagues at S&C. It’s hard to believe, but that project started in 2016 when I was only a sixth-year associate. It was an intense experience negotiating with DOJ and other regulators. The experience was a true advantage in the arbitration because I

already knew the contours of very complex divestments by heart. Those details mattered in the case, and Steve and I knew them better than any other lawyer on either side.

Looking through your bios, none of you seem to specialize in international arbitration. What were the challenges and advantages of being relative newcomers to this forum?

Pepperman: This was my first arbitration, international or otherwise. In the end, I think that proved to be an advantage. I approached my cross-examinations as I would at a trial. In my view, this resulted in more focused and pointed cross-examinations. My sense is that the arbitrators were better able to follow the points I was making during the cross-examinations.

Guzior: I agree with Rick. Each of us approached the case as a trial lawyer, and we often dispensed with some of the stiffness that can accompany traditional international arbitration practice. Depositions almost never happen in international arbitration, but we put forward a cogent explanation for why we needed to interview our adversary's employees—and got the interviews. Similarly, our cross-examination style was a bit more pointed and aggressive, but it paid off. The opponent was not able to respond effectively to the way we approached the “trial.”

What will you remember most about this matter?

Pepperman: What I will remember most about this matter is how much preparation we did for the

hearing. We started preparing in July for a November hearing. By the time of the hearing, we had met with each witness at least six times to get them comfortable with a process that was new to them. I have never prepared this much for a hearing, and I think all of the preparation showed in our hearing presentation and witnesses' testimony.

Guzior: What I will remember about this matter is the four weeks we spent in Germany preparing for and attending the evidentiary hearing. At every level, from legal assistants to partners, our team rallied to put on a truly sensational hearing. In an extremely complex matter like this one—to give a sense, each opening statement was three hours long—it's difficult to know how well you are communicating the key points, and difficult to balance a focus on the big picture story with the important details. It was such a pleasure to read the decision and see that each and every point we were trying to make fully landed. In a nearly 200-page decision, we won on virtually every point of law and fact, which I think is due to our hearing presentation.

Steve Holley: What I will remember most about the case is working collaboratively with the whole team—partners, associates, and paralegals—in our “war rooms” in Düsseldorf and Frankfurt, preparing for the arbitration hearings. It was the first time we could all be together because of COVID-19, and I was reminded how much can be accomplished in a short time when smart lawyers are all in the same room, exchanging ideas in real-time.