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on
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Introduction

The 2017 edition of the Austrian Yearbook on International Arbitration is the 11th edition of the Yearbook, which has developed in the course of 10 years to a standard reference work for the arbitration sector. The editors are proud to have created a medium where arbitration practitioners and academics discuss hot topics and interesting developments in arbitration and from which the readers can gain inspiration and new ideas that might help to solve a specific problem.

The present edition contains contributions of 53 authors and co-authors and addresses current trends discussed in the arbitration community. Quite a number of contributions deal with the theme of the 2016 Vienna Arbitration Days “Predictability” by examining some of the topics in even greater breadth and depth.

The article “The Vienna Predictability Propositions” sets out seven distinct proposals to enhance predictability in international arbitration which were developed during the World Café Discussion Rounds led during the Vienna Arbitration Days. These Vienna propositions, presented by 27 contributors contain practical advice and thoughtful recommendations from the wealth of experience of the international arbitration community and are intended as a guidance to the international arbitration community for best practices to be applied to secure a predictable conduct of the arbitral process.

Other contributions deal with dispute resolution in M&A transactions, the arbitrator’s duty to disclose and the applicable law, just to pick out a few topics by way of example only.

We are grateful for each contribution contained in this Yearbook and hope you will find the 2017 edition of the Yearbook to be an essential tool and up-to-date reference in your arbitration library.

Vienna, January 2017

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Chapter I
The Arbitration Agreement
and Arbitrability

Stavros Brekoulakis/Jonas von Goeler
It’s All About The Money: The Impact Of Third-Party Funding On Costs
Awards And Security For Costs In International Arbitration

Eliane Fischer/Michael Walbert
Efficient And Expeditious Dispute Resolution In M&A Transactions

Dietmar Czernich
The Theory Of Separability In Austrian Arbitration Law –
Is It On Stable Pillars?

Ezequiel H. Vetulli/Emmanuel E. Kaufman
Deciding Who Decides: Issues Arising Out Of The Failure To Fulfill
Pre-Arbitration Requirements
Efficient And Expeditious Dispute Resolution In M&A Transactions

Eliane Fischer/Michael Walbert

I. Introduction

Much has been written about the advantages of applying methods of alternative dispute resolution – arbitration in particular – to resolve disputes arising from M&A transactions. There can hardly be any doubt that arbitration remains the preferred dispute resolution method in M&A transactions.1) The arbitrators’ expertise, confidentiality and the possibility to choose the language of the proceedings are frequently referred to as decisive benefits of arbitration over state court litigation in this context.2)

However, in recent times, cost and time effectiveness of arbitral proceedings appear to be invoked less frequently as grounds for choosing arbitration over litigation in M&A disputes.3) On the contrary, with the number of arbitral proceedings in M&A-related disputes having increased significantly in the aftermath of the financial crisis, sharp criticism has been voiced regarding the cost and length of arbitral proceedings as they are often out of proportion with the complexity of the dispute and the value at stake. Extensive taking of evidence, lengthy submissions and hearings as well as extensive use of experts are among the drawbacks reported by parties not satisfied with the process.4)

This article seeks to respond to such criticism by proposing refinements to the process to increase efficiency and speed. While arbitration remains uncon-
tested as the preferred dispute resolution mechanism in the context of M&A transactions, the authors advocate certain adaptions and supplements to the process which meet the particular needs of the parties involved in M&A disputes.

For each stage of an M&A transaction, the authors set out the typical disputes. They describe the dispute resolution mechanisms best suited for these disputes and explain how these mechanisms can be tailored and aligned to form an integrated dispute resolution mechanism. Core elements of such an integrated dispute resolution mechanism for M&A transactions include expedited arbitral proceedings, commonly also referred to as "fast-track arbitration", and determination of primarily fact-driven disputes, in particular disputes as to adjustment of the purchase price, by experts, both of which will be addressed in detail below.

II. Pre-Signing Disputes

A. Typical Disputes

In the preparatory phase of an M&A transaction, the basic terms and conditions, the deal structure and/or procedural matters are regularly recorded in the form of a letter of intent (LoI), a memorandum of understanding (MoU) or a term sheet. In advanced stages of the transaction, information and documents relating to the target company are usually exchanged only on the basis of and subject to a non-disclosure agreement (NDA).

Whilst some provisions in these preliminary agreements may not be binding due to their nature as mere expressions of the parties’ intentions, other obligations, such as in particular the exclusivity of negotiations, confidentiality obligations and costs, are regularly binding on the parties and commonly sanctioned with penalties.

Disputes in the pre-signing stage of a transaction may arise from diverging views as to whether particular provisions of an LoI or MoU are legally binding on the parties, from an alleged violation of these provisions, or from a deviation therefrom in the course of subsequent negotiations on the terms of the SPA. Disputes in the pre-signing stage of a transaction may arise from diverging views as to whether particular provisions of an LoI or MoU are legally binding on the parties, from an alleged violation of these provisions, or from a deviation therefrom in the course of subsequent negotiations on the terms of the SPA. 3)

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putes may also arise from a breach of the confidentiality obligations of an NDA.9) A party asserting a breach may either claim damages/penalties or request specific performance, such as the non-disclosure of confidential information or suspension of parallel negotiations with competing bidders.

Disputes arising in the preliminary stage of a transaction often result in the abortion of the contemplated transaction. In addition to the potential disputes regarding the (non-)binding nature of the provisions of the LoI or MoU and/or alleged breaches of the confidentiality obligations, disputes will therefore primarily circle around the question of whether a party conducted – respectively discontinued – negotiations in bad faith and whether such party is liable for the other party’s damages suffered (in particular for transaction costs) or for payment of a break-up fee as a result10). Independent of contractual obligations or duties a party may become liable under the doctrine of culpa in contrahendo for breach of disclosure obligations or a duty of care resulting in the termination of negotiations.11)

B. Dispute Resolution Methods

1. Litigation v. Arbitration

M&A handbooks often recommend the inclusion of an arbitration clause in an LoI or MoU.12) Despite such recommendations, arbitration clauses are rarely seen in these agreements.13) It seems more common that the parties agree on the jurisdiction of local courts instead of arbitration in an LoI, MoU or an NDA, which does not mean that the parties would opt for court litigation also in the SPA. This may be due to the fact that the parties do not dedicate much attention to dispute resolution methods in the euphoria of a project in the emerging phase or that the parties do not attribute much importance to disputes arising at an early stage of the process.

In many cases, these assumptions do not hold true and should thus be reconsidered. Disputes arising from breaches of exclusivity and confidentiality obligations or from a discontinuation of negotiations may raise complex legal issues

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9) Henry Peter, M&A Transactions: Process and possible Disputes, in Arbitration of Merger and Acquisition Disputes 1, 10 (Kaufmann-Kohler & Alexandra Johnson eds., 2005).
11) Liability under the doctrine of culpa in contrahendo is subject to strict requirements under Austrian law; see Christoph Luegmaier, Strukturfagen des Verkaufsprozesses, in Unternehmenskauf in der Praxis 34, 44 (Mittendorfer ed., 2012); see also Alexander Reich-Rohrwig, Unternehmenskauf, Due Diligence und Aufklärungspflichten, ecolex 4 et seq. (2016); see also Gerhard H. Wächter, M&A Litigation 2 et seq. (2nd ed. 2014).
which require extensive taking of evidence. Court litigation has no advantages for the resolution of these pre-signing disputes. On the contrary, for the sake of consistency with the dispute resolution mechanism typically provided for in the SPA, arbitration is the preferred forum for these disputes.

2. Fast-Track Arbitration

a) A Need For Speed?

Having established that arbitration is generally preferable over litigation as a means of resolving pre-signing disputes in an M&A transaction, the question arises: Might the process require or benefit from refinements which reflect the nature of pre-signing disputes? More specifically, the question is whether certain pre-signing disputes might require fast or urgent resolution and as a consequence whether the parties should not only agree on arbitration, but also on rules facilitating a prompt and fast decision. If a party involved in a pre-signing dispute only claims damages, in particular to compensate frustrated expenses in case of termination of negotiations, there is not necessarily a need for immediate or expeditious dispute resolution. If, however, the harmed party claims specific performance, so that the breaching party is ordered to cease and desist from disclosing confidential information to third parties, or to discontinue parallel negotiations with third parties in violation of an exclusivity obligation, the harmed party will have a strong interest in a prompt and/or fast resolution of the dispute. Therefore, the harmed party can be in need of urgent or expeditious proceedings, such as fast-track arbitration, to resolve pre-signing disputes.

b) What Is Fast-Track Arbitration?

It has rightfully been questioned whether fast-track arbitration is new or different from “conventional” arbitration. 14) Already at a rather early stage of the discussion on fast-track arbitration, the English barrister and judge, Lord Mustill, pointed out that when arbitration was gaining in popularity several decades ago, the process used to be fast-track by definition, which was the reason why parties opted for arbitration in the first place. 15) In his view, the trend towards expedited proceedings belies the fact that “conventional” arbitration has become too slow. Over the decades, arbitration has become an increasingly expansive process, in which the length of the parties’ written and oral submissions and the extent of evidence taken even trumps that of state court proceedings. 16) Seen from that angle, fast-track arbitration is a development back to the roots of arbitration.

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16) See Irene Welser & Christian Klausegger, Fast Track Arbitration: Just fast or some-
Party autonomy generally grants the parties ample flexibility to tailor the arbitral process to their needs, this includes deadlines and the overall timeframe of the proceedings. However, parties often have opposing interests as to the celerity of the process. While dilatory tactics must be avoided, due process and the parties’ right to be heard set the outer limits of accelerating the process.\(^{17}\) A workable solution needs to strike the right balance between celerity on the one hand and respect for the parties’ fundamental procedural rights on the other.\(^{18}\) If this thin line is crossed, an award rendered in the proceedings is at risk of being set aside or being refused enforcement.\(^{19}\) Thus, also in expedited proceedings, each party must be granted sufficient opportunity to present its case and respond to the other party’s arguments and evidence.\(^{20}\) In practice, fast-track arbitration can only work if the parties are willing to cooperate in the process and have a shared incentive in reaching a fast resolution of their dispute.\(^{21}\) If the deadlines and overall timeframe for the process is overly aggressive, it will either not work at all or be prone to dilatory tactics, in which case, disputes over the compliance with the set schedule will most likely absorb any potential time savings. To cope with such a situation the ICC Rules provide for an explicit safety valve: according to Article 38 (2) the Court may on its own initiative extend any time limit that has been modified by the parties to the extent that this is necessary in order for the ICC Court and the Arbitral Tribunal to fulfill their responsibilities.\(^{22}\)
d) Institutional Rules For Fast-Track Arbitration

Most of the institutional rules for international arbitration offer special rules for fast-track arbitral proceedings on an opt-in basis. The German Institution of Arbitration (DIS) introduced its Supplementary Rules for Expedited Proceedings in 2008. As their title indicates, these rules for expedited proceedings supplement and amend the “conventional” DIS-Arbitration Rules. The Swiss Rules of 2012 as well as the Vienna Rules 2013 follow this model and provide for a set of special rules for expedited procedures. The Arbitration Institute of the Stockholm Chamber of Commerce has issued a fully integrated and stand-alone set of rules for expedited arbitrations. The ICC follows suit with the amendment of its Rules per 1 March 2017 and the introduction of an expedited procedure in Article 30 of its Rules. Contrary to the institutional rules described above, the ICC Rules are premised on an opt-out mechanism. Unless the parties explicitly agree otherwise or the ICC Court determines that the expedited procedure is inappropriate in the circumstances of the case, the expedited procedure applies to all disputes under the ICC Rules with an amount in dispute of up to USD 2 million if the arbitration agreement was entered into after March 1, 2017.

The various institutional rules on fast-track proceedings share the following fundamental principles aimed at speeding up the process: (i) overall time limit between 3 and 9 months, whereby reasoned extensions are granted in exceptional cases only; (ii) decision to be rendered by a sole arbitrator; (iii) shortened time limits for appointment of arbitrators; (iv) limited number of written submis-

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23) According to Article 42 (2) Swiss Rules, however, the expedited procedure shall apply as a general rule if the amount in dispute does not exceed one million Swiss francs.
29) Article 36 SCC Rules for Expedited Arbitrations provides for a time limit of 3 months. Article 1.2 DIS-SREP provides for an overall time limit of 9 months in case of a three member tribunal, but only 6 months in case of a sole arbitrator. Article 42 1. (d) Swiss Rules and Article 45 (8) Vienna Rules provide for an overall time limit of 6 months. Article 30 Subsection 1 ICC Rules provides for a time limit of 6 months for the final award in “standard” arbitral proceedings, which time limit is, however, rarely met in practice.
30) Article 3.1 DIS-SREP; Article 12 SCC Rules for Expedited Arbitrations; Article 45 (5) Vienna Rules.
sions;\(^{31}\) (v) only one single oral hearing;\(^{32}\) and (vi) reduced requirements as to the contents of an award.\(^{33}\) Furthermore, the admissibility of certain types of evidence\(^{34}\) or submission thereof\(^{35}\) can also be limited in expedited arbitral proceedings.\(^{36}\) The submission of expert reports and cross-examination of experts in the oral hearing may seriously undermine the very purpose of expedited proceedings.

### 3. Emergency Arbitrator

**a) Urgency v. Speed**

While “conventional” arbitral proceedings and fast-track arbitration are essentially the same process with varying durations, emergency arbitration is a different kind of animal. An emergency arbitrator issues an interim decision on matters which cannot await final determination due to their urgency.\(^{37}\) Although emergency arbitrator proceedings and fast-track arbitration are both types of proceedings that shall be carried out within a short period of time, the outcome of these proceedings is fundamentally different in terms of the legal quality and nature of the decision rendered.

**b) Interim Relief In International Arbitration**

The power of an arbitral tribunal to issue interim and conservatory measures is a well-established procedural tool that has already been incorporated into institutional arbitration rules many years ago.\(^{38}\) More recently, several institu-

\(^{31}\) Article 5.2 DIS-SREP; Article 19 (3) SCC Rules for Expedited Arbitrations; Article 45 (9) 9.1 Vienna Rule; Article 42 1. (b) Swiss Rules.

\(^{32}\) Article 5.2 DIS-SREP; Article 45 (9) 9.3 Vienna Rule; Article 42 1. (c) Swiss Rules.

\(^{33}\) According to Article 7 DIS-SREP the arbitral tribunal may abstain from stating the facts of the case in the award, unless agreed otherwise by the parties. In fast-track proceedings under the SCC Rules for Expedited Arbitrations a party may request a reasoned award no later than at the closing statement (Article 35 [1]). Under Article 42 1. (e) of the Swiss Rules the arbitral tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

\(^{34}\) Cf. Article 42 1. (c) Swiss Rules (referring to the parties’ option to agree that the dispute shall be decided on the basis of documentary evidence only).

\(^{35}\) See Article 45 (9) 9.2 Vienna Rules (according to which all written evidence shall be attached to the written submissions).


\(^{38}\) See, e.g., the ICC Rules of 1998, which introduced provisions expressly allowing applications for interim measures to courts; see Raja Rose & Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, 5 Int. A.L.R. 186, 187 (2012).
tions amended their rules to allow for interim and conservatory measures to be ordered even prior to the constitution of the arbitral tribunal. Before the introduction of the emergency arbitrator mechanism, the parties’ only option to apply for interim relief prior to the constitution of the arbitral tribunal was to file a respective request with the competent state courts.39)

Interim and conservatory measures issued by an arbitral tribunal lack finality by their nature and thus generally do not qualify as awards according to the New York Convention.40) The enforceability of interim and conservatory measures issued by an arbitral tribunal is a matter of the applicable domestic procedural law.41) Austrian courts enforce interim and conservatory measures issued by an arbitral tribunal according to Section 593 of the Austrian Code of Civil Procedure (Zivilprozessordnung – ACCP).42)

c) Institutional Emergency Arbitrator Rules

Prominent international arbitration institutions that have included emergency arbitrator rules include, inter alia, the SCC43), the Swiss Chambers’ Arbitration Institution (SCAI)44) and the ICC.45) The emergency arbitrator rules of all of these institutions essentially share the same characteristics. By means of an example, the authors will therefore focus on the ICC Rules.46)

d) ICC Rules

The ICC Emergency Arbitrator Provisions47) apply automatically if the parties have agreed on the ICC Rules of Arbitration. However, the parties are free to

39) Raja Rose & Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, 5 Int. A.L.R. 186 (2012); the ICC introduced ”Pre-arbitral Referee”-proceedings to obtain interim relief prior to the constitution of the arbitral tribunal already in 1990 on an opt-in basis, but this service has only rarely been made use of since then; see www.iccwbo.org/products-and-services/arbitration-and-adr/pre-arbitral-referee/ (last visited November 15, 2016).

40) Irene Welser, Fast track Proceedings, expedited Procedure and Emergency Arbitrator – Pros and Cons, in LIBER AMICORUM TO PROFESSOR JERZY RAJSKI 216, 221 (Beata Gesel-Kalinowska vel Kalisz ed., 2015); but see Rainer Werdnik, The Enforceability of Emergency Arbitrators’ Decisions, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2014 249, 264 (Klausseger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2014) (arguing that interim measures should be enforceable under the New York Convention under a pragmatic approach).


42) Gerold Zeiler, EINSTWEILIGE MASSNAHMEN, IN SIECHENVERFAHRENSRECHT 561, 574 et seq. (LIENSCHER, OBERHAMMER & REICHERBERGER eds., 2012).

43) Appendix II to the SCC 2010 Arbitration Rules.

44) Article 43 Swiss Rules.


47) As defined in Article 25 (5) of the ICC Rules of Arbitration.
opt-out of this regime.\textsuperscript{48}) An application for interim relief under the Emergency Arbitrator Provisions can be filed before, after, or simultaneously with a request for arbitration.\textsuperscript{49}) However, it must be filed prior to the transmission of the file to the Arbitral Tribunal.\textsuperscript{50}) Following a preliminary review of the application by the President of the Court, the application is served upon the responding party.\textsuperscript{51}) The emergency arbitrator is appointed by the President of the Court within two days of the notification.\textsuperscript{52}) The emergency arbitrator is free to conduct the proceedings taking into account their urgency,\textsuperscript{53}) but must hand down his or her decision in writing no later than fifteen days after transmission of the file.\textsuperscript{54}) The order issued by the emergency arbitrator is not binding upon an arbitral tribunal subsequently dealing with the dispute on the merits.\textsuperscript{55})

Interim and conservatory measures can be an important procedural tool to protect a party’s rights and interests involved in a pre-signing M&A dispute, in particular if such party makes a claim for specific performance. For instance, where a party disseminates confidential information in breach of an NDA or engages in parallel negotiations with a third party in breach of an exclusivity provision in an LoI, the harmed party might want to prevent the other party from committing further breaches as a matter of urgency.\textsuperscript{56})

\section*{C. Drafting Considerations}

\subsection*{1. Fast-Track Arbitration}

As set out above, there may be a need for expedited proceedings to resolve pre-signing disputes. Thus, the parties may wish to supplement the relevant dispute resolution clause – be it included in an LoI, MoU or NDA – with special procedural rules addressing the need for expeditious dispute resolution.

The first question that arises when it comes to drafting the dispute resolution clause is: Which rules shall be incorporated? If parties have opted for \textit{ad hoc} arbitra-

\textsuperscript{48}) Article 29 (6) b) ICC Rules of Arbitration; \textit{see} \textsc{Jason Fry, Simon Greenberg & Francesca Mazza, The Secretariat’s Guide to ICC Arbitration} 295, 309 (2012); a reason to opt-out from the Emergency Arbitrator Provisions might be the cost of an application to the emergency arbitrator, which is a lump sum of USD 40,000 to be paid upfront by the applicant.\textsuperscript{49}) Article 1 of Appendix V to the ICC Rules of Arbitration.\textsuperscript{50}) Article 29 (1) ICC Rules of Arbitration.\textsuperscript{51}) Article 1 (5) of Appendix V to the ICC Rules of Arbitration.\textsuperscript{52}) Article 2 (1) of Appendix V to the ICC Rules of Arbitration.\textsuperscript{53}) Article 5 (2) of Appendix V to the ICC Rules of Arbitration.\textsuperscript{54}) Article 29 (2) of the ICC Rules of Arbitration, Article 6 (4) of Appendix V to the ICC Rules of Arbitration.\textsuperscript{55}) \textsc{Jason Fry, Simon Greenberg & Francesca Mazza, The Secretariat’s Guide to ICC Arbitration} 295, 306 (2012).\textsuperscript{56}) \textsc{Henry Peter, M&A Transactions: Process and possible Disputes, in Arbitration of Merger and Acquisition Disputes} 1, 9 (Kaufmann-Kohler & Alexandra Johnson eds., 2005).
tration, they will have to draft their own special rules for expedited proceedings.\textsuperscript{57})
A simple alternative could be that the parties merely limit the overall length of the proceedings from receipt of the file by the arbitral tribunal or sole arbitrator to rendering of the arbitral award. In this case, the parties should explicitly clarify in the arbitration agreement that the arbitral tribunal does not lose its competence or jurisdiction if the award cannot be rendered within the set time limit for whatever reason.\textsuperscript{58})

It is a challenge to embed special rules on expedited proceedings smoothly into a contractual dispute resolution mechanism. There is a risk that the dispute resolution clause will get too complicated, and that special rules which, if not carefully aligned with the overall dispute resolution mechanism, may lead into a dead end and not work out properly. The safer alternative is to opt-in to a special set of rules developed by the leading international arbitration institutions, which have been tested successfully in practice for several years.

The second crucial question is: What disputes shall be dealt with under the regime of a special set of rules? Clearly, not all pre-signing disputes can and should be submitted to an expedited procedure.\textsuperscript{59}) The decisive element for the success of a dispute resolution clause setting out different avenues for different types of disputes is a classification of potential conflicts into cases which are suitable for a special procedure and others which are not.\textsuperscript{60}) Disputes requiring the establishment of complex facts or the determination of complex legal issues may not be suitable for submission to fast track proceedings. Thus, the dispute resolution clause must aim to define the disputes that shall be submitted to a particular dispute resolution procedure as precisely as possible. If the delimitation between potential disputes is not sufficiently clear, disputes may arise over what is to be considered a dispute to be submitted to a particular dispute resolution procedure. Such disputes will take away any potential benefit to be gained from expedited proceedings.

\textsuperscript{57}) See Klaus Sachs, \textit{Fast-Track Arbitration Agreements of MAC Clauses}, in \textit{Liber Amicorum Bernardo Cremades} 1051, 1059 and 1060 (M. Fernández-Ballesteros & David Arias eds., 2010) (proposing a comprehensive sample \textit{ad hoc} arbitration clause including detailed rules to accelerate the proceedings).

\textsuperscript{58}) Several institutional rules on expedited proceedings explicitly provide for such a clarification; see, e.g., Article 6.2 DIS-SREP, Article 45 (8) Vienna Rules; see also Irene Welser, \textit{Fast track Proceedings, expedited Procedure and Emergency Arbitrator – Pros and Cons}, in \textit{Liber Amicorum to Professor Jerzy Rajski} 216, 217 (Beata Gessel-Kalinowska vel Kalisz ed., 2015) (pointing out that in case the award is rendered after lapse of the set time limit it might be denied recognition and enforcement under the New York Convention on the ground of lack of the arbitral tribunal’s jurisdiction).


2. Emergency Arbitrator Proceedings

Although emergency arbitrator proceedings can play an important role in pre-signing M&A disputes, they do not form an element of proactive planning and tailoring of an efficient and expeditious dispute resolution mechanism for M&A disputes. The first reason for this is that emergency arbitrator provisions of institutional arbitration rules are applicable on an opt-out basis, unless the parties want to exclude the possibility to apply for interim and conservatory measures from an emergency arbitrator, emergency arbitrator proceedings do not need to be addressed in the dispute resolution clause. Secondly, interim and conservatory measures can provide additional protection to a harmed party in a dispute, but their primary purpose is not an increase of speed or efficiency.

III. Pre-Closing Disputes

A. Typical Disputes

The signing of the transaction documentation is a major milestone towards execution of an M&A transaction, but it is often not the end of the story. Implementation of complex transactions may require critical and complex steps in preparation of the transfer of a business or shares.\(^{61}\) For instance, the target business or the assets to be transferred may need to be prepared for transfer, e.g. by way of a spin-off.

Further, merger control approval proceedings before competition authorities of multiple jurisdictions and other required regulatory approvals often prove complex and time consuming. As a result, the period of time between signing and closing of a transaction may extend over several months.

Finally, the conditions precedent to closing constitute issues of particular importance to the parties. If these conditions are not met prior to the closing date, the parties are not prepared to finalize the transaction.

Especially if the period of time between signing and closing lasts for several months, the purchaser will have a vital interest in securing a certain extent of control over the target prior to closing. Thus, the seller’s conduct of business, management and administration of the target are often made subject to a comprehensive catalogue of obligations and undertakings. For instance, undertakings not to take certain measures or actions or not to enter into particular business transactions without the express prior approval of the purchaser.

Thus, many critical issues in an M&A-transaction need to be dealt with in the pre-closing phase. Needless to say that in dealing with the agreed conditions precedent the parties' interests will not always be aligned. Disputes between seller and purchaser may in particular arise as to whether the seller has breached a pre-

closing obligation or undertaking. Disputes relating to conditions precedent may arise as to their scope and interpretation, whether a party has met its obligation to bring about a particular condition precedent and whether a particular condition precedent is to be considered fulfilled in terms of the SPA for the purposes of closing the transaction.62) A material adverse change clause (MAC), which is aimed at protecting a party against a change of circumstances between singing and closing negatively affecting the target or the transaction, is particularly prone to disputes between the parties to the transaction as to whether the MAC’s requirements are fulfilled and whether a party may consequently be entitled to rescind from the transaction.63) The events constituting a material adverse change in terms of a MAC are often described in a broad way leaving vast room for interpretation and disputes.64)

Disputes arising between the parties to a transaction between signing and closing are, by their very nature, time critical. The parties are usually keen on keeping the period of time between signing and closing as short as possible. Once the deal is made, the parties have no incentive in sharing the risk of the target’s continued operation. A situation where the seller feels no longer in charge of the target and the buyer feels not yet in charge of the target may seriously harm the target’s business operations and result in a decrease of its value.65) This is particularly the case, if a dispute between the parties arises, which results in a deadlock and temporary standstill. Thus, any disputes arising between the parties between signing and closing need to be resolved quickly in order to prevent harm to the target’s business operations and in order to remove any obstacles to the implementation of the transaction.

Furthermore, it is common that the transaction documentation provides for a “Long-Stop Date”, i.e. a date as of which the parties are no longer bound to complete the transaction if the conditions precedent have not been fulfilled. The Long-Stop Date aims to prevent the parties from being stuck in limbo between signing and closing. The time frame for the resolution of disputes between signing and closing is thus set by the Long-Stop-Date. The transaction is at risk of failure if a pre-closing dispute cannot be resolved by the Long-Stop Date, and the parties cannot agree on the postponement of the Long-Stop Date.

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63) See Klaus Sachs, Fast-Track Arbitration Agreements of MAC Clauses, in Liber Amicorum Bernardo Cremades 1051, 1051 (M. Fernández-Ballesteros & David Arias eds., 2010).
65) Id.
B. Dispute Resolution Methods

1. Fast-Track Arbitration

As shown above, disputes arising between the signing and the closing of a transaction are particularly time critical. The parties are thus in need of reaching a final determination of a pre-closing dispute within a short period of time. As described in section II.B.2. above in further detail, fast-track arbitration proceedings constitute a well suited dispute resolution mechanism in cases where a fast decision is of the essence.66)

The parties to a transaction usually want to close the deal as soon as possible after signing and the chances of closing the deal may decrease with the lapse of time. Measures to further expedite the proceedings will be considered in section C.1. below. The time available for resolution of a dispute will often be weeks rather than months.

2. Dispute Boards

As an alternative to agreeing on fast-track arbitration proceedings, in particular with “stand-by” arbitrators already appointed in the dispute resolution clause67), the parties could agree that pre-closing disputes shall be referred to a dispute board.68)

Dispute boards became popular primarily as a permanent dispute resolution mechanism in large scale construction projects, where there is a permanent need for urgent and expeditious resolution of disputes in order to prevent holding up progress at the construction site.69) The incorporation of dispute adjudication boards in FIDIC conditions of contract contributed to establishing dispute boards as a standard dispute resolution mechanism in construction projects.70)

Dispute boards usually consist of one to three members, among them often technical or other experts, which provide non-binding recommendations71) to
the parties on how to resolve a dispute or issue a binding decision on the parties.72) The following definition of a dispute board can be found in the foreword to the Dispute Board Rules of the ICC:

“A dispute board is a standing body typically set up upon the signature or commencement of performance of a mid- or long-term contract, to help the parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract.”73)

This definition specifically refers to the fact that dispute boards may not only take the role of a dispute resolution mechanism, but may potentially also serve to prevent disputes from arising by an early intervention of the members of the dispute board, primarily in the form of non-binding recommendations or a neutral assessment of the dispute or the parties’ positions respectively.

While dispute boards share some of the fundamental principles with arbitral proceedings, such as the independence and impartiality of the dispute board members74), they follow a rather informal procedure aimed at a quick result. Dispute boards are not arbitral tribunals. If dispute boards issue binding decisions on the parties, such decisions do not have the legal quality of an arbitral award.75) As a purely contractually based dispute resolution mechanism, dispute boards come probably closest to the concept of expert determination (Schiedsgutachter).76)

Dispute boards can be included in a contractual dispute resolution mechanism as a first escalation level, whereby its decisions are binding on a preliminary basis only.77) The dispute board’s decision becomes only binding if no party files a notice of dissatisfaction. If a party does file a notice of satisfaction, the dispute is finally decided by an arbitral tribunal or other dispute resolution mechanism agreed on by the parties.78)

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72) Commonly referred to as a “Dispute Adjudication Board” (DAB).


74) Ulrike Gantenberg & Gustav Flecke-Giammarco, Dispute Resolution Boards Revival – Championing the Use of Dispute Adjudication Boards as a Project Management Tool That Helps to Avoid Disputes, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2016 201, 205 (Klaussegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2016).

75) See fn 74, 204.

76) See Section IV.B.1. on expert determination.

77) Ulrike Gantenberg & Gustav Flecke-Giammarco, Dispute Resolution Boards Revival – Championing the Use of Dispute Adjudication Boards as a Project Management Tool That Helps to Avoid Disputes, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2016 201, 202 (Klaussegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2016).

The parties can either agree on an *ad hoc* dispute board following the rules individually agreed by them or incorporate institutional dispute board rules by reference in their agreement. The ICC has gained a leading market position among dispute resolution service providers offering dispute board administration services over the last decades, which might *inter alia* be attributable to the fact that the FIDIC contract terms make reference to the ICC rules.

In October 2015, the ICC introduced revised dispute board rules governing both Dispute Adjudication Boards and Dispute Review Boards.\(^79\) In addition to providing a set of rules governing the proceedings before dispute boards, the ICC Dispute Board Rules 2015 include standard dispute board clauses as well as a model dispute board member agreement.\(^80\)

Dispute boards are generally perceived as less adversarial in comparison to arbitral proceedings. The process before a dispute board is focused more on reaching a compromise, in view of the parties being dependent on ongoing cooperation, rather than on the opposing positions taken by the parties in a controversy. It is often said that recommendations and determinations by dispute boards find a high level of acceptance among the parties making use of the process.\(^81\) The main reason why dispute boards have been used very successfully in major construction projects is certainly that the project’s overall success is dependent on the parties’ successful cooperation over a period of time often spanning several years. In a way, the parties are “chained together” leaving neither room nor time for battles in court or before an arbitral tribunal. Seen from that angle, the dynamics between parties to an M&A transaction will only rarely be similar to those in a long-term construction project. In the majority of transaction disputes, the parties might be better served with a final decision on a pre-closing dispute rendered by an arbitral tribunal in expedited proceedings rather than with a preliminary determination of a dispute board that may be subject to subsequent review by an arbitral tribunal. In most M&A transactions the parties are not dependent on a successful business relationship between them in the long run. More often, the parties will either want to find a quick solution to an issue that prevents closing or walk away from the deal. That outcome is probably what expedited arbitral proceedings can deliver better than dispute boards. However, a dispute board can make sense where closing requirements or the closing mechanisms of a transaction are very comprehensive or complex and completion of such process might take up to a year. In such a case, the parties’ incentive to cooperate in the period between signing and closing with the joint goal to close the transaction will most likely be significantly higher.

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\(^81\) See fn 78.
3. Emergency Arbitrator

If a dispute board or a panel of stand-by arbitrators is available to the parties in case of a dispute, the need for an application for interim relief to an emergency arbitrator might be limited. A dispute board or stand-by arbitral tribunal will not only be able to hand down a decision within a short timeframe, but will also be able to react without delay – just as an emergency arbitrator would do – in case a party applies for relief on an urgent basis. At least an interim or conservatory measure issued by a stand-by panel of arbitrators is not of a different legal quality than an order issued by an emergency arbitrator.

C. Drafting Considerations

1. Fast-Track Arbitration

Section II.B.2.d) above provides an overview on institutional fast-track arbitration rules. While proceedings administrated by an institution have many advantages in comparison to ad hoc proceedings, including standardized dispute resolution clauses which facilitate the incorporation of the rules on expedited proceedings in the overall proceedings, ad hoc proceedings may be preferable where time is particularly of essence.82)

Firstly, institutional rules for fast-track proceedings provide for a time frame of 3 or 6 months83), which is usually too long for most pre-closing disputes.84) However, the parties can agree on a shorter overall timeframe for the proceedings, which requires careful adaptation of the deadlines for each single procedural step.

Secondly, it always takes some time to get the process started through the involvement of an institution, which the parties can save in a self-administered ad hoc process.85) The ICC Emergency Arbitrator Provisions demonstrate that an institution is able to get a process started within a very short time-frame.86) However, it should be kept in mind that emergency arbitrator proceedings under the ICC Rules are a special product, which is priced accordingly.

Thirdly, the parties may not need the administration services of an institution if they agree already in the dispute resolution clause on matters typically dealt with by the institution, such as the appointment of the sole arbitrator or a tribu-

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83) See Section II.B.2.d) above.
86) See Section II.B.3.d) above.
nal’s chairman.87) If the parties agree on the decision maker in the dispute resolution clause, valuable time can be saved when referring a dispute to fast-track arbitral proceedings.88) However, the appointment of “stand-by” arbitrators requires clearance in advance, in regards to their availability as well as their independence and impartiality. In addition, the parties will have to enter into an arbitrators’ agreement with the stand-by arbitrators governing matters such as their remuneration and reimbursement of expenses. Furthermore, the parties need to agree on a fall back procedure for the appointment of alternative arbitrators in case the pre-agreed arbitrators are not available for whatever reason or have to decline their appointment due to a conflict of interest that arose between their initial appointment and the point in time in which a dispute is referred to them.89)

Of course, in order to agree on a bespoke procedure for ad hoc fast-track arbitral proceedings and to cover the procedural aspects referred to above, the parties need to carefully draft and agree on a rather comprehensive dispute resolution clause.90) This will not only require the expertise and drafting skills of an experienced dispute resolution practitioner, but also the parties’ shared commitment to the process and an investment of effort. The authors are well aware that parties to an M&A transaction will usually not take the burden of dedicating considerable time and effort to negotiating and agreeing a tailor-made arbitration agreement. However, if the conditions to be met and the steps to be taken to effect closing of a transaction are particularly comprehensive and complex, and thus prone to disputes, it might well pay-off to invest the effort in planning of a dispute resolution mechanism covering the specific needs of the parties and requirements of the transaction.

The importance of precise classification of disputes suitable for submission to fast-track arbitral proceedings should be recalled also in connection with pre-closing disputes. The dispute resolution clause in the transaction documentation should define disputes to be referred to fast-track arbitration as precisely as possible. The provisions of an SPA on closing, particularly the closing conditions as well as pre-closing obligations and undertakings, are often largely independent from other provisions of the SPA and could therefore be separately referred to fast-track arbitration by way of reference to the clauses in the SPA governing those issues. If the disputes to be submitted to a particular process of the dispute resolution mechanism are not clearly defined, disputes may arise as to what constitutes a

dispute qualifying for submission to a particular procedure. On that basis a party might challenge the jurisdiction of the dispute resolution body to which the other party has referred the dispute.

In order to expedite the procedure even further, the parties could consider limiting the jurisdiction of a fast-track arbitral tribunal to decisions on whether or not a particular requirement or condition to closing is met or fulfilled and whether closing can occur. The decision on potential consequences arising from a breach of an SPA’s provisions on closing of the transaction, such as in particular damage claims, could be left to a “conventional” arbitral tribunal.91)

2. Dispute Boards

Avoidance and resolution of disputes by dispute boards is a process on its own different form arbitral proceedings. While dispute boards have become widely accepted as a dispute resolution mechanism over the last couple of decades particularly in construction and other long-term projects, they have not been extensively tested in other fields of application such as M&A transactions. The creation of ad hoc dispute board procedural rules is thus entering unchartered territory to a certain extent. If the parties to an M&A transaction decide to incorporate a dispute board in the dispute resolution mechanism it seems advisable to incorporate the rules of a well-established dispute resolution service provider such as the ICC, the rules of which have been tested for a considerable period of time and were only recently revised to meet the needs of today’s dispute resolution practice. Where needed, the parties can adapt institutional rules to meet their individual requirements.

IV. Post-Closing Disputes

A. Typical Disputes

In practice, most disputes arising from M&A transactions occur after completion of closing and transfer of the target assets or shares to the purchaser.92) Broadly speaking, post-closing disputes can be grouped into the following categories: (i) disputes regarding the validity of the SPA and rescission therefrom; (ii) disputes as to the adjustments of the purchase price; and (iii) disputes from a breach of representations and warranties or indemnities.


1. Validity And Rescission Of The Transaction Documentation

Disputes on the validity of the transaction documentation may arise from formal defects, such as non-compliance with mandatory requirements as to the form of the transaction documentation\(^{93}\) itself or ancillary documents relating to it, such as powers of attorneys. However, mere formal issues do not seem to be the source of disputes in a considerable number of cases. The challenge of the transaction documentation’s validity on the basis of fraudulent misrepresentation is seen more often in recent times. Such challenge is often based on the purchaser’s allegation that the seller has not disclosed information or documentation on the target, which would have influenced its investment decision. Claims on that basis might have increased in number, due to due diligence investigations into the target’s affairs having become dramatically leaner in post-crisis M&A practice and the M&A market having shifted to a buyer’s market in recent years.\(^{94}\) Shorter limitation periods for raising warranty claims and broad exclusion of remedies available to the purchaser may result in purchasers resorting to extraordinary remedies such as challenge on the basis of fraudulent misrepresentation, which cannot be excluded by the parties’ agreement and which are usually subject to mandatory limitation periods exceeding contractually agreed limitation periods by far.

2. Purchase Price Adjustments

The parties to an M&A transaction often agree on purchase price adjustments to take account of changes in its valuation in the period between signing and the last balance sheet reference date preceding the closing date. Common purchase price adjustments are made on the basis of a true-up of financial figures such as \(e.g.\) the target’s working capital, net debt or equity as per the closing date.\(^{95}\) Earn-out mechanisms provide for an increase of the purchase price dependent on the development of defined financial figures, such as the target’s earnings, in a particular period of time after the closing date.

Both types of purchase price adjustments are particularly prone to disputes due to a number of factors, including: the complexity of the mechanisms; definition of the relevant balance sheet positions and performance characteristics and the standards and methods to be applied for determination thereof. Moreover, it is common knowledge that financial accounting is not a precise science and that accounting rules and principles leave room for the accountant’s judgment and discretion. In addition, purchase price mechanisms are typically individually tailored to the relevant target, including the factors to be measured for purposes of the commercial arrangement between the parties. Thus, the parties often cannot resort to mechanisms previously tested in practice.

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\(^{93}\) Under Austrian law for instance a transfer of shares in an Austrian limited liability company (GmbH) must be documented in the form of a notarial deed.

\(^{94}\) See, \(e.g.\), Übernahmen: Verkäufer im Vorteil, Die Presse, March 26, 2015.

\(^{95}\) See Clemens Grossmayer, \(M\&A: Variable Kaufpreisgestaltung und Feststellung durch Schiedsgutachter\), ecolex 395 et seq. (2016).
3. Representations, Warranties & Indemnities

When thinking of post-M&A disputes most practitioners might think of disputes arising from a breach of representations and warranties or an indemnity being triggered. Indeed, a vast number of post-M&A arbitrations, if not the majority circle around damage claims on that basis.96)

Disputes on representations, warranties and indemnities often arise due to vague or ambiguous language of the relevant clauses in the transaction documentation. This is sometimes unavoidable due to the complexity of the matters to be covered. Balance sheet warranties are particularly prone to disputes for the reasons stated in subsection 2 above.

Representation, warranties and indemnities are certainly among the most critical provisions of the transaction documentation, since they constitute crucial assumptions underlying the target’s valuation, thus having a direct influence on the purchase price. If the representations and warranties are breached, the purchaser will be eager to enforce its rights arising therefrom to maintain the economic equilibrium of the deal based on its valuation of the target.

Disputes on representation and warranties may not only be complex due to the subject matters covered by them, but also due to the fact that such disputes can involve third parties asserting a claim against the target company, and thus also the target company itself, in addition to the seller and the purchaser.97)

B. Dispute Resolution Methods

1. Expert Determination

a) Distinction Between Arbitration And Expert Determination

Expert determination can be the quickest and most cost effective way for resolving valuation or technical disputes.98) This is why expert determination clauses have become a standard feature of SPAs.99) Expert determination clauses are typically found in the context of purchase price adjustment clauses, in particular for disputes over closing accounts, but they may also befit certain representation and warranties disputes, such as environmental issues.100)

99) See fn 98.
Contrary to arbitrators who tend to be lawyers, experts are typically specialists in their field of expertise with little or no legal background. In purchase price adjustment disputes, parties commonly rely on internationally recognized public accounting firms. The choice of expert is closely linked to the tasks the expert is called to perform. Experts are called to establish a fact or a limited set of facts or to supplement, amend or replace the intention of the parties.\(^{101}\) In other words, the expert essentially establishes the factual foundation for a final resolution of the broader dispute by the arbitral tribunal.\(^{102}\) In practice, the distinction between arbitration and expert determination is often less clear cut. The SPA may stipulate that the dispute is to be submitted to an "expert arbitrator" or "appraiser". Do these terms designate an arbitrator or an expert? In case of disagreement, the question of whether the parties agreed on expert determination or on arbitration has to be decided based on a case by case analysis.\(^{103}\) In case of doubt, it is the content of the agreement, i.e. the tasks entrusted upon and powers vested in the expert or arbitrator and not the terminology employed by the parties that determines whether the parties agreed on expert determination or on arbitration.\(^{104}\) The scope of the dispute to be decided plays an important role in this respect. The narrower the scope, the more it is an indication that the parties intended the dispute to be decided by an expert rather than an arbitrator.\(^{105}\)

But even where the qualification of the expert determination is undisputed, the expert will often have to interpret the contractual provisions and will have to make a legal determination for his assessment. This is for instance the case where, for the assessment of the accuracy of the closing accounts, the expert has to interpret undefined terms such as "cash", "financial debt" or "net working capital" which are not clearly defined.

The distinction between expert determination and arbitration is of paramount importance because of the different legal regimes that apply in either case. While arbitral proceedings are governed by the provisions of the lex arbitri which are usually supplemented by a set of rules set forth by an arbitral institution chosen by the parties, the expert determination procedure is typically not or only

80 (Briner, Fortier, Berger & Bredow eds., 2001); see also Alice Broichmann, Disputes in the Fast Lane: Fast-Track Arbitration in Merger and Acquisition Disputes, 4 Int. A.L.R. 143, 151 (2008).

101 Christian Hausmaninger, § 581, 142, in Kommentar zu den Zivilprozessgesetzen (Fasching & Konecny eds., 2007).

102 See fn 101.


scantily regulated (see below). The legal regime also varies greatly with respect to setting aside and enforcement (see below).

**b) Expert Determination Procedure**

Although expert determination is known in most jurisdictions, statutory law typically does not contain rules governing expert determination.\(^{106}\) Moreover, courts in Austria and Switzerland have found that the rules governing the arbitral procedure cannot be applied *per analogiam* to expert determination.\(^{107}\) This lack of applicable norms means that the success or failure of the process is largely dependent on the agreement of the parties.

One of the crucial elements that the parties have to agree on is the choice of the expert. Ideally, the SPA stipulates which natural person or legal entity\(^{108}\) will be appointed as expert and sets forth a substitute procedure in case the designated expert is unable or unwilling to perform the task. Parties could for instance agree on a third party to appoint an expert in line with specific criteria set forth in the expert determination clause.\(^{109}\) The appointing authority does not have any legal obligation to comply with the parties’ appointing request,\(^{110}\) but many arbitral institutions, such as the ICC and the German Institution of Arbitration offer to act as expert appointing authority against payment of a small fee. In 2015, the ICC International Centre for ADR introduced specific rules for the Appointment of Experts and Neutrals.\(^{111}\) Unless specifically requested by the parties, the ICC ADR Center’s role is limited to the process of appointing the expert and replacing him or her in case he or she is not fulfilling the expert’s functions, is not independent or impartial.\(^{112}\) The parties will have to agree directly with the appointed expert on the scope of the mission and the expert fees.\(^{113}\)

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\(^{107}\) Decision of the Swiss Supreme Court dated Mai 20, 2015, 4A_655/2014, c. 2.5.


\(^{110}\) Decision of the Swiss Supreme Court dated Mai 20, 2015, 4A_655/2014, c. 2.5.

\(^{111}\) ICC Rules for the Appointment of Experts and Neutrals in force as of February 1, 2015.

\(^{112}\) The ICC ADR Center’s competence to decide challenges against the expert can play an important role in jurisdictions where the state courts do not have jurisdiction to decide such challenges in the context of expert determination, as is the case in Switzerland, see Decision of the Swiss Supreme Court dated Mai 0, 2015, 4A_655/2014, c. 2.5.

\(^{113}\) In addition to choosing the ICC ADR Center as an appointment authority, the
As regards the procedure to be applied by the expert, it is widely recognized that experts will have to respect the equal treatment of the parties and the right to be heard.\textsuperscript{114) The expert determination procedure must comply with the basic requirements of a fair proceeding.\textsuperscript{115) Beyond these fundamental principles, the parties have to reach an agreement among themselves and with the expert on the expert’s powers and the way the proceedings will be conducted. Because of the private nature of his mandate, the expert does not \textit{per se} have a right to request access to information and production of documents. As for the appointment procedure, arbitral institutions have stepped into the gap and have drawn up rules for the conduct of expert proceedings which can be incorporated by reference in the expert determination clause.\textsuperscript{116)\textsuperscript{c}) Binding Nature And Enforceability Of Expert Determinations\textsuperscript{117) An expert determination is generally recognized as being binding in the sense that a judge or arbitrator will not have jurisdiction to re-assess the facts established by the expert.\textsuperscript{118) Contrary to the setting aside of an arbitral award, the grounds for challenging an expert determination are typically not stipulated in statutory law, but were instead developed through case law.\textsuperscript{119) In Austria, Germany and Switzerland, expert determinations are not binding in case of coercion, deceit or error, if the principle of equal treatment or the right to be heard was violated or if the result is grossly incorrect.\textsuperscript{120) The latter was for instance found to be the case for the evaluation of a severance payment where the accountant only took a limited number of documents provided to it by the Claimant into account and assessed the due amount without involvement of the Respondent.\textsuperscript{121)\textsuperscript{114) Christian Dorda, \textit{M&A und alternative Streitbeilegung}, GesRZ 5, 9 (2012); Harold Frey & Dominique Müller,\textit{ Preisanpassungsstreitigkeiten bei Unternehmenskäufen unter besonderer Berücksichtigung des Schiedsgutachterverfahrens, in M&A Recht und Wirtschaft in der Praxis} 191, 219 (Breitenstein & Diem & Oertle & Wolf eds., 2010).\textsuperscript{115) Balz Gross, \textit{M&A disputes and expert determination: getting to grips with the issues, in PLC CROSS-BORDER ARBITRATION HANDBOOK} 3 (2010/11).\textsuperscript{116) See for example: ICC Rules for the Administration and of Expert Proceedings in force as of 1 February 2015; DIS Rules on Expert Determination in force as of May 1, 2010.\textsuperscript{117) Wolfgang Peter, \textit{Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes, in ARBITRATION INTERNATIONAL} 19, 502 (2003); Christian Hausmaninger, § 581, 153 in\textit{ Kommentar zu den Zivilprozessgesetzen} (Fasching & Konecny eds., 2007).\textsuperscript{118) For Austria, see for example: Judgment of the Austrian Supreme Court OGH, February 28, 2011, docket no. 9 Ob 80/10w. For Switzerland: Supreme Court Decision published in BGE 129 III 535, at 538.\textsuperscript{119) Christian Hausmaninger, § 581, 153 in\textit{ Kommentar zu den Zivilprozessgesetzen} (Fasching & Konecny eds., 2007); Wolfgang Peter, \textit{Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes, in ARBITRATION INTERNATIONAL} 19, 502 (2003); Supreme Court Decision published in BGE 129 III 535, 538.\textsuperscript{120) Judgment of the Austrian Supreme Court OGH, February 28, 2011, docket no. 9 Ob 80/10w.
An expert determination does not qualify as an arbitral award and can therefore not be enforced based on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In cases where the losing party refuses to voluntarily comply with the expert determination, the time and cost efficiencies that the parties intended to achieve through the expert determination procedure will therefore be cancelled out by the burden of going through a two-tier procedure. However, this does not mean that expert determination is not a useful tool. On the contrary, a well-reasoned expert opinion that takes into account both parties' submissions and is based on the expert's in-depth knowledge of the subject matter will in many cases bring the dispute to an end – or will at least provide a solid basis for further negotiations or arbitration proceedings.

2. Fast-Track Arbitration

It has been stipulated above that some types of M&A-disputes may not be suitable for resolution in fast-track proceedings due to their complexity. Many disputes arising from representations and warranties such as disputes on balance sheet warranties or disputes relating to intellectual property rights are driven by highly complex facts and industry specific issues and may therefore be too complex to be resolved in fast-track proceedings.

Other disputes on representations and warranties might not be overly complex and may thus be generally suitable for resolution in fast-track proceedings, but an upfront agreement on which disputes will or will not be subject to fast-track arbitration will hardly ever be feasible – or advisable – in practice. A particular set of facts and circumstances might for instance constitute a breach of several representations and warranties at the same time. The transaction documentation usually excludes double dipping preventing a party from raising damage claims for the same facts and circumstances based on several legal grounds or contractual provisions. Despite such a provision in the SPA, a damaged party may want to base its claims on different legal grounds or contractual provisions. If some of these claims are subject to fast-track arbitration, while others must be brought in “standard” proceedings, issues might be triggered due to parallel proceedings and the potential for conflicting outcomes. Thus, the parties should agree on a uniform dispute resolution mechanism for disputes arising from representations and warranties to avoid a segmentation of dispute resolution mechanisms within the same category.

Further, the parties will not be equally incentivized to contribute to a fast resolution of disputes on representation and warranties. As has been stipulated earlier, fast-track arbitration will likely not bring about the desired results if the parties are not willing to cooperate.

By contrast, the parties might very well have a shared interest in a fast resolution of disputes on the validity of the transaction documentation and rescission thereof. As in the period between signing and closing, a dispute as to the transaction documentation’s validity might result in a deadlock or standstill in the target, potentially inflicting irreparable harm on it. The faster a dispute on the validity of
the transaction documentation and thus management and ownership of the target can be resolved, the lower potential damages inflicted on the target – and thus finally also on the parties – will be. Therefore, such disputes might be suitable for submission to fast-track arbitral proceedings.

Finally, fast-track arbitration might be the suitable dispute resolution mechanism for disputing issues relating to expert determination, but which cannot be decided by the expert himself. Such disputes might arise e.g. from a conflicting interpretation of related legal issues, which constitute a preliminary issue to be decided before the expert can proceed with establishing and determining the facts and matters in dispute. As time is of essence in expert determination proceedings, arbitral proceedings with a direct impact on the expert’s determination should be resolved as fast as possible. Conventional arbitral proceedings might hold up expert determination proceedings for too long, thereby undermining their very purpose of bringing about a fast and informal determination of disputed facts and issues.

3. Arbitration

As has been indicated already in the introduction to this article, arbitration is the most common form of dispute resolution in M&A transactions and is generally preferred over state court litigation. Decision makers in M&A-disputes not only require legal expertise, but in particular also a profound understanding of the business and economic background and mechanics of an M&A transaction. The possibility to choose an arbitrator who has the required expertise is therefore one of the most important factors in favor of selecting arbitration over litigation as a means of resolution of M&A disputes. Arbitral proceedings administered by a well-established arbitral institution have proven to work well in practice for disputes arising from M&A transactions. There does not appear to be a specific need or particularly strong case for ad hoc arbitration in that area.

C. Drafting Considerations

1. Fast-Track Arbitration

Reference is made to the considerations in section III.C.1. above, which apply equally to such post-closing disputes which might be suitable for resolution in fast-track arbitral proceedings.

2. Expert Determination

In many jurisdictions, expert determination is not or only cursorily regulated by statutory law. The parties’ agreement as reflected in the wording of the expert determination clause is therefore of paramount importance. Ideally, the parties spell out the details of the expert procedure from the outset. This could for
instance be done in an annex to the SPA. However, in the overwhelming majority of cases, the parties will not be willing to spend the time and costs involved in negotiating extensive expert instructions when entering into an M&A transaction. In these cases, the parties should focus on setting out the following main cornerstones in their expert determination clause:

i. Description of the type of dispute that is to be subject to expert determination

ii. Clear wording that the parties agree on binding expert determination (as opposed to non-binding expert determination or arbitration)\(^{121}\)

iii. Designation of expert and/or expert appointing authority

iv. Expert’s powers in administration of evidence

v. Interplay between expert determination clause and other dispute resolution clauses\(^{122}\)

vi. Cost allocation principles

Apart from the description of the type of dispute that is to be subject to expert determination, a bespoke clause on these points can be avoided through the incorporation of institutional rules, such as the ICC Rules on the Appointment of Experts and Neutral and the Rules on the Administration of Expert Proceedings and the DIS Rules on Expert Determination, mentioned above. As all standardized rules, these rules may not fit all the specificities of the dispute but they have the advantage of providing a comprehensive and conclusive set of rules in case the parties are not able or not willing to devise a tailor-made set of rules for themselves.

3. Arbitration

The best and safest option to agree on arbitration in an M&A transaction is certainly by including a sample arbitration clause of an arbitral institution, thereby incorporating the institution’s arbitration rules by reference. Additional agreements as to the arbitral proceeding’s framework and procedure as suggested by the institutions should be considered by the parties.\(^{123}\)

An M&A transaction is usually not only documented in one single document (such as a share purchase agreement), but in a number of main and ancillary agreements related thereto. Ancillary agreements often entered into in connection


\(^{123}\) See, e.g., the possible supplementary agreements suggested by the VIAC, available at viac.eu/en/arbitration/model-clause (last visited on November 15, 2016).
with an M&A transaction include for instance service level and other transition agreements or financing agreements. Another setting in which a number of interrelated transaction agreements are entered into is a multijurisdictional transaction consisting of a master transaction agreement and local share or asset transfer agreements. It is crucial for the establishment of an efficient dispute resolution mechanism to include the same arbitration clause in the various transaction documents to avoid parallel proceedings before different forums and potentially conflicting outcomes from parallel proceedings.\(^\text{124}\)

The various layers of transaction agreements in an M&A transaction often involve third parties in addition to the seller and the purchaser, e.g. suppliers, customers or financing parties. Such multi-layered settings often result in multi-party arbitral proceedings if a dispute in relation thereto arises. Parties might need to be joined into ongoing arbitral proceedings or the consolidation of parallel proceedings in relation to a transaction might result in an increase of efficiency of the overall dispute resolution process.\(^\text{125}\) If the parties want to make use of the possibilities to join a third party into proceedings and/or consolidate several related proceedings, they should include their express consent to these procedural instruments already in the arbitration agreement.\(^\text{126}\) To that effect the parties should amend a uniform “multi-contract arbitration clause” included throughout the transaction documentation to expressly specify the disputes arising from the transaction documentation, which can be consolidated into uniform proceedings and which parties of the transaction documentation can be joined into ongoing proceedings.

V. Conclusion

As this article’s analysis has shown, there are several dispute resolution methods and procedural instruments capable of increasing efficiency and speed of a dispute resolution mechanism in an M&A transaction. Nevertheless, the authors are well aware of the fact that in M&A practice parties to a transaction do not often invest time and effort into tailoring a sophisticated dispute resolution mechanism which satisfies their individual needs and expectations. The often-used term


“midnight clause” for the dispute resolution clause in the transaction documentation has not lost relevance nowadays.  

The authors are not overly optimistic that this general approach in M&A practice will fundamentally change any time soon.

A multi-layered dispute resolution mechanism may neither be required nor suitable in all M&A transactions. Often, a well-drafted arbitration clause in the transaction agreement will do the job perfectly. However, where a transaction or the parties’ requirements and expectations give rise to a need of more efficiency and speed in dispute resolution, the parties to an M&A transaction are well advised to consider incorporating one or more of the dispute resolution methods or procedural instruments suggested in this article.

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