

Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions

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Introduction

Mergers and acquisitions (M&A) are, almost by definition, complex business transactions, in particular when they take place cross-border. They typically involve numerous corporate entities and lengthy, multifaceted agreements. As there is a multitude of specific problems and complications related to M&A transactions,¹ it is inevitable that some deals result in disputes, the more so as there is regularly a considerable amount of money at stake.²

This chapter focuses on the role of international arbitration in M&A disputes, its advantages, its effects and its procedural particularities. Arbitration has indeed emerged as the preferred method to resolve M&A related disputes and, today, mergers and acquisitions is one of the fields of international business law with the highest proportion of arbitration agreements.³

1 Karl-Heinz Böckstiegel, "Schiedsgerichtsbarkeit bei Mergers & Acquisitions", *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 3.

2 Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at p. 75; Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 77.

3 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 123.

Advantages of Arbitration in International Mergers and Acquisitions

There are, of course, other means of dispute resolution than arbitration that can be resorted to when M&A disputes occur, such as conciliation and mediation, which may have their advantages. In the case of a merger, in particular, the parties usually have a common perspective and, therefore, a strong motivation to compromise.⁴ However, practice has shown that parties today almost invariably agree on arbitration for the resolution of their disputes arising out of M&A.⁵ Klaus Sachs, a well-known German arbitration specialist, wrote that "[n]owadays, arbitration agreements in international and national M&A transactions are rather the rule than the exception".⁶ Why do businessmen and their lawyers make that choice? Besides the more general arguments that speak in favor of arbitration,⁷ a number of advantages that are of particular importance in the M&A context, especially when compared to court litigation, need to be highlighted.

Firstly, the parties have the right to choose their own arbitrators. Dealing with M&A disputes often means dealing with complicated valuation and accounting issues. The persons who decide the dispute

4 Karl-Heinz Böckstiegel, "Schiedsgerichtsbarkeit bei Mergers & Acquisitions", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 4; Bernardo M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration", *Arbitration International*, Volume 14, Number 2, 1998, at p. 163, note 9: "As a matter of fact, companies which actually enter into transnational merger transactions show an increasingly inherent desire to avoid both the escalation of antagonism that the adversarial system has come to represent and the severe financial consequences of corporate litigation. Thus, contrary to the former longstanding attitude of seeking justice through judicial channels, nowadays many of these companies seek to settle their conflicts through consensus, where practicable. Hence, alternative dispute resolution (ADR) in merger transactions is needed . . .".

5 Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at p. 80.

6 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 123.

7 These include the neutrality of the forum, flexibility, efficiency, professionalism, finality of the arbitral award (that is, only one instance and generally a restricted appealability to the courts) and worldwide enforceability thanks to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

must be knowledgeable about the industry and economic matters. Court judges may not always be qualified in this respect. Arbitrators and experts involved in arbitral proceedings, however, are service providers and may be selected according to their professional and technical expertise, their language proficiencies and availability.⁸

Secondly, parties to an M&A deal usually strive to keep their disputes "unspectacular". It is important to avoid publicity. Also, they are often anxious to safeguard any confidential information *vis-à-vis* competitors. Confidentiality is, therefore, a crucial factor in M&A.⁹ Before the courts, confidentiality is not assured.¹⁰ Axel Baum, however, rightly points out that, to some extent, the same is true for arbitration, as confidentiality "cannot overcome a publicly held or listed corporation's obligation to disclose the existence of the arbitration or the result of that arbitration".¹¹

Thirdly, it is important, especially in international transactions, that the legal proceedings can be in any language. In arbitration, for example, English may be chosen as the language of the proceedings, even though the contracts may, for example, be drafted in German, governed by Swiss law and the proceedings held in Argentina. Such combinations of relevant legal knowledge and language proficiency can generally only be offered by an arbitral tribunal, especially since

8 Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at p. 78; Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at p. 503.

9 Eugen Salpius, "Einige Gedanken zur Gestaltung von Schiedsklauseln in Mergers & Acquisitions-Verträgen", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 74; Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at p. 76.

10 Bernardo M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration", *Arbitration International*, Volume 14, Number 2, 1998, at p. 163, note 9.

11 Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 82.

courts only proceed in their official language(s), as a rule.¹² Since commercial cases tend to involve voluminous and complicated documentation, this flexibility of language offered by arbitration can help avoid the necessity of translations, with consequent significant savings in time and money.¹³

Finally, arbitrations take place in an often more amicable and business-like manner than litigation before the courts and, because economic aspects play a more central role, also frequently result in settlements.¹⁴ Consequently, arbitration can have a "defusing" effect and foster the parties' business relationships. This is particularly important when the parties to a deal remain associated after the transaction and need to find a way to cooperate in the future.¹⁵

Daimler-Chrysler and Bombardier provided an example of this in September 2004 when they settled a purchase price adjustment dispute between them over the sale of Berlin-based railcar maker "Adtranz". Bombardier had initiated arbitration proceedings before the International Chamber of Commerce in Paris (ICC), claiming for a reduction in the purchase price and more than US \$1-billion in damages after allegedly having discovered heavy undisclosed costs after its purchase. The two companies ended the arbitration proceedings by adjusting the preliminary purchase price of Adtranz from the original US \$725-million down to US \$209-million.¹⁶

In summary, particularly in international M&A transactions, but also in the domestic context,¹⁷ the arguments in favor of arbitration are compelling.

12 Klaus Günther, "Die Bedeutung von Schiedsvereinbarungen im M&A Bereich", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 12.

13 Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at pp. 78–79.

14 Eugen Salpius, "Einige Gedanken zur Gestaltung von Schiedsklauseln in Mergers & Acquisitions-Verträgen", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 72 and 73.

15 Klaus Günther, "Die Bedeutung von Schiedsvereinbarungen im M&A Bereich", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 13.

16 *Neue Zürcher Zeitung* of 30 September 2004.

17 Karl-Heinz Böckstiegel, "Schiedsgerichtsbarkeit bei Mergers & Acquisitions", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 4.

Arbitration at Various Stages of Mergers and Acquisitions Transactions

It was mentioned above that disputes arising out of M&A transactions are increasingly being referred to arbitration. The following presentation gives a *tour d'horizon*, accompanied by a few practical examples, of the stages of mergers and acquisitions at which disputes may and do occur.

Negotiation Stage: Pre-Closing Disputes

M&A transactions usually begin with initial exploratory talks, an information memorandum, the signing of preliminary agreements and a negotiation phase, including due diligence investigations and discussions about the framework of the transaction.

Memorandum of Understanding — Letter of Intent

If the parties agree on the essential terms of the transaction, they regularly wish to draw up and sign a memorandum of understanding and/or a letter of intent in which they outline the envisaged deal structure. These "pre-contracts" — although often expressly non-binding — create a quasi-legal relationship, which imposes certain obligations upon the parties, for example, the duty to act in good faith. Non-compliance with such a duty may already give rise to disputes.¹⁸ Also, the issues of whether a binding effect exists and how to enforce any obligation of the other party at that stage of the negotiations may cause the deal-makers to consult their lawyers. However, in order for such disputes to be resolved by means of arbitration, the memorandum of understanding or letter of intent must include an arbitration agreement, which is not invariably the case. Alternatively, the parties might agree to submit a dispute to arbitration after the initial dispute has arisen in the expectation that any contract ultimately entered into will itself contain an arbitration clause.

¹⁸ Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 125.

Confidentiality and Exclusivity Agreements

Memoranda of understanding and letters of intent typically comprise agreements on the period of exclusive negotiations between the parties¹⁹ and confidentiality regarding both the fact that negotiations are going on and the information that is being exchanged, in particular, during due diligence investigations and if the potential buyer is a competitor. Such clauses are often linked to contractual penalties and, consequently, disputes revolve around the aggrieved party's right to ask for damages and/or rapid relief.

Due Diligence

The detailed and often complex negotiations between the parties are almost always accompanied by due diligence investigations with regard to legal, financial and other aspects of the target company, such as possible environmental liabilities. Once the future buyer has gathered the relevant information, typically by the seller making target company documents available for consultation by the buyer in a data room, a written due diligence report is then prepared. This forms the basis of further negotiations between the parties. Generally, and ideally, full due diligence is performed before the signing of the purchase agreement. This permits the buyer to assess all relevant economic and financial aspects of the target company and enables both parties to draft the appropriate representation and warranty provisions.

The outcome of any due diligence is critical to the parties' further negotiations and generally has far-reaching consequences for the deal. The due diligence process, therefore, frequently gives rise to disputes. The most common area of controversy is the scope of the pre-contractual duties of disclosure of the seller. Questions that frequently come up concern the completeness of the information provided by the seller in the data room and the obligation of the seller to disclose sensitive information or certain difficulties at that early stage, without being expressly asked to do so by the buyer.²⁰ On the other hand, the seller might argue that the buyer conducted the due diligence only cursorily or not at all, the latter thereby having waived

19 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 125.

20 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 126.

its right to notification of defects in the target company that it could have discovered in the data room.

Post-Closing Stage: Disputes Arising from Merger or Purchase Agreements

The majority of M&A arbitrations occur after the parties have signed the merger or purchase agreement and closed the deal by the transfer of assets, that is, "post-M&A".²¹ In the period between the signing of the agreement and its execution, however, disputes may arise if certain conditions have not been fulfilled or, for example, the buyer has negotiated for a *force majeure* clause and suddenly seeks to exit the deal.

Naturally, the question of the validity of an M&A agreement may also be a source of dispute, for example, arising from one party's lack of a power of attorney, missing approvals, unfulfilled conditions precedent, exercise of rights to withdraw or formal objections. For example, in the arbitration between Reteitalia Spa (Italy) and Lagardère SCA (France), the parties were at odds over whether a contract for the sale of shares in the French television channel, *La Cinq*, was void for legal impossibility. As a result of the acquisition, Reteitalia's holding would have exceeded the maximum twenty-five per cent threshold permitted under the applicable French law. The three-member arbitration panel dismissed Lagardère's request for the recognition of an option in its favor to sell the shares because it concluded that the parties' agreement was indeed invalid.²²

Representations and Warranties

Many post-M&A arbitrations result from claims of the acquiring company based on contractual representations and warranties, that is, statements of the seller concerning the state of the target at the time of the execution of the acquisition agreement.²³ Many of these "snapshot"

21 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 125.

22 *Reteitalia Spa (Italie) v. Lagardère SCA (France)*, Swiss Federal Tribunal, 1st Civil Chamber, Decision of 26 May 1999, *ASA Bulletin* 2000, at pp. 331–336. Upon review, the Swiss Federal Tribunal held that the principle of *pacta sunt servanda*, as part of public policy, had not been violated and refused to set the award aside.

23 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 126.

statements concern the correctness of the company's financial statements, the absence of liabilities other than those reflected in its latest balance sheet, the seller's title to the assets part of the sale and compliance with applicable laws.²⁴

One important source of disputes is vaguely, ambiguously or incompletely drafted representations and warranties, as the buyer may then more easily claim that the seller is liable for breach of contract and/or (negligent) misrepresentation. On the other hand, the seller may ask that certain claims be excluded by making reference to independent assessment made by the purchaser and the knowledge gained in the due diligence process.²⁵ Further, representations and warranties are closely linked to the purchase price as they reflect the target's guaranteed qualities. If any warranted qualities of the target turn out not to be real, such as the existence of certain assets on the balance sheet, the purchaser will often claim an adjustment of the price. The following are two practical examples.

In a 1997 arbitration case before the Geneva Chamber of Commerce, the buyer, S. Compagnie S.A., found grave errors and gaps in the balance sheet of the target company S. Créations S.A. S. Compagnie S.A. argued that these misrepresentations had led to a substantive over-valuation of the price of the shares and claimed breach of contractual warranties entitling it to a reduction in the purchase price. Unfortunately, the outcome of the case is not publicly known, since the published decision of the Geneva court only concerned the purchaser's application for disclosure of information from the seller's Board members.²⁶ Everything outside that remained confidential.

In another case, an ICC arbitration taking place in Switzerland, two companies had sold their entire stock in a company to the purchaser, who negotiated a reservation for a certain price adjustment. The parties agreed to place a part of the purchase price on an escrow deposit to secure certain representations and warranties. Subsequently, the purchaser conveyed parts of the receivables to a third company that later filed a request for arbitration for price adjustment, based on general representations and warranties. In a partial award,

24 Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at pp. 492-493.

25 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 126.

26 C. and K. v. S. Compagnie S.A., Geneva Court of Justice, Decision of 15 October 1999, *ASA Bulletin* 2000, at pp. 793-802.

the arbitral tribunal declared itself competent. The sellers challenged this award before the Swiss Federal Tribunal, which denied its jurisdiction, holding that the partial award had not been rendered in an international arbitration in accordance with Articles 176 *et seq.* of the Swiss Federal Statute on Private International Law, but in a domestic arbitration and, thus, within the scope of application of the Swiss Intercantonal Concordat Regarding Arbitration of 27 March 1969.²⁷

Earn-Out Clauses — Price Adjustment

Purchase agreements regularly state only a provisional price and, in addition to that, provide for "open-ended" adjustment mechanisms and procedures.²⁸ By far the most common post-M&A disputes center on earn-out provisions and purchase price adjustment calculations.²⁹ Earn-out clauses³⁰ provide for an additional purchase price that the seller will receive, based on the future earnings of the target over a stipulated period (earn-out period). Such clauses may engender dissention between the parties when the future performance needs to be assessed objectively.

Typical issues concern the type of performance indicator that is to be taken into consideration or the seller's contention that the buyer tried to "manipulate" earnings, for example, by changing the accounting policies or by altering the operations of the business after the purchase, making it difficult to prepare accurate earn-out calculations consistent with the terms of the agreement. In an international setting, the parties' different cultural backgrounds and accounting or reporting practices may produce additional complications.³¹

Similarly litigious are purchase price adjustment clauses, providing for a post-closing mechanism to adjust the price based on a change in a specified benchmark, such as the net asset value of the

27 Swiss Federal Tribunal, 1st Civil Chamber, Decision of 27 October 1995, *ASA Bulletin* 1996, at pp. 277–283.

28 Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at p. 494.

29 Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at pp. 491–505.

30 Markus Vischer, "Earn out-Klauseln in Unternehmenskaufverträgen", *SJZ* 98 (2002), at pp. 509–517.

31 Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at p. 494.

target company, between the date of the financial statements that were used to negotiate the purchase price and the closing balance sheet upon which the purchase price is ultimately determined.³² The following two examples demonstrate the kind of complications that might originate from purchase price adjustment clauses.

In a recent international arbitration administered by the Zurich Chamber of Commerce, under a contract subject to German law, the claimant company had sold its shares in the defendant company to the defendant and its holding company. The defendant then changed its Articles of Association and increased its share capital by issuing new shares to a third company. The arbitral tribunal appointed to interpret the price increase clause included in the share purchase agreement ruled that, although the clause did not expressly cover the increase of share capital, such increase — which was to be considered under Swiss law — nevertheless constituted a betterment that came within the scope of application of the price increase clause. Consequently, the arbitral tribunal ordered the defendants to pay additional amounts on the purchase price plus interest to the claimant. The defendants' motion to set the award aside was denied by the Swiss Federal Tribunal.³³ In the facts section of the decision, the Federal Tribunal cites the definition of a purchase price adjustment clause (*Besserungsabrede*) used by the arbitral tribunal in its award:

" . . . provision based on which the purchaser pays to the seller an (additional) purchase price depending on the occurrence of certain events after the closing of the purchase agreement for the acquisition of a company or shares in a company".³⁴

32 Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at pp. 491 and 492; Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at p. 75.

33 Swiss Federal Tribunal, 1st Civil Chamber, Decision of 16 March 2004, 4P14/2004, *ASA Bulletin* 4/2004, at pp. 770–781.

34 The original German text reads as follows: "Die Besserungsabrede umschrieb das Schiedsgericht als Bestimmung, aufgrund derer der Käufer nach dem Vollzug des Kaufvertrages über ein Unternehmen oder eine Beteiligung an einem solchen dem Verkäufer einen von bestimmten, nach diesem Vollzug eintretenden Ereignissen abhängigen (zusätzlichen) Kaufpreis bezahlt."

In the 2003 case from the United States, *Richard Hoeft III v. MVL Group, Inc. et al.*, the parties had agreed that the seller could defer paying a portion of the price for the purchased stock until the following year and that it would receive a purchase price adjustment if the value of the companies increased. The adjustment would be based on a calculation of EBITDA, which was defined in an amendment to the stock purchase agreement. The disagreement involved the proper treatment of certain one-time payments to employees (sale-related bonuses and stock option extinguishment costs) made in connection with a stock sale. The arbitrator, a certified accountant, found in favor of the seller and awarded damages accordingly. The District Court set the award aside on the ground that the arbitrator manifestly disregarded the law in failing to calculate Primary Year EBITDA in accordance with the generally accepted accounting principles (GAAP). The United States Court of Appeals for the Second Circuit, however, reversed and remanded that decision, upholding the principle of finality of the arbitral process.³⁵

Another important issue in the context of earn-out clauses and price adjustment calculation is the question as to whether any benefits or burdens of operating the business during the period between the signing of the agreement and closing give rise to a claim for compensation between the buyer and the seller.

Valuation — Expert Determinations

Most purchase or sale agreements, particularly in cross-border transactions,³⁶ contain valuation³⁷ or purchase price adjustment clauses providing for a two-stage dispute resolution mechanism. At the expert determination stage, if the parties cannot agree upon a valuation or the adjustment, an independent third party (forensic) accountant

³⁵ *Richard Hoeft III v. MVL Group, Inc. et al.*, United States Court of Appeals for the Second Circuit, Decision of 3 September 2003, 343 F.3d 57 (2nd Cir. 2003).

³⁶ Francisco Orrego Vicuña, "Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation", *Dispute Resolution Journal*, 2002, at p. 68.

³⁷ With respect to the valuation of shares, see Partial Award made by the Permanent Court of Arbitration dated 22 November 2002, Case Number 2000-03, *Horst Reineccius (Claimant Number 1), First Eagle SoGen Funds, Inc. (Claimant Number 2), Pierre Mathieu and La Société Hippique de la Châtre (Claimant Number 3) v. Bank for International Settlement (respondent)*, *ASA Bulletin* 2004, at pp. 116-131: partial award, *inter alia*, on the applicable standards for the valuation of shares, at pp. 120-122.

will be retained to determine the resolution of certain specific questions that are well circumscribed and generally fact-based.³⁸

The accountant acts as an expert, not as an arbitrator, that is, he neither tries to achieve a resolution of the dispute as a whole, nor does he render an award that could be enforced against an uncooperative party.³⁹ However, the expert's determination does bind the arbitral tribunal dealing with the same case in the sense that the latter will not have the right to revisit the factual outcome settled on by the expert.⁴⁰ In general, expert determinations are quick and cost-efficient procedures for resolving certain types of disputes.⁴¹

On the second level, the arbitration stage,⁴² the dispute is resolved as a whole, in a binding legal determination proceeding on the facts established by the expert. In some cases, however, the arbitrators may have to determine the content and signification of a certain balance sheet item impacting upon an evaluation before the expert can determine the correctness of a financial statement.⁴³

In addition, the arbitrators are frequently called upon to resolve disputes arising when one of the parties obstructs the expert determination process, for example, by appointing the expert or a new expert if the first one has been challenged. As the determination of the expert is often crucial to the outcome of the dispute, the resolution of such preliminary issues is very important. Generally speaking, experts

38 Anke Sessler and Corina Leimert, "The Role of Expert Determination in Mergers and Acquisitions under German Law", *Arbitration International*, Volume 20, Number 2, 2004, at pp. 151–165; Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at pp. 501, 502; Fritz Nicklisch, "Der Ingenieur als Schiedsgutachter und Quasi-Schiedsrichter bei internationalen Bau- und Anlagenprojekten", in *Festschrift für Walter J. Habscheid* (1989) at pp. 217–231.

39 Anke Sessler and Corina Leimert, "The Role of Expert Determination in Mergers and Acquisitions under German Law", *Arbitration International*, Volume 20, Number 2, 2004, at p. 152.

40 Bernardo M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration", *Arbitration International*, Volume 14, Number 2, 1998, at p. 163, note 9.

41 Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at p. 80.

42 Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at pp. 503 and 504.

43 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 124.

play a very significant role in M&A disputes and must be selected with special care. The following is a case involving an expert determination.

Under an agreement to merge American Medical Electronics, Inc. (AME) with Othello to form Orthofix, Inc., the determination of the amounts payable to the shareholders pursuant to the contractually specified formulae was entrusted to a Review Committee, the decision of which would be final and binding. If the Review Committee was unable to agree by a majority decision on the correct payout, the matter could be submitted by the Committee to binding arbitration. The Review Committee decided that the appropriate payout was US \$6-million. As part of its decision, the Committee specified that its payout determination would be conditional upon submission to and approval by an arbitrator. An arbitrator was appointed and rendered a "consent award", adopting the settlement in its entirety. Dissatisfied with the payout, AME shareholders filed suit in Colorado against the Committee's members and against Orthofix, asserting, *inter alia*, claims for breach of fiduciary duty and breach of contract.⁴⁴ The AME shareholders also filed a motion in the Southern District of New York to vacate the award. The Colorado case was transferred to the United States District Court for the Southern District of New York and the proceedings were consolidated.

Since expert determination and arbitration are often combined in a two-step (or parallel) dispute resolution mechanism, disputes have been caused by the lack of definition of the scope of assignment at each level.⁴⁵ The following 2002 case from the United States is a good example of the problems that may arise if the dispute resolution clause is not sufficiently clear.

The parties had entered into a share purchase agreement, which provided that the "final share price" for the sale was to be determined

44 *Clarence Frere, et al. v. Orthofix, Inc. et al.*, United States District Court for the Southern District of New York, Decision of 6 December 2000, 99 Civ. 4049, 0 Civ. 1968; excerpts in AJ van den Berg (ed.), *Yearbook Commercial Arbitration*, Volume XXVI (2001), at pp. 1042–1045.

45 Klaus Günther, "Die Bedeutung von Schiedsvereinbarungen im M&A Bereich", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 20–22; Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at pp. 81–83.

by the company's accountants and specified that such determination "shall be final and binding on seller and buyer and shall not be subject to any appeal, arbitration, proceeding, adjustment or review of any nature whatsoever". The agreement also provided that all disputes arising under the agreement were to be resolved by arbitration. Following the accountants' submission of a valuation substantially lower than the seller expected, the seller initiated arbitration seeking to invalidate the accountants' determination. The buyer, in turn, sought to rescind the agreement and recover money already paid to the seller. The arbitral panel assumed jurisdiction and overturned the accountants' determination as flawed.

The buyer brought suit in the United States District Court for the Southern District of New York, seeking approval of the arbitral award in his favor. The court instead vacated the panel's decision to overturn the accountant's determination, holding that the parties had committed review of the valuation determination to the accountant under the purchase agreement and that the panel had exceeded its authority in reviewing that determination.

The United States Court of Appeals for the Second Circuit affirmed, holding that questions of arbitrability are to be decided by the court where the parties' purchase agreement contains both a broad arbitration clause and specific clauses assigning certain decisions to an independent accountant. The appellate court stated that arbitrators, rather than the courts, may resolve questions of arbitrability only if there is "clear and unmistakable" language to that effect in the arbitration agreement. The court explained that when a broadly worded arbitration clause committing all disputes to arbitration is coupled with a specific clause assigning certain determinations to an independent accountant, ambiguity exists that requires questions of arbitrability to be decided by a court.⁴⁶

In *FAX (France) v. SL (Netherlands)*,⁴⁷ which involved an acquisition of shares with a guaranteed value, an "audit arbitration" was followed by arbitration proceedings. The purchaser requested the ICC arbitral tribunal to hold that the accounts were wrong and to order the seller to pay damages for having breached the guarantee clause. The

⁴⁶ *Norman Katz v. Herbert Feinberg*, United States Court of Appeals for the Second Circuit, Decision of 26 April 2002, 167 F. Supp.2d 556, 565-66 (S.D.N.Y. 2001) affirmed, 290 F.3d 95 (2d Cir. 2002).

⁴⁷ *FAX (France) v. SL (Netherlands)*, Partial Award, ICC Case Number 8360, *ASA Bulletin* 1999, at pp. 338-354.

arbitral tribunal, however, first had to determine its competence in view of the "price adjustment procedure" (audit arbitration) and the arbitration agreement in the share purchase agreement. After interpretation of the provisions, the arbitral tribunal declared itself competent and that it was not bound by the audit arbitration.

While expert determination and arbitration may usefully interact in complex M&A-related disputes, the combining of different alternative dispute resolution (ADR) mechanisms may not always be in the parties' best interests. A multi-step system may indeed lock the parties up into a fixed program that results in the loss of valuable time and may even be the source of new disputes when the parties disagree on whether or not the "next step" has been reached.⁴⁸ In the majority of cases, the parties will first try to resolve their dispute through management negotiations or even resort to mediation before initiating binding arbitration proceedings. The preliminary mechanisms can always be agreed on *ad hoc*.

Put and Sales Options

Another area that is fertile for post-transaction disputes is put and sales options, generally revolving around the issue of whether or not an option has been triggered. The following three cases underline the practical importance of arbitration in this respect. In the first case, the Dutch retailer Ahold recently announced that it had received a decision from a Swedish arbitration tribunal regarding the premium which is part of the price of a put option exercised by the Norwegian entity Canica AS for its twenty per cent stake in the Scandinavian joint venture ICA AB. According to the shareholders' agreement, among Ahold, Canica and the third joint venture partner, ICA Förbundet Invest AB, Ahold was obliged to buy the shares offered by Canica. The arbitration tribunal rejected the challenges made by Canica to the premium rate and established the rate at 49.56 per cent, which corresponded to the outcome of the valuation made earlier by the valuation expert engaged by the partners in ICA AB.⁴⁹

In another recent arbitration between IPOC International Growth Fund Ltd. (Bermuda) and LV Finance Group Ltd. (British Virgin

⁴⁸ Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at pp. 76–77.

⁴⁹ "Ahold bekommt Recht — überhöhte Forderung für ICA-Kauf zurückgewiesen", *Neue Zürcher Zeitung* of 11 October 2004, at p. 23.

Islands), the ICC arbitrators ordered LV Finance Group Ltd. to honor one of two stock option agreements and transfer the promised 25.1 per cent of the shares in the Russian mobile telephone operator OAO MegaFon to IPOC International Growth Fund Ltd. The panel in Geneva found that IPOC had "validly exercised and paid for its option" when LV Finance made itself available for sale to another company.⁵⁰ The Swiss Federal Tribunal dismissed LV Finance's motion to have the award set aside.⁵¹ A second arbitration has been initiated regarding the second option agreement.⁵²

In the Canadian arbitration case *Agrifoods International Cooperative Ltd. v. (1) Agropur, Coopérative Agro-Alimentaire and (2) Ultimas Foods Inc./Aliments Ultima Inc.*, the shareholders' agreement contained a share purchase option. The Ontario Superior Court of Justice granted an injunction enjoining a shareholder from exercising the purchase option pending arbitration proceedings about the validity of the sale and the occurrence of a trigger event provided for in the shareholders' agreement. The court enjoined the application of the relevant section of the shareholders' agreement until the fifth day after the decision of the arbitration panel becomes final.⁵³

Anti-Trust and Competition

Usually, the very last event preventing a merger from closing is the approval of the relevant merger control authorities. A dispute can arise when the parties disagree on who should bear the risk of such a refusal or if one party accuses the other of not having made best efforts to obtain the approval.⁵⁴ The arbitral tribunal may also have to modify or stay the procedures in recognition of the regulatory authorities' action.

⁵⁰ *IPOC International Growth Fund Ltd. (Bermuda) v. LV Finance Group Ltd. (British Virgin Islands)*, ICC Case Number 12875/MS, final award of 16 August 2004, *Mealey's International Arbitration Report*, Volume 19, Number 9, September 2004, at pp. 6–8, A-1-A-17.

⁵¹ Swiss Federal Tribunal, 1st Civil Chamber, Decision of 14 December 2004, 4P.208/2004, *ASA Bulletin* 2005, at pp. 321 *et seq.*

⁵² *Neue Zürcher Zeitung* of 27/28 November 2004, at p. 25.

⁵³ *Agrifoods International Cooperative Ltd. v. (1) Agropur, Coopérative Agro-Alimentaire and (2) Ultimas Foods Inc./Aliments Ultima Inc.*, Ontario Superior Court of Justice, Decision of 23 March 2001, *ASA Bulletin* 2001, at pp. 355–366.

⁵⁴ Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ*, 2004, at p. 125.

Since the *Eco Swiss* decision rendered by the European Court of Justice,⁵⁵ it is undisputed within the European Union (EU) that EU competition law provisions⁵⁶ fall within the notion of public policy in terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁵⁷ and that arbitrators, therefore, must apply such law in order to make sure that their award will not be set aside. In line with the holding in the United States case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁵⁸ and often expressly under the influence of this case, most jurisdictions now treat antitrust issues as arbitrable.

Disputes under Ancillary Agreements

Management Agreements

Finally, M&A-related disputes might stem from ancillary agreements, such as — in the case of mergers — management agreements, outlining who will manage the company and to whom management will be reporting.

Intellectual Property Agreements

Also, agreements on intellectual property issues, such as license agreements, can give rise to arbitration.

Non-Competition Agreements

In non-compete clauses, the seller usually agrees not to compete with the purchaser in relation to the business sold for a certain period of

⁵⁵ *Eco Swiss China Time Ltd. (Hong Kong) v. Benetton International NV (The Netherlands)*, European Court of Justice, Decision C-126/97, dated 1 June 1999, *Yearbook Commercial Arbitration*, Volume XXIV, 1999, at pp. 629–639; Georgios I. Zekos, "Eco Swiss China Time Ltd. v. Benetton International NV — Courts' Involvement in Arbitration", *Journal of International Arbitration*, 2000, at pp. 91–94.

⁵⁶ EC Treaty, Article 81.

⁵⁷ Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 127.

⁵⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 83.

time. Such non-competition agreements are frequently secured by contractual penalties and can, therefore, come before an arbitral tribunal.

Tax Implications

Also frequent are disputes stemming from the parties' failure correctly, or at all, to consider the tax implications of their deal.

Procedural Particularities of Mergers and Acquisitions-Related Arbitrations

A number of procedural problems have frequently arisen in the context of M&A arbitrations.

Multi-Party and Multi-Contract Disputes

M&A-related arbitrations often arise out of multi-party situations or multi-contract structures, especially on the purchaser's side.⁵⁹ This creates problems regarding the constitution of the arbitral tribunal, namely, in view of equal participation, that is, each party's right to appoint its "own" arbitrator.

To take account of the well-known 1992 *Dutco* decision of the French *Cour de Cassation*, according to which it was against public policy to force multiple defendants to jointly appoint an arbitrator,⁶⁰ the rules of most modern arbitration institutions, such as the ICC⁶¹

59 Bernard Hanotiau, "Complex — Multicontract-Multiparty — Arbitrations", *Arbitration International*, Volume 14, Number 4, 1998, at pp. 369–394; Bernard Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues — An Analysis", *Journal of International Arbitration*, Volume 18, Number 3, 2001, at pp. 253–360; Konstadinos Massuras, *Dogmatische Strukturen der Mehrparteienschiedsgerichtsbarkeit* (1998) at p. 7; Serge Gravel, "Multi-party Arbitration and Multiple Arbitration", *ICC International Court of Arbitration Bulletin*, Volume 7, Number 2, December 1996, at p. 45.

60 *Siemens AG and BML Industrieanlagen GmbH v. Dutco Construction Co.*, Cour de Cassation, Decision of 7 January 1992, *Revue de l'arbitrage*, 1992, at pp. 470–472, with note by Pierre Bellet, at pp. 473–482; *Journal du Droit International*, 1992, at pp. 712–713, with the Conclusions of the Attorney General at pp. 713–726 and note of Ch. Jarosson, pp. 726–736.

61 International Chamber of Commerce Rules, Article 10 ("Multiple Parties").

and LCIA Rules,⁶² today provide for adequate solutions to solve this practical problem, consistent with the principle of equal treatment of the parties.⁶³ In transactions involving several parties and/or multiple contracts, it may, therefore, be sufficient to insert model clauses of such institutions into the agreements.

Another important question is whether the parties agree to consolidate parallel proceedings in order to prevent contradictory decisions from being rendered.⁶⁴

Extension of Arbitration Agreements to Third Parties

Lawyers dealing with M&A arbitrations are frequently confronted with the issue of extension of the proceedings to third parties who have not signed the arbitration agreement. This is particularly an issue in situations with group company structures and transactions.⁶⁵ As there is a multitude of possible situations, the rules of national and international arbitration institutions — unlike in the case of multi-party disputes — rarely provide any guidance.⁶⁶ On the one hand, an extension to non-signatories may take place by virtue of a number of legal theories, such as legal succession, or through letters of comfort.⁶⁷ However, as many arbitral tribunals are rather reluctant to extend the arbitration to third parties on these grounds, it is advisable to provide clearly what parties are bound by the arbitration agreement and to let them all sign.

62 London Court of International Arbitration Rules, Article 8 ("Three or More Parties").

63 Klaus von Schlabrendorff, "Schiedsgerichtsbarkeit bei M&A — Mehrparteiensituationen und Inter-Omnès Wirkung", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) Bd. VIII/01, at p. 35.

64 Klaus von Schlabrendorff, "Schiedsgerichtsbarkeit bei M&A — Mehrparteiensituationen und Inter-Omnès Wirkung", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 34.

65 Jan-Michael Ahrens, *Die subjektive Reichweite internationaler Schiedsvereinbarungen und ihre Erstreckung in der Unternehmensgruppe* (Frankfurt, 2001).

66 Klaus Sachs, "Erstreckung von Schiedsvereinbarungen auf Konzernunternehmen", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 54.

67 Klaus Sachs, "Erstreckung von Schiedsvereinbarungen auf Konzernunternehmen", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 55–63.

A controversial issue is whether an arbitration agreement can be extended to other companies within the same group.⁶⁸ According to the "group of companies doctrine", developed in the famous French case *Dow Chemical Firms et. al. v. Isover Saint-Gobain*,⁶⁹ the "corporate veil" can be "pierced" if the other group company:

- (1) Actively participated in the execution or termination of the agreement;
- (2) Can be regarded as the "actual" party to the agreement; and
- (3) Has its own peculiar economic interest in the contract.

In other European countries, however, such as Switzerland and Germany, this doctrine has been rejected by both courts and doctrine for being inconsistent with the parties' intention and the principle of privity of contract.

Production of Documents

Given the complexity of the factual basis in arbitrations on M&A transactions, it may be desirable to provide for the extensive taking of evidence (witnesses and expert opinions).⁷⁰ Since a lot of the information involved is frequently "sensitive", document requests may cause confidentiality problems and require specialized procedures, particularly when the companies involved are competitors.⁷¹

68 Otto Sandrock, "The Extension of Arbitration Agreements to Non-signatories: An Enigma Still Unresolved", in *Corporations, Capital Markets and Business in the Law* (Liber Amicorum Richard M. Buxbaum, 2000) at p. 465; Otto Sandrock, "Arbitration Agreements and Groups of Companies", *Etudes de Droit International en l'Honneur de Pierre Lalive* (1993) at pp. 625-647; Klaus Sachs, "Erstreckung von Schiedsvereinbarungen auf Konzernunternehmen", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 63-66.

69 *Dow Chemical Firms et. al. v. Isover Saint-Gobain*, ICC Case Number 4131, *Yearbook Commercial Arbitration*, 1984, at pp. 130 and 134.

70 Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 125. Wolfgang Peter, "Witness 'Conferencing'", *Arbitration International*, Volume 18, Number 1, 2002, at pp. 47-58.

71 Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 79 and 81.

In any event, the role of discovery in international arbitration depends largely upon the rules of the chosen arbitral institution and the domestic procedural rules of the place of the arbitration or — in the case of *ad hoc* arbitrations — on the provisions of the arbitration agreement as written by the parties. In recent years, the very different approaches in Civil and Common Law jurisdictions have been harmonized in the sense that international arbitration practitioners today use an attenuated form of discovery.

Remedies Awarded

More than in other arbitrations, in M&A disputes, arbitrators might be called upon not only to decide on the amount of a price adjustment or to award damages to the prevailing party, but to tailor the award to meet the needs of the particular situation.⁷² This may include specific performance awards or the forming of new arrangements between the parties, such as buy/sell options, if the applicable substantive law and the place of enforcement permit this.⁷³ The relief originally requested might also become obsolete if the nature of a company has evolved since the beginning of the arbitration proceedings.

Drafting Arbitration Agreements in the Mergers and Acquisitions Context

In view of the multitude of sources for M&A-related disputes and the procedural particularities addressed above, the drafting of "water-tight" arbitration agreements that meet the standards required for an

⁷² Klaus Günther, "Die Bedeutung von Schiedsvereinbarungen im M&A Bereich", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 13; Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 77 and 84.

⁷³ Wolfgang Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", *Arbitration International*, Volume 19, Number 4, 2003, at p. 505; Klaus Günther, "Die Bedeutung von Schiedsvereinbarungen im M&A Bereich", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 13.

efficient dispute resolution mechanism takes a fair amount of skill. An additional risk in practice is caused by the circumstance that the transaction lawyers who prepare the M&A agreements may not always be sufficiently familiar with arbitration law and/or they may only deal with the arbitration clause just before closing as an "after-thought", not giving it the necessary careful attention.⁷⁴

The court-tested model clauses of the more reputable arbitration institutions have proved themselves in the majority of cases, despite the fact that they rarely include a provision for multi-party disputes.⁷⁵ Selecting such a clause will make it unnecessary to draft lengthy provisions and provide a degree of security to the parties. The parties and arbitrators can still tailor the procedure to their needs once it is underway.⁷⁶

Alterations to the model clauses must be carefully considered.⁷⁷ They should be drafted with close cooperation between the transactional and the arbitration lawyers to make sure that they "fit" the specific dynamics of a certain deal. A particularly important issue, as mentioned earlier, is the clear delimitation of scope between expert determination and arbitration.

74 Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 78–80; Christian Borris, "Streiterledigung beim Unternehmenskauf", in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at p. 88.

75 Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 80; Klaus Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge — unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ* 2004, at p. 124.

76 Axel Baum, "Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 84.

77 Eugen Salpius, "Einige Gedanken zur Gestaltung von Schiedsklauseln in Mergers & Acquisitions-Verträgen", in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 71.

Conclusion

From the foregoing, the conclusion can be drawn that, despite certain procedural particularities and pitfalls to look out for when drafting arbitration clauses, arbitration is an effective dispute resolution mechanism in mergers and acquisitions at every stage of a transaction, with features that make it an attractive alternative to court litigation. Two keys to successful M&A arbitration, both in the domestic and in the international context, need to be kept in mind: firstly, the careful drafting of an effective arbitration agreement, preferably to be done jointly between the transactional and the arbitration lawyers, or the considered choice of a model clause of a well-known arbitration institution; and, secondly, the choice of the right experts, whose know-how and the professional impression they can make on the arbitrators may be decisive as to the outcome of the case.

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