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„ Arbitration and Expert Determination as Dispute Resolution
Mechanisms in Stages of Cross-Border Mergers and
Acquisitions Transactions “

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
APA	Asset Purchase Agreement
CIETAC	China International Economic and Trade Arbitration Commission
CP	Conditions Precedent
CISG	United Nations Convention on Contracts for the International Sale of Goods
EBIT	Earnings Before Interest and Taxes
EBITDA	Earnings Before Interest, Taxes, Depreciation and Amortization
EC	European Commission
ECJ	European Court of Justice
IBA	International Bar Association
ICAC	The International Commercial Arbitration Court
ICC	International Chamber of Commerce
GAAP	Generally Accepted Accounting Principles
HKIAC	Hong Kong International Arbitration Center
LCIA	London Court of International Arbitration
MAC	Material Adverse Change
MBO	Management Buyout
NDA	Non-Disclosure Agreement
PPA	Purchase Price Adjustment
SCC	Stockholm Chamber of Commerce
SEC	U.S. Securities and Exchange Commission
SPA	Share Purchase Agreement
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitration Center
WIPO	World Intellectual Property Organization

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1. INTRODUCTION

Cross-border mergers and acquisitions (M&A) transactions have allowed companies to expand transnationally due to the financial liberalization movements of developing countries, technological progress and globalization. A decade ago, developed countries had a staggering average of 85% out of all transactions as both acquiring and target countries, with the United States and the European Union (EU15) constituting the largest numbers.¹ In comparison, more recent players like China are shifting the trend and introducing a broader range of countries to engage in business with. As the trend of cross-border M&A transactions grew exponentially, disputes regarding such transactions have required more international and feasible legal solutions. There is a notable worldwide increase in the practice of dispute resolution mechanisms as alternatives to litigation. Specifically, in cross-border commercial disputes, arbitration and – if circumstances allow – expert determination have tremendous advantages over bringing a case to a national court.²

Cross-border M&A agreements generally have an arbitration clause that theoretically covers all disputes arising out of or in connection with the agreement. It is a commonly preferred dispute resolution method while often supplemented by a conciliation/mediation clause before resorting to arbitration. A conciliation/mediation clause is a cost-effective and amicable approach to dispute resolution, but parties need to be cautious about drafting the clause in which they are highly advised to set time limits. Although this is not the main concentration of this thesis, the vulnerability of parties to various disputes in M&A contracts and the complications that may emerge during the ADR procedures will show that a preemptive and peaceful measure should be taken – such as mediation – prior to invoking the mechanisms subject to this thesis. Expert determination is the most informal, inexpensive way of resolving technical or estimation of values questions and extremely advantageous in terms of time efficiency. Thus, it is convenient that arbitration and expert determination should be contained in a dispute resolution clause/agreement where they can be invoked in possible disputes.

¹ Numbers for 2003-2005. See Nicolas Coeurdacier, Roberto A De Santis, Antonin Aviat, *Cross-Border Mergers and Acquisitions-Financial and Institutional Forces* [2009] ECBWS, 7.

² See Section 2.1.

The main objective of this dissertation is to initially explain the intricacies of drafting hybrid/carve-out Alternative Dispute Resolution (ADR) clauses and provide examples from different jurisdictions, while setting a chronological order of cross-border M&A transactional stages and define possible disputes subject to arbitration and expert determination. Along with drafting out the stages, this dissertation also aims to define these two methods and demonstrate their advantages.

Cross-border M&A contracts involve numerous corporations and contracts being included in one big transaction. In the initial stages³ of M&A, such as strategic planning, there is no room for a dispute between the acquiring and selling parties. Nevertheless, these stages shall be explained briefly to grasp the whole process of a cross-border M&A transaction. At pre-closing stage, most of the disputes subject to arbitration and/or expert determination arise in the post-signing phase. However, the number of disputes reach to a peak during post-closing stage – e.g. purchase price adjustment, representations and warranties. However, the intricacies of these disputes are mostly accounting related. Therefore, the explanations are more focused on ADR remedies and contract drafting.

Arbitration and expert determination can occasionally bear complications within themselves. Especially multi-party and multi-contractual arbitrations are exceedingly prone to take time and could be expensive at the end. For instance, constituting an arbitral tribunal would be very difficult, particularly in an ad hoc arbitration where parties might not have designated an appointing authority or referenced to any institutional arbitral rules. There could be issues with conditions precedent to closing, especially with competition law and material adverse changes at the pre-closing stage (post-signing phase), e.g. EC Merger Control, where third party competitors might create the need to resort to ADR mechanisms. It will be demonstrated that arbitration and expert determination of the antitrust disputes is possible. In that regard, this thesis will point out whether arbitration or expert determination is more suitable to these types of disputes. Therefore, it is important to discuss the role of arbitration in EC Merger Control since the cross-border transaction's closing is tied to its decision.

In the case of expert determination, a common issue is whether the arbitral tribunal is bound by the decision of the expert. Similarly, matters such as interpretation of the ADR clause or competence of the chosen expert might stall the dispute resolution process and

³ For a full overview of the transaction stages, see Figure 1 in section 4.

might require a court decision. The scope of the expert's determination is another question to be answered in the corresponding sections below. Finally, as the disputes are addressed, it will be evident that a decently arranged combination of both ADR mechanisms will in fact develop the application of a carve-out/multi-tiered dispute resolution and create the need for countries and institutions to adopt procedural rules and laws that are more detailed and broad than that surpasses arbitration as the most common ADR.

2. ARBITRATION OF M&A DISPUTES

Arbitration is a 'private method of settling disputes, based on the agreement between the parties. Its main characteristic is that it involves submitting the dispute to individuals chosen, directly or indirectly, by the parties.'⁴ Arbitration is purely consensual and the award rendered at the end of the proceedings is final and binding. It is worth mentioning that the consensual nature of arbitration still remains even when it is the adoption of arbitration as a dispute resolution clause is held as a requirement. For instance, Novo Mercado, a corporate governance listing in Brazil that is based on the Stock Exchange BM&F BOVESPA, deems it mandatory to adopt arbitration as dispute resolution clause. In this case, entering into the Novo Mercado Agreement directly gives consent to the Market Arbitration Panel in case of any dispute.⁵ Additionally, it is important to note that not all claims can be submitted to arbitration as they should be objectively and subjectively arbitrable.

2.1. Advantages of Arbitration in Cross-Border M&A Disputes

Arbitration provides a procedural freedom that makes it appealing to complex commercial contract disputes. Considering how international M&A disputes could arise from differences in cultures and legal systems, arbitration is a neutral dispute resolution mechanism where the home court advantage ceases to exist.

The flexibility of arbitration proves itself in various procedural aspects. Parties have utmost control in appointing arbitrators with relevant qualifications to the dispute. Meanwhile, in litigation, the judges who are appointed by the state will most likely not be

⁴ Emmanuel Gaillard, John Savage, *Fauchard Gaillard Goldman on International Commercial Arbitration* (1st, Kluwer Law International, 1999) 10.

⁵ Novo Mercado Listing Rules 2000 s 13 (1).

endowed with experience in accounting, valuation and knowledge of the specific industry in which the parties operate their business. The benefit of party autonomy reflects itself in the possibility of making ‘custom made procedures’ upon the parties’ agreement.⁶ The opportunity to tailor proceedings also accentuates the flexible and practical nature of arbitration. Parties can also determine whether it will be ad hoc or institutional arbitration, the scope of evidence, as well as document production and disclosure – depending on the complexity and requirements of the dispute.

Unless the provisions clearly state otherwise, choosing the seat of arbitration determines the procedural law to be applied. Seeing as the mandatory rules of the seat of arbitration cannot be overridden, it is highly advantageous to avoid procedural laws that would affect the enforceability, allow challenging of the finality of the award in courts and highly restrict party autonomy. Parties may want to override certain aspects of common or civil law systems, which would increase the importance of arbitration and the option to choose the arbitration seat as opposed to litigation. Awarding of punitive damages for example, is a distinctive practice in the common law systems, especially in the United States, as opposed to civil law jurisdictions.⁷ American corporations and their shareholders have long been financially suffering from punitive damage claims.⁸ However in a cross-border M&A setting, a US firm could by-pass this issue by pushing for a seat of arbitration other than the States. For instance, there is a vast probability that the arbitral tribunals applying German law as procedural law might refrain from awarding punitive damage claims as they might not be enforceable or it has the danger be set aside due to public policy.⁹

⁶ Steven P Finizio and Duncan Speller, *A Practical Guide to International Commercial Arbitration* (Sweet & Maxwell/Thomson Reuters 2010) 10.

⁷ Amaury Sibon, "Enforcing Punitive Damages Awards in France: Facing Proportionality Within International Public Policy" [2013] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382817> accessed 15 February 2016.

⁸ See Phillip M. Davis, "Design News - Blog - How to Avoid Punitive Damage Awards" (*Designnews.com*, 1996)<http://www.designnews.com/author.asp?section_id=1386&doc_id=225492&dfpPPParams=aid_225492&dfpLayout=blog> accessed 15 February 2016.

⁹ Siegfried H. Elsing and others, "Germany – Law & Practice – International Arbitration 2016 – Chambers And Partners" (*Chambersandpartners.com*, 2016) <<http://www.chambersandpartners.com/guide/practice-guides/location/265/7784/2042-200>> accessed 15 February 2016.

Unlike in state courts, proceedings in arbitration are not public.¹⁰ M&A lawyers and companies insist on arbitration due to its confidentiality feature to safeguard their clientele, know-how or trade secrets from competitors, and to avoid publicity over the dispute.¹¹ Confidentiality in arbitration is only ensured in some arbitration rules and national laws¹² but there is no universal rule that deems arbitration confidential. With that in mind, parties should always provide confidentiality as a term in their arbitration agreements.

Finality of the award, as another advantage of arbitration, can only be challenged in courts on the issues of jurisdiction, unfair procedures and public policy.¹³ Additionally, most countries have ratified the Convention of the Recognition and Enforcement of the Foreign Arbitral Awards signed in 1968 – referred to as the New York Convention herein after – which grants enforcement of the foreign arbitral awards without a court judgment.¹⁴ In litigation, it could take years for a dispute to either be settled or concluded with a judgment that almost certainly will be appealed, due to the complexity and the amount of documents and facts of an M&A case. Even though third party joinder and multiple parties and contracts are better suited for litigation, arbitration, both in terms of time and money, is less costly due to the flexibility of the procedures.

The opportunity to set a time frame and expedite the arbitration procedures and exclusively confining the scope of evidence and document production in relation to the dispute at hand precludes squandering time and financial resources. For instance, if there was a dispute on a Non-Disclosure Agreement (NDA) or bad faith in negotiations, it would be best to have expedited hearings while excluding immaterial documents. Therefore, it is essential to prudently draft an arbitration agreement for a copious utilization of the advantages of arbitration.

2.1.1. Drafting the Arbitration Agreement for Cross-Border M&A Deals

¹⁰ Arthur Mazirow, *The Advantages and Disadvantages of Arbitration as Compared to Litigation* (1st edn, 2008) <http://www.cre.org/images/my08/presentations/the_advantages_and_disadvantages_of_arbitration_as_compared_to_litigation_2_mazirow.pdf> accessed 4 August 2015.

¹¹ Bernd Ehle and Matthias Scherer, 'Arbitration of International M&A Disputes' [2015] IBPA Journal 23.

¹² IBA Guidelines for Drafting International Arbitration Clauses, Option 3 para 60.

¹³ Steven P Finizio and Duncan Speller, *A Practical Guide to International Commercial Arbitration* (Sweet & Maxwell/Thomson Reuters 2010) 12.

¹⁴ 7 ILM 1046 (1968).

An arbitration agreement displays the parties' consent to submit 'all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not' to arbitration, according to the UNCITRAL Model Law definition.¹⁵ The agreement can be drafted as an 'arbitration clause' in the main contract, or as a 'submission to arbitration' separately.¹⁶ The consent given by the parties is what makes the arbitration agreement valid and enforceable. With that notion in mind, a party can claim the validity of an arbitration agreement by referring to the arbitration clause in one of the contracts in the M&A transaction. The validity of the form of agreement is 'in writing' according to the New York Convention.¹⁷ However, the advancements in technology have altered the channels of communication and how the contracts are being executed, and thus, requiring a more updated approach in validity. Correspondingly, UNCITRAL Model Law maintained the validity form 'in writing'¹⁸ but extended the definition by the inclusion of 'means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.'¹⁹ This clause has provided a more up-to-date solution.

As common sense prevails, the composition of the arbitration agreement carries great importance in order to ensure feasible proceedings to achieve an outcome that serves the interests of the parties without means that are time consuming and costly. Therefore, in practice, the agreements are popularly drafted to cover a broad scope of disputes in order to avoid fragmentation of the claims between national courts and arbitral tribunals.²⁰ From hereunder, the significance of properly drafting the provisions of choice of applicable law, seat of arbitration, procedural rules, institutional or ad hoc system, language, composition of the tribunal, scope of evidence and other imperative aspects in order to achieve successful proceedings will be laid down in detail.

¹⁵ 24 ILM 1302 (1985).

¹⁶ Alan Redfern, J. Martin Hunter *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 5.

¹⁷ 7 ILM 1046 (1968).

¹⁸ *ibid* n 16.

¹⁹ *ibid*.

²⁰ Alejandro I. Garcia, "Scope of Arbitration Clauses and Carve-Out Clauses: Erring On the Side of Caution or On the Side of Daring?" <<http://kluwerarbitrationblog.com/2012/05/25/scope-of-arbitration-clauses-and-carve-out-clauses-erring-on-the-side-of-caution-or-on-the-side-of-daring/>> accessed 15 February 2016.

2.1.1.1. Procedural Rules and The Choice between Ad hoc and Institutional Systems

The establishment of the procedural rules varies in the context of the parties' objectives but it is safe to assume that all claimants aspire to reach and enforce a desirable award, or in lack thereof an award from the perspective of the defendants, in the least costly and timeliest manner. In order to ensure well-organized arbitration proceedings and the constitution of an impartial and competent tribunal, procedural rules must be laid down either in the arbitration agreement, prior to the dispute or in the course of it.

In case the constitution of an arbitration tribunal fails in ad hoc arbitration, the agreement should stipulate an appointing authority. Although ad hoc arbitration offers a high degree of flexibility, it can prove costlier than arbitration institutions. For example, since in ad hoc cases the organizational support will be scarcer than in institutional systems, need might arise to hire an administrative assistant, in addition to the fees of arbitrators.²¹

Parties need to provide a good procedural framework such as the UNCITRAL Arbitration Rules and the IBA Rules on Taking Evidence in International Commercial Arbitration.²² Taking evidence is vital to the proceedings. Issues of confidentiality might arise if the jurisdiction is a common law country where the document production will be in a broad sense. In such cases, the document production should be relatively confined to the specific dispute and the spectrum of required documentation should be defined clearly. This is important in order to avoid being buried in documents that could take a long time to process.

Given the multicultural and complex factors of cross-border M&A cases, institutional arbitration is worth opting for due to the pool of competent and multilingual arbitrators, 'the heightened predictability, stability, and institutional expertise provided by the former and because institutional arbitration rules often provide useful mechanisms for enhancing the arbitral process (e.g., replacing arbitrators, corrections to awards).'²³ Most

²¹ Michael McIlwrath and John Savage, *International Arbitration and Mediation* (Wolters Kluwer 2010) 63.

²² Providing a balance between Continental and Common law systems on taking evidence, document production.

²³ Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Fourth Edition), 4th edition (© Kluwer Law International; Kluwer Law International 2013) 44.

prominent institutions include ICC, AAA, LCIA, HKIAC, and VIAC. Disputes regarding intellectual property rights can be submitted to the WIPO Arbitration and Mediation Center under the WIPO Arbitration Rules.

During the process of drafting the arbitration clause or a submission to an arbitration agreement, avoiding pathological clauses have the utmost importance. Parties should be accurate in writing the correct administrative institution and rules, since unwarranted consequences might emerge – as in the Züblin case, which will be further explained in the following section.

2.1.1.2. Seat of Arbitration

The seat of arbitration is crucial and influential on the arbitration proceedings; although it is not necessarily where the hearings physically take place. Naturally, not just the country but also the city of the arbitration venue must be specified on the agreement as it determines a number of matters such as the municipal law that governs the arbitration, the courts that would ‘supervise and support ... the arbitration’ and the ‘nationality of the award’.²⁴ As a legal consequence of selecting the place of arbitration, the Arbitration Act of the country will be applied as the procedural law (*lex arbitri*). Parties who decided on ad hoc arbitration must take extra precautions while choosing the seat of arbitration.²⁵ It is recommended that arbitration-friendly countries should be selected. Numerous countries have thus adopted UNCITRAL Model Law to provide a more contemporary environment for arbitration.

According to the IBA Guidelines on Drafting International Arbitration Clauses, considerations regarding the location should involve ‘the availability of hearing facilities, proximity to the witnesses and evidence, neutrality, parties’ familiarity with the language and culture, willingness of qualified arbitrators to participate in proceedings in that place’²⁶. One can argue that in an M&A deal, the seat of arbitration should be the place of the target company since the majority of the assets and relevant evidence will be in close proximity.

²⁴ McIlwrath and John Savage, *ibid.* p.21.

²⁵ Marc Blessing, 'The Arbitration Agreement - Its Multifold Critical Aspects' (1994) 8 ASA Special Series 51.

²⁶ Guideline 4 para 20.

This is especially practical from both parties' point of views while considering the claimant having the burden of proof. However, factors of neutrality and whether the country is arbitration-friendly or not should logically take precedence over the practicality of proximity to evidence since the enforceability of the award depends on them.

Furthermore, the conduct of the courts regarding its recognition of the finality of the award, excessive intervention to the proceedings and enforcement of the arbitration agreement are also essential attributes to deliberate.²⁷ Enforcement of the arbitration agreements and the awards are ensured by the New York Convention that has been ratified in most of the countries in the world. Although some countries such as Japan and Belgium have reciprocity reservations, through new legislations – specifically new arbitration laws –, these reservations have become redundant.²⁸ Once the signatory state to the New York Convention is decided as the seat of arbitration, the next step is to look at the national arbitration laws and regulations. The validity of the arbitration agreement and the required procedures will differ from one country to another. For instance, if the appointed tribunal decided to pierce the corporate veil, and the seat of arbitration is in Ukraine, the award will not be enforced under the Ukrainian Law.²⁹

Primarily, the arbitration agreement should be drafted in conjunction with the procedural law of the seat of arbitration. Another example to demonstrate the effect of country-specific procedural laws could be the choice of the seat of arbitration of a cross-border M&A dispute is China, where the award will be enforced. In this example the agreement should include:

I. an expression of intention to apply for arbitration;

II. matters for arbitration; and

²⁷ Jan Paulsson, Nigel Rawding, et al. (eds), *The Freshfields Guide to Arbitration Clauses in International Contracts* (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2010) 32.

²⁸ *See for Japan* David Gilmore and others, "Japan – Law & Practice – International Arbitration 2016 – Chambers and Partners" (*Chambersandpartners.com*, 2016) <<http://www.chambersandpartners.com/guide/practice-guides/location/265/7770/2188-200>> accessed 16 February 2016. *See for Belgium* Gautier Matray, "Belgium Adopts a New Law On Arbitration" (*Kluwerarbitrationblog.com*, 2013) <<http://kluwerarbitrationblog.com/2013/07/04/belgium-adopts-a-new-law-on-arbitration/>> accessed 16 February 2016.

²⁹ Kostiantyn Likarchuk and Mykyta Nota, 'Resolving M&A Disputes in Arbitration - Corporate/Commercial Law - Ukraine' (*Mondaq.com*, 2012) <<http://www.mondaq.com/x/183722/M+A+Private%20equity/Resolving+MA+Disputes+In+Arbitration>> accessed 27 August 2015.

III. a designated arbitration commission

according to the Arbitration Law of the People's Republic of China.³⁰ In 2006, Wuxi Intermediate People's Court³¹ denied Züblin International GmbH's request to enforce an ICC award³² due to the failure in referencing the International Arbitration Court of ICC as the governing institution. Had it been drafted in accordance to the law, the arbitration agreement would not be deemed void.

2.1.1.3. Substantive Law

The law that will be applied to the case is in discretion of the parties. M&A cases are highly complex and choosing the law beforehand prevents legal ambiguities as well as unfavorable results. The favorable option would be to choose a law that is current and impartial. Quite popularly, parties to the international M&A deals prefer the laws of New York due to 'the perception that it would be better equipped to deal with the types of issues that might come up in the event of an international M&A dispute.'³³

In case parties do not opt for an applicable law, the arbitral tribunal has the authority to determine the substantive law.³⁴ The ICC Rules, providing an international standard, recognize the authority of the tribunal in choosing the substantive law in case the parties could not determine a substantive law.³⁵ Vienna Rules of Arbitration also has a parallel approach in the arbitrators' authority to select a substantive law in the absence of an expressive choice by the parties.³⁶ If the arbitration is not governed by institutional rules however, some countries might have different approaches to the arbitrators' freedom in

³⁰ Arbitration Law of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China on August 31, 1994) Chapter 3 art 16.

³¹ The court rendered the following decision after receiving the approval of the Supreme Court. Civil Case Decision No.1, 2004, Wuxi Intermediate People's Court, Xi Min Zhong Zi Min 3 NO.1, 2004.

³² Final Award No. 12688/TE/MW on March 30, 2004.

³³ American Bar Association, 'ABA Section of Business Law Survey On Dispute Resolution in International M&A Deals General Report' (American Bar Association 2015)
<<https://apps.americanbar.org/buslaw/blt/content/2010/10/0001d.pdf>> accessed 27 August 2015.

³⁴ ICC Rules of Arbitration, art 21 para 1.

³⁵ *ibid.*

³⁶ Vienna Rules of Arbitration, art 27 para 2.

choice of law. For instance, Japanese law only allows the tribunal to ‘apply the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected.’³⁷ Therefore, not agreeing or staying silent on the choice of substantive law proves to be a precarious option to follow. A vital contract for both parties, for example, might become void due to changes in the law of the State that is applied to the dispute.

Contracting parties frequently exclude *renvoi*, as in ‘the choice-of-law clause will make it clear that the substantive laws of the chosen jurisdiction, and not its conflict of laws rules, are applicable.’³⁸ It is not necessary to make that exclusion expressively in the arbitration agreement if procedural laws and/or institutional rules already exclude it such as the Vienna Rules.³⁹

Another aspect that comes to mind is the law of the place of incorporation, *lex societatis*. Does or should the mandatory provisions of the *lex societatis* have relevance to the substantive law choice in arbitration? In a cross-border deal, there will be multiple *lex societatis* and legal systems to deliberate on. In an example, arbitration proceedings could be affected by another national law, i.e. disputes over parties’ legal capacities.⁴⁰ An arbitration agreement will be deemed invalid for lack of arbitrability, if a particular dispute must be submitted to a specific forum due to the mandatory provisions of *lex societatis*.⁴¹ However, the situation is different for non-mandatory provisions. It is a possibility that considering the parties’ autonomy over the seat of arbitration which could be a different country other than the *lex societatis*, the arbitrators ‘could in any case determine the law applicable to the merits on the basis of their own conflicts-of-law “methodology” ... [and] the arbitrators could even decide *ex aequo et bono*, without making any application of the *lex societatis*, if so mandated by the parties.’⁴²

³⁷ eg. Japanese Arbitration Law, art 36 para 2.

³⁸ Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Fourth Edition), 4th edition (© Kluwer Law International; Kluwer Law International 2013) 160.

³⁹ art 27 para 1.

⁴⁰ Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards* (Peter Lang 2010) 138.

⁴¹ Massimo V Bendettelli, ‘Brussels I, Rome I and Issues of Company Law’, *Enforcement of international contracts in the European Union* (1st edn, Intersentia 2004) 250.

⁴² Massimo V Bendettelli, ‘Brussels I, Rome I and Issues of Company Law’, *Enforcement of international contracts in the European Union* (1st edn, Intersentia 2004) 250.

The application of the United Nations Convention on Contracts for the International Sale of Goods is another issue if the agreement is an Asset Purchase Agreement. The CISG does not cover share deals, but rather asset deals in which more than half of the assets are goods that fall within the scope of CISG.⁴³ If the parties do not wish the Convention to be applied, they must expressly prohibit the application of the CISG in the arbitration agreement.⁴⁴

Since there is party autonomy on choice of law, non national laws can also be formulated into the arbitration agreement. However, there are several issues with the application of such laws. Allowing the tribunal to apply *lex mercatoria* or general principles of law must be avoided because of the vagueness they may create in the sense there is ‘much academic debate, but little judicial authority, about what such clauses mean, and there are doubts how widely they are enforceable.’⁴⁵

Aside from choosing the most favorable law, parties should anticipate the potential disputes that could arise out of the transaction. For example, if the statute of limitations would be an issue in one of the national laws of the parties, then it would be prudent to select another law that is in connection to the share purchase agreement (SPA). For instance, the buyer may want to avoid short statute of limitations for representations and warranties as different jurisdictions will have varying durations.⁴⁶ Moreover, a considerable amount of cross-border M&A disputes arises from warranties or the target company’s misconduct. Therefore, it is advisable that the substantive law should be the law of the seat of the target company.⁴⁷

2.1.1.4. Language

⁴³ Wolfgang Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes' (2003) 19 Arb. Intl. 492.

⁴⁴ Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (Fourth Edition), 4th edition (© Kluwer Law International; Kluwer Law International 2013) 167.

⁴⁵ Born, *ibid.* p. 164.

⁴⁶ Gregory Fine and Jessica Mendoza, 'Survival of Reps & Warranties: Avoiding Unpleasant Surprises | Mintz Levin' (Mintz Levin, 2014) <<https://www.mintz.com/newsletter/2014/Advisories/3992-0514-NAT-CORP-MA/index.html>> accessed 25 February 2016.

⁴⁷ Karl J. T Wach, Frank Meckes and Emanuella Agostinelli, *Tactics in M & A Arbitration* (German Law Publishers 2008) 38.

The language of the proceedings is one of the critical issues that are often overlooked. The subject material of the M&A dispute such as contracts, documents, etc. involve complex wording and impose substantial language qualification demand from the arbitrators as well as the legal teams of both parties. Given the fact that some jurisdictions such as Germany and Sweden do not permit parties to compel the arbitral tribunal to use translators⁴⁸, it poses a strain on the proceedings as well as the prospect of a carefully rendered award. However, continuing with the example of Germany, the arbitral tribunal may order the documents submitted in a different language to be translated into the language/s of the arbitration.⁴⁹

If there is no language provision in the arbitration agreement, there are few solutions that the institutional procedural rules and national laws proffer. The LCIA Rules state that ‘the initial language of the arbitration (until the formation of the Arbitral Tribunal) shall be the language or prevailing language of the Arbitration Agreement, unless the parties have agreed in writing otherwise.’⁵⁰ Once the tribunal is formed, the language selection lies within the discretion of the arbitrators according to the ICC Rules.⁵¹ The seat of arbitration may rarely affect the discretion of the tribunal in that regard. The Spanish Arbitration Act, for instance, instructs the arbitrators to determine the language in compliance with ‘one of the official languages of the place of the proceedings.’⁵² In order to override the possibility of such a decision for cross-border M&A disputes, there are two courses of action to be taken.

According to Karl T. Wach, the language of the substantive law or the native language of the representatives should be chosen in order to avoid misinterpretation of the legal concepts.⁵³ Adding to the example of Spain, the Arbitration Act allows arbitrators to carry out bilingual proceedings and document production ‘with no need for translation’ unless

⁴⁸ Wach, *ibid* p. 41.

⁴⁹ §1045 ZPO.

⁵⁰ The LCIA Rules Art 17 para 1.

⁵¹ The ICC Rules Art 20.

⁵² Arbitration Act 60/2003 of 23 December Art 28 para 1.

⁵³ Karl J. T Wach, Frank Meckes and Emanuella Agostinelli, *Tactics In M & A Arbitration* (German Law Publishers 2008).

a party clearly expresses its refusal thereof.⁵⁴ This may create confusion and lengthy proceedings if the other party's legal team is not fully proficient in the other language. The SPA and other documents can be translated as well as witness testimonies.

2.1.1.5. Composition of The Tribunal

The determination of the number of arbitrators to preside the case can be made with respect to the fiscal value of the dispute at hand. It is only convenient to appoint a sole arbitrator for a dispute that is minor and the award value is low. An arbitral tribunal, however, is essential in cross-border M&A cases due to their complexity, where the value of the dispute is considerably high. If the parties omit the number of arbitrators to be appointed, UNCITRAL Arbitration Rules have the provision of three arbitrators to be appointed unless the parties concur that, within 30 days after the notice of arbitration is received by the respondent, there would be a sole arbitrator.⁵⁵ The default number differs according to the institution that was selected. The ICC and the LCIA consider one arbitrator as default with the exception of circumstances that require a tribunal while the SCC, ICAC and CIETAC deem the opposite.⁵⁶

It is not wise to write the arbitrators' names on the arbitration agreement due to the probability of inaccessibility when the dispute arises. Excessively specifying the qualifications of the desired arbitrator also might cripple the arbitration agreement and/or delay proceedings to start since that person can also not be available or no arbitrator can match the requirements. For instance, some jurisdictions might have their own principles for the constitution of the arbitral tribunal. Saudi Arabia requires the arbitrator –or the chairman of a tribunal- to have a degree in Sharia law or legal sciences.⁵⁷ What should be the selection criteria? As common sense suggests, the arbitrators' proficiency in the chosen substantive law and the languages of the dispute is plausible.

⁵⁴ Arbitration Act 60/2003 of 23 December Art 28 para 2.

⁵⁵ Art 7 para 1.

⁵⁶ Jan Paulsson, Nigel Rawding, et al. (eds), *The Freshfields Guide to Arbitration Clauses in International Contracts* (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2010) 81.

⁵⁷ Jean-Benoît Zegers and Omar Elzorkany, *Kingdom of Saudi Arabia* (1st edn, IBA Arbitration Committee Arbitration Guide 2014) <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=B771EC7D-1691-4B32-8EFD-595A3F8315C7>> accessed 4 September 2015.

Nationality is another factor to contemplate on. Excluding the chairman who should have a different nationality from both sides, a better understanding of the two different cultures can be attained if two party-appointed arbitrators are from the nationalities of the parties.⁵⁸ Accounting and valuation knowledge are essential for M&A cases⁵⁹ but it is not completely sufficient for an arbitrator. There could be other legal issues and concepts that an arbitrator who has the sole expertise on accounting cannot comprehend or decide on.⁶⁰ Purchase price disputes, for instance, are very common so it is an advantage to select those who have experience regarding this matter. Lawyers and/or academics that have been renowned for their publications and experience in this industry would make a logical choice.

2.1.2. Procedural Issues

2.1.2.1. Interim Relief

The parties to the dispute can seek interim measures through the national courts or the arbitral tribunal, although the desired remedy is the personalized interim measures taken by the consideration of arbitrators upon request. In many jurisdictions, even though arbitrators can issue injunctions and temporary restraining orders, the enforcement of the preliminary relief forces the party to recourse to national courts.⁶¹ It is also possible that jurisdictions, such as Italy, prohibit arbitrators to grant ‘attachment or other interim measures of protection’⁶² or Japan, deeming the interim measures unenforceable if granted outside a State court.⁶³ Nonetheless, most States have conditions and time frames to request interim measures from the tribunal. According to French Code of Civil Procedure, the courts have jurisdiction in issuing orders of interim measures before the arbitral tribunal is established.⁶⁴ Receiving interim relief from the arbitral tribunal is advantageous where ‘such relief can be

⁵⁸ Karl J. T Wach, Frank Meckes and Emanuella Agostinelli, *ibid.* p. 58.

⁵⁹ Wolfgang Peter, *ibid.* p.503.

⁶⁰ Karl J. T Wach, Frank Meckes and Emanuella Agostinelli, *ibid.* p. 57.

⁶¹ Rudolf Tschäni, 'Specific Issues in Different Types Of Contractual Relations - Corporate Disputes', *Specific Performance as a Remedy Non-Monetary Relief in International Arbitration* (ASA Conference 2008) 4.

⁶² Art 818 cod. proc. civ.

⁶³ Hiroyuki Tezuka and Yutaro Kawabata, *Arbitration Guide Japan* (1st edn, IBA Arbitration Committee 2012) <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=DBCf3CAB-E985-4A9B-BBA1-D8D9D191EF5E>> accessed 9 September 2015.

⁶⁴ Art 1458 Nouv. C. pr. civ.

obtained “centrally” in one neutral and confidential forum.’⁶⁵

The governing law of the granted interim measures is another aspect to evaluate. Is it the substantive law or the *lex arbitri*? According to Redfern and Hunter, this controversial matter should be resolved by referring to the applicable conflict of laws provisions.⁶⁶ For instance, Swiss PILA indicates that the substantive law should prevail in terms of temporary injunctions, or other protective preliminary measures.⁶⁷

Interim measures could involve cease and desist, a specific performance, tolerance, and declaratory award. Certain jurisdictions also limit the areas where parties can seek interim relief via arbitral tribunal. For instance, People’s Republic of China only permits granting interim measures for the ‘preservation of assets and evidence.’⁶⁸ The specific situations where interim relief will be sought are going to be explained further in the relevant sections of Cross-border M&A disputes below.

2.1.2.2. Multi-Contract and Multi-Party Situations

Similar to joint venture contracts, M&A deals often include the involvement of multi-contracts and parties to the SPA or APA. As Bernard Hanotiau states ‘the parties to the arbitral proceedings will not necessarily be all the parties bound by the arbitration clause; and conversely, there may be parties to the arbitral proceedings who were not parties to the original arbitration clause, or at least not signatories of the contract in which it was included.’⁶⁹ If the purchaser or the target is consisted of multiple legal entities, the M&A dispute proceedings will most likely be comprised of multiple parties from their sides as well. Following Hanotiau’s guide, parties who are not actual signatories to the SPA such as successors, heirs, ‘guarantors, warrantors or financiers, managers from the target company,

⁶⁵ *Guide to WIPO Arbitration* (1st edn, WIPO Arbitration and Mediation Center 2016)
<http://www.wipo.int/edocs/pubdocs/en/arbitration/919/wipo_pub_919.pdf> accessed 25 February 2016.

⁶⁶ Alan Redfern, J. Martin Hunter *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 359.

⁶⁷ Rudolf Tschäni, ‘Specific Issues in Different Types of Contractual Relations - Corporate Disputes’, *Specific Performance as a Remedy Non-Monetary Relief in International Arbitration* (ASA Conference 2008).

⁶⁸ Jan Paulsson, Nigel Rawding, et al. (eds), *The Freshfields Guide to Arbitration Clauses in International Contracts* (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2010) 47.

⁶⁹ Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, (© Kluwer Law International; Kluwer Law International 2006) 163.

consultants of the participants, etc.’⁷⁰ might be included in the proceedings, even though the dispute appears to be confined to signatory parties.

From the claimant’s perspective, it is timeous and fiscally strategic to claim an award/(s) from multiple parties in the same proceedings and before one tribunal. Therefore, companies should draft an arbitration clause that has multi-party and multi-contract provisions, an umbrella or a shield clause per se, that would include all possible dispute sources and related future contracts (sub, accessory, etc.) in the main contract; from M&A perspective, it should be a part of the SPA. A separate submission to arbitration agreement that will be ‘incorporated by reference in all related contracts’⁷¹ might be better suited for multi-contract situations. Nevertheless, arbitration clauses in related contracts should be parallel to each other in aspects such as wording, choice of law and language clauses, seat of arbitration etc. so that it reflects the intention to consolidate proceedings.

Institutions provide clear provisions for multi-party situations. Elaborating with an important issue, consolidation of related arbitration proceedings is regulated under the ICC Rules, in which all the parties to either consent on consolidation or that all of the claims are subject to the same arbitration agreement or ‘where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.’⁷² If the option of consolidation is strategically preferable, parties should draft it in the arbitration agreement. Following the example, the necessity of an umbrella clause with a broad scope of disputes has grave significance.

After disputes arise and different arbitrations start taking place, consolidation of the proceedings become virtually unmanageable in practice. In ad hoc arbitration, the failure to include solid multi-party and multi-contract provisions with an umbrella clause will create major inconveniences. Even if there will be consent from one of the parties, another might object on the grounds for a void arbitration agreement between them.

⁷⁰ Karl J. T Wach, Frank Meckes and Emanuella Agostinelli, *ibid.* p. 43.

⁷¹ IBA Guidelines for Drafting International Arbitration Clauses, Multi-contract Guideline 1: para 108.

⁷² The ICC Rules Art 10.

2.1.2.2.1. Extension of the Arbitration Agreement

Joinder⁷³ refers to ‘joining of parties (usually contracting parties, but potentially other parties as well) to arbitration by an existing party’⁷⁴ while intervention occurs when a third party voluntarily intervenes to an existing arbitration.⁷⁵ All parties in the commenced arbitration proceedings will have the right to claim, counter-claim or cross-claim against any party. Regarding both of the possibilities, IBA Guidelines for Drafting International Arbitration Clauses stress on the advantage of creating a time limit ‘after the notice of each contracting party to intervene or join other contracting parties in the proceedings.’⁷⁶

Whether or not multi-party situations can also emerge through the extension of arbitration to the third parties has been a controversial topic. As mentioned before, arbitration is purely consensual in nature. How can a party be compelled to participate in the arbitration proceedings? In the case of *Bettis Group, Inc. v. Transatlantic Petroleum Corp.*, the Circuit Court approved the decision of a tribunal that had jurisdiction over the dispute and compelled the defendant to arbitrate due to the broad arbitration clause in the main agreement. The court makes a reference to the ‘commitments’ and obligations of the guarantor in a rendered award and states that ‘where the parties include a broad arbitration provision in an agreement that is essential to the overall transaction [the Shareholders Agreement] ... they intended the clause to reach all aspects of transaction.’⁷⁷ This could be a far-reaching approach since there is no express consent of the guarantor to arbitrate and courts of different States might not have the same approach. With that note, parties need to incorporate arbitration clauses carefully with a broad scope with specific measures on complex situations.

The application of the alter ego doctrine is contingent on several aspects. If piercing the corporate veil is strictly prohibited, application of the theory is practically

⁷³ LCIA Rules Art 22 does not require the third party to be party in the arbitration agreement. Advantageous in terms of multi-contract situations.

⁷⁴ Herbert Smith, 'Dealing with Multi-Party and Multi-Contract Arbitration Issues' (2015) <<http://www.herbertsmithfreehills.com/-/media/HS/T-060612-18.pdf>> accessed 15 September 2015.

⁷⁵ *ibid.*

⁷⁶ Multiparty Guideline 2 para 103.

⁷⁷ *Bettis Grp., Inc. v. Transatlantic Petroleum Corp.*, 55 F. App'x 717 (5th Cir. 2002).

impossible. Nonetheless, some jurisdictions do have prerequisites to pierce the corporate veil such as the US. If ‘the non-signatory exercises complete domination over the signatory, uses its domination to commit a fraud or wrong, [and] the fraud or wrong results in an unjust loss or injury to the counter-party.’⁷⁸ Relatively, the group of companies doctrine is accepted in certain circumstances as the Swiss Federal Court pointed out in a judgment:

*‘The group of companies doctrine does not per se justify extending an arbitration clause to another company within the group. Unless there is an independent and formally valid manifestation of consent of the other company of the group to the agreement to arbitrate, such an extension will be granted only in very particular circumstances that justify a bona fide reliance of a party on an appearance caused by the non-signatory.’*⁷⁹

It is not uncommon that the arbitration of the M&A dispute extends to the consumer. Wach and Meckes present the example of ‘private individuals selling their equity interest, or in case of an MBO, acquiring such interest’ and add that unless the consumer personally signed an agreement to arbitrate or failed to object after receiving the notice of arbitration, the consumer cannot be compelled to arbitration.⁸⁰

2.1.2.2.2. Arbitrator appointments in Multi-Party and Multi-Contract Situations

A common constitution of an arbitration tribunal is through parties, picking their arbitrators and the chairman is appointed either by an institution, an appointing authority or the party arbitrators. However, the constitution of the tribunal is a tricky issue when it comes to multi-party arbitrations and equality is a concern. Hence, some institutional rules adapted provisions in which ‘a request for the joinder of a new party must be made before the arbitrators have been appointed or confirmed, unless all parties agree to such joinder’ to

⁷⁸ Irina Tymczyszyn and others, 'Joining Non-Signatories To An Arbitration' [2014] WestlawNext 5.

⁷⁹ Decision of Swiss Federal Court on 1 September 1993, 14 ASA Bull. 623 (1996) in Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions, (© Kluwer Law International; Kluwer Law International 2006) 58.

⁸⁰ Karl J. T Wach, Frank Meckes and Emanuella Agostinelli, *ibid.* p. 46.

protect the parties' right to be heard and ensure they equally partake in the constitution of the tribunal.⁸¹

If the arbitration agreement has not been drafted with caution, arbitration proceedings could be delayed if not impossible. Siemens v. BKMI and Dutco case exemplifies the consequences. BKMI and Dutco did not agree on a jointly appointed arbitrator and then challenged the arbitrator who was appointed in accordance to the ICC Rules, stating their objection to the composition of the tribunal. The Court de Cassation overturned the rejected appeal and decided on grounds for 'equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen'⁸² and that the parties cannot be mandated to a tribunal they had no consent to. It is indeed the party autonomy that is inherent to arbitration but the decision is controversial. The question is whether should the party that was able to jointly maintain an agreement on the constitution of the tribunal be suffering the results such as setting aside of an award and/or litigation such as this due to the failure of the adverse side? As consent was mentioned before, all parties that agreed to the institutional rules of ICC were fully aware of the multi-party provisions. It could be claimed that the reason of public policy might be a stretch in this case.

Regardless of the discussions, there could be other jurisdictions in the same tendency. IBA Guidelines for Drafting International Arbitration Clauses suggest that in case there is a sole arbitrator or a tribunal, parties should either jointly select the arbitrator or otherwise, refer the selection to the institution or an appointing authority⁸³ and alternatively, in order to maintain fairness, if two or more parties on each side fail to do so, the institution or the appointing authority will appoint *all* the arbitrators.⁸⁴ This is a more preferable outcome from the perspective of the co-defendants or co-claimants who could not succeed agreeing on an arbitrator due to the fact that solely one party will not get to retain their chosen arbitrator in the tribunal and contributing to a more favorable decision.

⁸¹ Bernard Hanotiau, *ibid.* 171.

⁸² Stefan Kröll, 'Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties In The Appointment Process In Multiparty Cases | Kluwer Arbitration Blog' (*Kluwerarbitrationblog.com*, 2015) <<http://kluwerarbitrationblog.com/blog/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/>> accessed 19 September 2015.

⁸³ Multiparty Guideline 1 para 98.

⁸⁴ *ibid* para 99.

3. EXPERT DETERMINATION AS A CARVE OUT DISPUTE RESOLUTION CLAUSE IN CROSS-BORDER M&A DISPUTES

Expert determination is an alternative dispute resolution mechanism, most commonly drafted with an arbitration agreement as a multi-tier or carve out dispute resolution clause where parties of a contract agree upon asking an independent expert to give a definitive decision on a dispute regarding valuation and technical issues. When do the parties resort to expert determination in a cross-border M&A deal? In particular, to scrutinize ‘annual financial statements and ... for the purpose of determining the equity capital on which the calculation or an adjustment of the purchase price is to be based.’⁸⁵ Intellectual property licensing issues and technological disputes may require an expert to determine the facts. Moreover, the need for an expert determination might arise in representation and warranty issues, all of which will be discussed in the related chapters.

The procedures are considered faster and inexpensive compared to other dispute resolution methods, e.g. arbitration or litigation. An expert determination clause is different from an arbitration agreement/clause in the sense that ‘validity and enforceability are not governed by international or domestic arbitration laws, but in principle, by rules of contract only.’⁸⁶ Correspondingly, drafting an expert determination clause in a careful manner has critical importance in order to avoid procedural ambiguities and reflect full consent of the parties since the validity of the ADR clause and the enforceability of the expert’s decision is governed on a contractual basis.

Procedural rules that govern the expert determination proceedings do not exist. Though as an option, Expertise Rules of ICC establish a framework for the selection and neutrality of the experts, miscellaneous information about waivers, costs, liabilities, etc. in addition to the rules of conduct for parties and experts both. On a positive note, bearing in mind the difficulty of retaining confidentiality in multi-tier/carve-out dispute resolution clauses, Expertise Rules affirms that ‘the work of the Standing Committee and the Secretariat is of a confidential nature which must be respected by everyone who participates in that work

⁸⁵ Anke Sessler and Corina Leimert, 'The Role of Expert Determination in Mergers and Acquisitions Under German Law' [2004] 20 Arb. Int. 151.

⁸⁶ Balz Gross, Homburger, 'M&A disputes and expert determination: getting to the grips with the issues' [2010/11] PLC 2.

in whatever capacity.’⁸⁷ Irrespectively, a watertight confidentiality clause should be implemented to the agreement/terms of reference.

How does one appoint an expert? The clause should ‘specify the field of expertise from which the expert is to be chosen, provide that the parties will try to agree on the identity of the expert at the time the dispute arises and failing such agreement, provide for appointment by an appropriate professional institution. Ensure that the institution exists and is willing to appoint an expert’ since judges have no authority on appointing an expert.⁸⁸ As for an institutional capability of expert appointment, ICC offers as part of its services to appoint an expert upon the request of the parties.⁸⁹ Alternative dispute resolution methods such as arbitration require an unbiased and independent individual(s) to make a decision. Therefore, it would be appropriate to state that the expert whose decision carries great importance to the outcome of a dispute settlement is expected to be completely neutral but there are no procedural laws⁹⁰ to dictate this which is one of the shortcomings of this method of ADR. The terms of reference must include procedural rules and rules of conduct before the dispute arises. For instance, whether there will be hearings or not, the scope of power conferred upon the expert, the timeline for the determination to conclude and the form of the decision with reason attached, etc. should be drafted diligently.⁹¹

The expert is not a judge nor an arbitrator and thus, the parties could clearly indicate whether or not they will be bound by the expert’s decision. Parties should avoid using phrases that would suggest finality and certainty of the expert’s decision since it may cause problems in terms of challenging it. Even if the expert’s outcome is wrong, the decision is final and there are only few grounds to appeal.⁹² *Owen Pell Ltd. v Bindi (London) Ltd.*

⁸⁷ ICC Expertise Rules Appx 1 art 4.

⁸⁸ *Expert Determination* (Ashurst Quickguides 2015) <https://www.ashurst.com/publication-techguide.aspx?id_Content=5974&expandTypeList=true&id_queryResource=247> accessed 20 September 2015.

⁸⁹ See the ICC website for further information (<http://www.iccwbo.org/products-and-services/arbitration-and-adr/experts/>).

⁹⁰ *Expert Determination* (Ashurst Quickguides 2015) <https://www.ashurst.com/publication-techguide.aspx?id_Content=5974&expandTypeList=true&id_queryResource=247> accessed 20 September 2015.

⁹¹ *ibid.*

⁹² *ibid.*

decision constitutes a guide in terms of grounds for overturning a decision of an expert who does not meet the neutrality expectation. If the expert answered the wrong question, or was accused of fraud, collusion or bias, challenging the expert is possible.⁹³ That is why the expert should be endowed with the know-how of the specific industry and selected carefully.

3.1. Differentiating Expert Determination from Arbitration

There are evident differences between arbitration and expert determination. First of which is the scope of jurisdiction. A tribunal decides on a case and grants an enforceable award whereas expert determination establishes answers to factual questions that bind the parties and unlike an award, cannot have the conveniences of New York Convention. Even though it is possible, there are risks to submitting a legal issue along with valuation and factual questions to an expert. For instance, the expert might not have the appropriate legal expertise and interpretation of the contract, taking of evidence and witness testimonies may be necessary – the expert does not possess enough procedural authority –; correspondingly, the arbitral tribunal might not be willing to be bound by an expert's decision on a merely legal question.⁹⁴ The appointed expert does not have to be a natural person.⁹⁵ Parties are free to appoint a legal entity, e.g. consulting company. This is a striking difference from arbitration since an entity cannot act as an arbitrator or be included in the composition of a tribunal. Comparatively, the grounds for challenging the expert is more limited as discussed above.⁹⁶ Judicial review of the arbitral award however is breach of public policy whereas expert's determinations may be reviewed in case the outcome is 'arbitrary, obviously unfair, riddled with mistakes or based on wrong factual assumptions.'⁹⁷

Liability is another distinction between an arbitrator and the expert. For example, Australian Uniform Commercial Arbitration Acts that attempt to unify the legislation within

⁹³ [2008] EWHC 1420 (TCC).

⁹⁴ Balz Gross, Homburger, *ibid*.

⁹⁵ Balz Gross, Homburger, *ibid*.

⁹⁶ *See Section 3.*

⁹⁷ Matthias Scherer, Introduction to the Case Law Section, ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2005, Volume 23 Issue 2) 248. *Also see Owen Pell Ltd. v Bindi (London) Ltd case above.*

the country does not grant the liability protection to experts as it does to the arbitrators.⁹⁸ This is a reflection of the contractual nature of expert determination. In breach of contract, the expert becomes liable to parties as well as third parties, by 'contract or the tort of negligence (or both), for failing to act in accordance with the terms of the appointment, or failing to exercise the standard of care and diligence expected of an Expert in his or her position.'⁹⁹

Procedural rules exist in arbitration to protect the parties' rights and the neutrality of the arbitrators, create a framework for the constitution of the tribunal as well as details on proceedings, costs of arbitrators and taking evidence; though as mentioned in the previous section, this is contradictory to expert determination. For instance, an expert cannot and does not have to call witnesses and will decide on the questioned valuation/technical/environmental issue from the documents that were supplied to him/her. Furthermore, 'an expert investigates the case *ex officio*'¹⁰⁰ but the tribunal is bound by the scope of arbitration agreement as well as the procedural rules.

On July 5th 2011, the Swiss Supreme Court establishes a case by case basis general criteria for the differentiation of expert determination and arbitration. The decision stresses on the intention of the parties and the acting expert/arbitrator. The initial criterion is the wording of the agreement between the parties. Then, the next step is to assess the amount of power given to the individual(s) since an expert and arbitrator have different capacities to act on. The court continues with its judgment about the availability of the debt enforcement proceedings which inherently, the expert's decision cannot initiate obligations or rights but the mere declaration of facts. Followed by that, the conduct of the individual who acts in the capacity of an arbitrator or an expert needs to be taken into account. 'Moreover, the concepts of an arbitral award and an expert determination are not always mutually exclusive, combinations of the two are conceivable.'¹⁰¹

⁹⁸ Robert Hunt, 'The Law Relating to Expert Determination' (2008)
<<http://www.roberthuntbarrister.com/ExpertDetLawApril2008.pdf>> accessed 22 September 2015.

⁹⁹ *ibid.*

¹⁰⁰ Sessler, *ibid.* p. 153.

¹⁰¹ Nathalie Voser, Anya George and Schellenberg Wittmer, 'Swiss Supreme Court Rules On Distinction Between Expert Determination and Arbitral Award' (*Swlegal.ch*, 2011)
<http://www.swlegal.ch/getdoc/0fdd19cb-f76f-420f-9d5e-8d4e81f80814/2011_Nathalie-Voser_Anya-George_Swiss-Supreme-Cour.aspx> accessed 22 September 2015.

3.2. Possible Problems Associated with Expert Determination as a Carve-out Dispute Resolution Clause

In practice, drafting of the arbitration agreement and the agreement to submit certain issues to expert determination affect the outcome of the dispute resolution process. For instance, if the wording is incorrect and/or the scope of disputes are too broad or ambiguous, a determination given by an expert can be invalidated or an arbitral award can be set aside due to the excess in the scope of powers of the arbitrator.¹⁰² Moreover, there is also the issue of whether the arbitral tribunal is bound by the expert's findings or not. If the award to be granted is connected to the expert's determination, the arbitral tribunal will have to decide whether the determination is binding on the tribunal.¹⁰³

The following case example given by Bernd Ehle reveals the consequences of a poorly drafted dispute resolution agreement. Parties who concluded an SPA which had the provision of submitting the determination of the final share price for the sale to Company Accountants and it "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." Subsequent to the valuation of the share price by the accountants, the seller who found the price unsatisfactory commenced arbitration proceedings to override the determination by the accountants. The buyer respectively aimed to revoke the agreement and retrieve the excess money paid in exchange for shares. The tribunal decided that they had jurisdiction over the dispute and found the accountant's determination faulty. Displeased with the award, litigation was initiated in United States District Court for the Southern District of New York. The court decided that the tribunal has exceeded its power by subjecting the determination to its review even though parties specifically agreed on the accountants' determination under the SPA.¹⁰⁴ Upon the appeal of the decision, the United States Court of Appeals, Second Circuit affirmed the District Court's decision:

Under First Options of Chicago, Inc. v. Kaplan, a court should

¹⁰² See Norman Katz v. Herbert Feinberg, 290 F.3d 95 (2d Cir. 2002) *below*.

¹⁰³ Balz Gross, Homburger, 'M&A disputes and expert determination: getting to the grips with the issues' [2010/11] PLC 2.

¹⁰⁴ Bernd D. Ehle, 'Arbitration as a Dispute Settlement Mechanism in Mergers and Acquisitions' (2005) 27 The Comparative Law Yearbook of International Business 287, 300.

find that the parties agreed to allow an arbitrator to resolve questions of whether an issue is arbitrable only if the agreement so provides in “clear and unmistakable” language. 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ... we cannot conclude that in this case where a single agreement contains both a broadly worded arbitration clause and a specific clause assigning a certain decision to an independent accountant, that the parties' intention to arbitrate questions of arbitrability under the broad clause remains clear. We find the presence of both these clauses creates an ambiguity, which, under First Options, requires us to assign questions of arbitrability to the district court, not the arbitrator. See 514 U.S. at 944, 115 S.Ct. 1920.1 On these grounds, we affirm the district court's conclusion that determination of the arbitrability of arbitrability lay with it and not with the arbitration panel, and that, therefore, de novo review of the panel's arbitrability findings was appropriate.

When an agreement includes two dispute resolution provisions, one specific (a valuation provision) and one general (a broad arbitration clause), the specific provision will govern those claims that fall within it ... Furthermore, the Court notes that in this case, the inclusion in § 2(b) of language not only making the accountants' determination “final and binding,” but also excluding it from “any appeal, arbitration, proceeding, adjustment or review of any nature whatsoever” further affirms the parties' intent to exclude determinations assigned to the accountants under § 2(b) from later challenge under the general arbitration provision of § 14(g). See Purchase Agreement § 2(b).¹⁰⁵

This decision provides a great perspective while applying general principles of law such as *lex specialis* and interprets the intention of the parties. Arbitration tribunal has no jurisdiction over the matter if the clause is in a written form in which the “binding” consent of both of the

¹⁰⁵ Norman Katz v. Herbert Feinberg, 290 F.3d 95 (2d Cir. 2002).

parties is reflected, and specified the areas of expert determination. Similarly, the courts look at the conduct of the parties and the arbitrator/expert in order to determine the intent of the parties. For instance, if an expert acted in a full capacity as an arbitrator, and the parties obliged throughout the proceedings, it is possible that the judge could deem the determination as an award.

If parties opt out on a binding expert determination or simply do not include a provision of binding nature, is the tribunal bound by the findings of the expert? As an example, FAX (France) v. SL (Netherlands) ‘involved the acquisition of shares with a guaranteed value, an “audit arbitration” was followed by arbitration proceedings.’¹⁰⁶ 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 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 is was not bound by the audit arbitration.’¹⁰⁷ An arbitral tribunal may give unpredictable decisions of jurisdiction in cases where the specific ADR clause does not clearly reflect the parties’ intentions, especially if the determination has been concluded beforehand.

Is it possible for an expert to decide on preliminary legal issues such as coming to a decision through a legal contract interpretation? Some jurisdictions such as Germany does permit legal interpretation; ‘Federal Supreme Court (Bundesgerichtshof, BGH) has shown a growing tendency to accept decisions relating to certain ancillary or preliminary legal issues by an expert, always provided that this is in line with the arrangements made between the parties.’¹⁰⁸ It is not advised to broaden the scope of authority of the expert in that regard however. The expert will most likely not be a lawyer; hence, lacking competence in reviewing contractual issues will lead to future disputes and there is also the ambiguity of the fact that the tribunal might not be bound by the determinations that interpret contractual and legal issues. French law does not permit such interpretation ‘due to the particular concept of the

¹⁰⁶ Bernd D. Ehle, *ibid.* pp. 300-301.

¹⁰⁷ *ibid.*

¹⁰⁸ Anke Sessler and Corina Leimert, ‘The Role of Expert Determination in Mergers and Acquisitions Under German Law’ [2004] 20 *Arb. Int.* 156.

mandataire commun' unless it is related to an issue that is technical.¹⁰⁹

Quite frequently, the courts bypass commenting on the applicable law in their decisions regarding expert determination. Why is the substantive law important? In challenging the expert's determination for instance: one jurisdiction might not be inclined to consider expert determination as binding whereas another could excessively hold it binding. This would affect the arbitration proceedings as well as the outcome of the disputes. Logically, there needs to be a balance between these approaches to the binding nature of the expert decision. The courts should not be able to disregard the binding effect of a valid contract. If party autonomy is one of the key characteristics in ADR mechanisms such as arbitration and expert determination, the will of the parties should be taken into account where they expressed their intention to submit the disputed question to an expert in a contract. By the same reasoning, parties mutually have the right to exclude an expert's decision if they mutually decide to end the contract, including the cases where the expert's findings are objectively and obviously incorrect.¹¹⁰

In conclusion, expert determination offers binding or non-binding solutions to factual questions without the lengthy proceedings and the high cost factor. Drafting of the ADR clauses clearly and in a practical manner would serve the parties' interests, while avoiding costly and long litigation procedures. It should be noted, however, different necessities may entail different measures. For instance, if the parties find that party appointed expert witnesses or a tribunal appointed expert to be more fitting for purpose rather than expert determination, the wording of the agreement should be able to provide the flexibility and address the possible disputes and situations that might emerge. If the language of the ADR clause is too strict and multiple disputes arise simultaneously, there is a possibility of parallel proceedings of arbitration and expert determination that could prove to be costly and time consuming.

4. M&A TRANSACTION STAGES AND POSSIBLE DISPUTES

¹⁰⁹ Cahit Agaoglu, 'Arbitration in Merger and Acquisition Transactions' (PhD, Queen Mary University of London 2012) 188.

¹¹⁰ *Example clause* '... and the Expert's determination shall, in the absence of manifest error be final and binding...' See (2006)

<http://www.giur.uniroma3.it/materiale/didattico/international%20business%20contracts/1904/handout_MAC.pdf> accessed 3 March 2016.

This chapter attempts to specify the transaction stages while pointing out to the possible disputes that may arise. It is also aimed to present arbitration and expert determination as ADR remedies to these possible disputes while comparing their practicality in the matter. It should be noted that what it is implied by the term M&A transactions in this dissertation are private M&A deals since arbitration is not a commonly preferred dispute resolution in public M&A. In fact, only 2% of public M&A deals in the US included an arbitration clause in 2012.¹¹¹ The concepts of “merger” and “acquisition” are generally used interchangeably in practice; although there are minor differences in definitions. An acquisition is in most basic terms ‘gaining control or possession over a target company or its assets’¹¹² whereas in a merger, two or more corporations/companies consolidate into one legal entity.¹¹³

Mergers can transpire horizontally and vertically. Horizontal merger is ‘a business consolidation that occurs between firms who operate in the same space, often as competitors offering the same good or service.’¹¹⁴ For instance, the failed merger between the US company Chrysler and German company Daimler would have been a horizontal merger where both operated in the automotive industry.¹¹⁵ A vertical merger is the term used ‘when two or more firms, operating at different levels within an industry’s supply chain merge operations.’¹¹⁶ The example of Russian oil company TNK and BP could be given for vertical mergers. TNK’s sizeable amounts of oil reserves and BP’s advanced infrastructure corresponded to a profitable merger.

¹¹¹ Richard Hall and Matthias M. Pitkowitz, 'Tailor-Made—Unique Dispute Resolution Clauses In M&A Agreements' (2012) 5 New York Dispute Resolution Lawyer 29, 31.

¹¹² *Mergers And Acquisitions Disputes* (1st edn, AICPA 2013)
 <<http://www.aicpa.org/InterestAreas/ForensicAndValuation/Resources/DownloadableDocuments/M%20and%20A%20Disputes%20-%20excerpt.pdf>> accessed 27 May 2015.

¹¹³ Turkish Commercial Code article 136 allows two types of forms for a merger. One form is through creating a new legal entity and the only other permitted form is merger by acquisition/takeover.

¹¹⁴ Investopedia, "Horizontal Merger Definition | Investopedia" (2003)
 <<http://www.investopedia.com/terms/h/horizontalmerger.asp>> accessed 17 February 2016.

¹¹⁵ Scott Moeller and Chris Brady, *Intelligent M&A: Navigating The Mergers and Acquisitions Minefield* (1st edn, John Wiley & Sons 2015)
 <https://books.google.at/books?id=63oMWv2H0dAC&pg=PT56&dq=share+deal+m%26a&hl=en&sa=X&ei=vH1kVah_ha9RseqAsAo&ved=0CEYQ6AEwBQ#v=onepage&q=share%20deal%20m%26a&f=false> accessed 28 May 2015.

¹¹⁶ Investopedia, 'Vertical Merger Definition | Investopedia' (2003)
 <<http://www.investopedia.com/terms/v/verticalmerger.asp>> accessed 28 May 2015.

The structure of the deal is foreseen at the strategic planning stage of the transaction. It is an imperative choice especially in cross-border M&A transactions where different laws, regulations and economic environments of countries effect the business transactions. For instance, tax is one of the foremost reasons why a company might prefer asset or share deal. Merger control authorities of different jurisdictions may not allow certain transactions to take place. Also, the operational aspects of the target – e.g. employee structure– are important to choose the right kind of deal for the transaction. During this phase, buyer and/or seller agree on making a transaction and start preparations. After the decision and assessment of a business strategy, firms select consultants or an investment bank to guide through the transaction while the seller also aims to picture whether the deal is going to be asset or shared deal. In this premature stage, lawyers are not quite involved. The deal could be carried out in an auction so it is also possible that the buyer is still not determined yet. Finally, identifying and contacting prospective buyers and sellers trigger the pre-due diligence phase.¹¹⁷ Prior to explaining what the preliminary due diligence phase entails, the question of what would be the name of the contract in which the parties will execute corresponding to the structure of the deal should be answered.

4.1. Asset Deals vs. Share Deals

An acquisition can be in the form of an asset purchase deal is ‘where the buyer acquires some or all of the assets of the target, usually in exchange for cash or buyer shares.’¹¹⁸ The main advantage with this type of deal is the lack of liabilities. In some jurisdictions such as the US, an asset deal is more common due to buyer’s option to choose the assets and liabilities to be acquired, –also called “cherry pick”- and the risk of encountering a hidden liability befalls considerably low. This form of acquisition is highly sensible if the target has major debt or environmental issues. Liquidation only occurs when all the assets of the company is acquired by the buyer.¹¹⁹ The asset purchase can be in a wide

¹¹⁷ Clifford Chance, ‘General procedure for M&A Transactions in Germany’, <<http://globalmandatoolkit.cliffordchance.com/Broschuere-MA-Transactions-Lowres.pdf>> accessed 17 March 2015.

¹¹⁸ ‘Asset Purchase’ (Cross Border Management, 2011) <<http://www.crossbordermanagement.com/en/guides/mergers-a-acquisitions-in-the-us/deal-structures/basic-asset-purchase>> accessed 31 March 2015.

¹¹⁹ ‘Asset and Stock Deals’ (Macabacus) <<https://www.macabacus.com/accounting/types-of-acquisitions>> accessed 1 April 2015.

range that covers office supplies, goodwill¹²⁰, equipment, immovable assets, plantations, employees¹²¹, former customer contracts, intellectual property rights and any other assets and liabilities one can think of. The APA to be signed needs to involve thorough description of assets. The assets are transferred in compliance with the relevant legal principles of the target company.¹²² The buyer will be compelled to renew licenses and permits. In terms of taxes, although purchase price can be depreciated or amortized is a profitable outcome, double taxation on the transferred assets and the profits that were distributed to the shareholders from the transaction is an undesirable consequence to asset purchase agreements.¹²³

Majority of the M&A deals are structured as a share deal due to the complexity of transferring all the assets of the target company one by one in an asset deal. The share deal is finalized after the closing, following the signing of a share purchase agreement. The acquirer buys all the share capital of the target company for cash or other considerations such as securities.¹²⁴ Single layer taxing is one of the core advantages of the share deal in which the seller shareholders are mostly imposed to pay capital gains tax on the profit made by their sale unless the country of the target company has different tax regulations. Differentiating from the asset deal, the buyer acquires the legal entity -and its balance sheet as a whole- of the target company and assumes all potential risks and liabilities. Therefore, a meticulous and in-depth due diligence and a carefully drafted SPA with negotiated warranties and indemnities are fundamental.

Below, Henry Peter provides a basic timeline for the M&A deal from commencement of the deal until post-closing.

¹²⁰ ‘An intangible asset that arises as a result of the acquisition of one company by another for a premium value. The value of a company’s brand name, solid customer base, good customer relations, good employee relations and any patents or proprietary technology represent goodwill.’ (Investopedia)

¹²¹ In some jurisdictions, labor laws might be strict in protecting the employees’ jobs in case of a transaction

¹²² Turkish Civil Code articles 705 et seqq. regulate the real estate transfer and the general rule for acquiring property is registration to the Deed Registry Office.

¹²³ ‘The Acquisition Process: Structuring the Deal, Negotiating the Letter of Intent & Conducting Due Diligence’ (Brooks Barristers & Solicitors) <<http://www.brookslaw.ca/The-Acquisition-Process.pdf>> accessed 1 April 2015

¹²⁴ Paul S Sperry and Beatrice H Mitchell, *The Complete Guide To Selling Your Business* (2nd edn, Kogan Page, 2005) 91

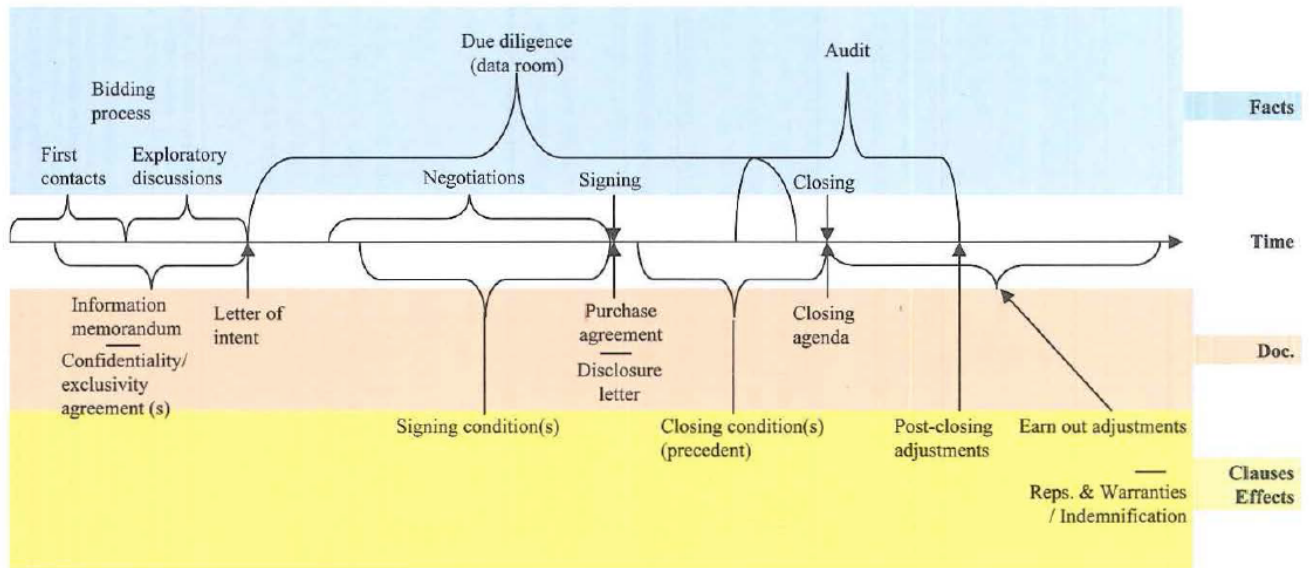


Figure 1. M&A Schedule¹²⁵

4.2. Pre-closing Stage

4.2.1. Preliminary Due Diligence

Preliminary due diligence stage is carried on until signing of the Letter of Intent. It serves as a certain indication of whether the seller is serious about selling the company or buyer is confident in making the transaction. Formal due diligence is a longer and more expensive process and subsequently, the buyer might want to withdraw from the transaction in case there are red flags such as environmental issues, unexpected expenses, litigation, etc. early on. The process requires different measures hinging on whether the deal is buyer or seller driven. If an investment bank is involved in the transaction, the deal is most likely to be carried out as a seller driven limited auction¹²⁶ but one-to-one transaction is also possible and the future steps to be taken in this stage depends on this particular choice.

¹²⁵ Henry Peter, 'M&A Transactions: Process and Possible Disputes', *ASA Special Series No. 24* (1st edn, 2005).

¹²⁶ John McDonald, Daniel Raglan, 'The M&A Sale Process - From Term Sheet to Closing' (*Kelley Drye*, 17 July 2013) < http://www.kelleydrye.com/m&a_sale_process.pdf > accessed 9 March 2015.

The first step to be taken by the seller's side is drafting a **teaser and an information memorandum**. They function as a summary of the target company's business and do not contain confidential information. Seller also assembles data rooms and determines the documents to be disclosed to the buying company in which they can request specific information and/or documents to be included.¹²⁷ Both the target company and the buyer select their due diligence teams in the mean time. The information memorandum is not released and data room is not accessible until the confidentiality agreement is signed.

Confidentiality agreement, also referred to as a non-disclosure agreement, is a fundamental part of preliminary due diligence that kicks off the formal due diligence phase. It is a 'legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to by third parties.'¹²⁸ As the definition indicates, the objective of a non-disclosure agreement is to protect the target's interests and trade secrets. The seller also might not want to release the news of a possible transaction. The scope of the agreement has a vast significance. What kind of information is the seller willing to reveal to the other side? There are red files that contain sensitive material such as technology, know-how that the seller does not want to expose until the SPA is negotiated to an advanced stage. That is why blacking out some names and pricings is a common practice.

The structure and scope of a confidentiality agreement depends on the target's willingness to share information and the M&A deal. Typically, a definitional term as to what constitutes confidential, duration of confidentiality agreement, applicable law, parties and individuals/representatives who are bound by the agreement (parties, employees, attorneys, consultants, etc.) and exceptions to confidentiality, enforcement and remedies are the main provisions of a confidentiality agreement.¹²⁹ It is prudent to specifically look for provisions in confidentiality agreements such as covenant not to use, exclusion of independently acquired

¹²⁷ Clifford Chance, *ibid*.

¹²⁸ 'Confidentiality Agreements' (*Cross-Border Management*, 2011), <http://www.crossbordermanagement.com/en/guides/mergers-a-acquisitions-in-the-us/preacquisition-agreements/confidentiality-agreements> accessed 17 March 2015.

¹²⁹ Igor Kirman and Sabastian Niles (2012) <<http://media.straaffordpub.com/products/m-and-a-confidentiality-agreements-2012-07-19/presentation.pdf>> accessed 22 February 2016.

information – without any use or help of the confidential information – and no raid clause to avoid solicitation of employees.¹³⁰

Buyer's access to employees is a very critical issue that could injure the seller's interests, especially software engineers. Hence, non-solicitation is a typical contract term. However, in some jurisdictions such as Germany, non-solicitation clause is null.¹³¹ Exclusivity as a contractual obligation is not probable in a limited auction until the end of it. Destruction clause could also be included, in which all material and their copies to be destructed if the deal fails. Breach of the agreement will most likely end any transaction. Additionally, it is also possible to add a damages clause.

4.2.2. Formal Due Diligence

Due diligence is the process to discover all the relevant information about the target company. This stage helps the buyer to envisage a complete picture of the company that is to be merged with/acquired, 'identifying potential exposures and areas of risk'¹³² and to decide whether or not the transaction will be completed.¹³³ In cross-border M&A transactions, due diligence is performed in different jurisdictions and that is why it is essential to have local advice in each jurisdiction.¹³⁴ Standard practice is for counsels to give one consolidated report to the client. Due diligence is comprised of legal (including intellectual property), environmental, financial, tax, human resources, commercial, technical and sales/marketing areas.¹³⁵

Following the signing of an NDA, the buyer and seller allow access to their data rooms (virtual, electronic and physical) for each party to commence with due diligence. As mentioned in the pre-due diligence phase, the information that carries sensitive characteristics

¹³⁰ Robert Kibby, "Key Provisions in M&A Confidentiality Agreements | Munsch Hardt Kopf & Harr" (*Munsch.com*, 2010) <<http://www.munsch.com/articledetail/542>> accessed 22 February 2016.

¹³¹ Clifford Chance, *ibid*.

¹³² Peter Howson, *Due Diligence: The Critical Stage in Mergers and Acquisitions* (Gower 2003) 159.

¹³³ Henry Peter, *ibid*.

¹³⁴ Peter Howson, *ibid*. p. 51.

¹³⁵ Thomas Gray, "Due Diligence Documents" (*Thomas H. Gray, Profit Spotter*, 2014) <<http://www.tom-gray.com/2014/02/26/due-diligence-documents/>> accessed 18 February 2016.

of seller's business are not traditionally obtainable in the initially arranged of documents for other parties to see. During the primary part of the formal due diligence, buyer formulates a series of questions concerning documents and data and directs them towards the seller. Furthermore, the buyer's due diligence team investigates the initial environmental, litigation and financial & commercial history of the firm. For instance, specific contracts that were made with others such as non-compete agreements, contracts with a supplier, etc. and the buyer might not want to engage in a transaction due to these. Regulatory problems may also cause issues with the transactions. If a country imposes new legal framework that would implicate restrictions on a specific sector, it will be considered as a major risk factor. After the Q&A, seller reviews additional document requests and questions and in the mean time buyer drafts the letter of intent.

4.2.3. Letter of Intent

The letter of intent has no regulated meaning in national laws. It is conventionally signed after negotiations reach to a point where target and buyer demonstrate a 'common intent to implement a specific deal.'¹³⁶ It is cogitated as a first step for parties to assess whether they agree or not on basic elements that are going to be negotiated and signed by their respective CEOs. The intricacy, binding nature, and the amount of details are left to parties' own consideration. Typically, a letter of intent contains information on the procedure of the due diligence, subject matter(s) of the transaction, identity of seller and buyer, scope of territory, time frame of the transaction's stages, consequences of failure of deal, focus and disposition (share/asset deal, leveraged buy-out, etc.) of the transaction. It would also be beneficial to define the scope of 'good faith' in the letter of intent.¹³⁷ Letters of intent may instigate disclosure hazards for public companies. For instance, in the United States, SEC requires public companies to disclose letters of intent in the case where there is a 'material definitive agreement' (e.g. substantial break-up fees) while excluding non-binding letters of

¹³⁶ Henry Peter, *ibid*.

¹³⁷ Carlo Mastellone, 'Choice of Law and Jurisdiction Clauses In Cross-Border Agency and Distribution Agreements From an EU Perspective' (Studio Legale Mastellone, 2009)
<http://www.studiomastellone.it/pdf/Choice%20of%20law%20and%20jurisdiction%20clauses_REPORT.pdf>
accessed 27 March 2015.

intent.¹³⁸ That is why it is critical to know the laws and regulations of the foreign company while engaging in a transaction.

The letter of intent is mostly bilateral which means two parties perform it. Sporadically, a letter of intent that is multilateral can be signed by more than two parties which are 'acting in concert or belonging to the same group, sometimes also by the target.'¹³⁹ Legal complexion of letters of intent is a controversial matter. Is the letter of intent a contract, an offer or a mere promise of a contract? It is legally incorrect to contemplate on the notion of a contract here. Parties merely envision *essentialia negotii*¹⁴⁰ of a future SPA after the negotiations conclude, e.g. anticipated range of purchase price. However, there are binding provisions in the letter of intent such as dispute resolution clause, confidentiality (unless executed with a separate agreement), exclusivity, choice of law, costs and non-inducement.¹⁴¹ Non-binding clauses are generally perceived as confidence builders. Consequentially, in a general way of speaking, a letter of intent becomes half binding in nature. In order to call the letter of intent an offer, it needs to be unilateral. Additionally, the author of the offer is bound by their offer until it is accepted/denied or the deadline on the offer passes. The author, who in many cases is the buyer, will not want to make a material contractual offer that is binding until the signing stage of an SPA due to the possibility of completely withdrawing from the transaction if negotiations and/or due diligence conclude with failure. If a letter of intent is promise of a contract, then it has to bear all *essentialia negotii* of a final contract according to a Swiss Federal Court Judgement.¹⁴² The wording and parties' intentions determine the binding nature of the letter of intent.

It is rather an exception that any breach of the binding terms in a letter of intent may cause penalties. In Austrian law, mostly in private equity transactions, letter of intent

¹³⁸ Laura Anthony, 'Mergers and Acquisitions – Disclosure Matters' (Legal & Compliance, LLC 2011) <<http://www.reverse-merger.com/mergers-and-acquisitions-%E2%80%93-disclosure-matters-2/>> accessed 25 March 2015.

¹³⁹ Henry Peter and Jean-Christophe Liebeskind, 'Letters of Intent in The M&A Context', *ASA Special Series No. 24* (1st edn, 2005) 265, 269.

¹⁴⁰ Fundamental components of the transaction.

¹⁴¹ Henry Peter and Jean-Christophe Liebeskind, *ibid.* p. 271.

¹⁴² ATF 31 II 640 (1905).

typically includes a ‘reimbursement of due diligence costs.’¹⁴³ Break-up fees are used in practice but it is uncommon. Claiming damages is also possible on the basis of *culpa in contrahendo* liability.¹⁴⁴ In an attempt to elaborate, if the target company has important environmental issues that were not disclosed to the buyer and negotiations failed as a result; or a party fails to notify the other in a well-timed manner that they are withdrawing from the negotiations, the injured party can rely on the liability.

After the representatives of parties sign the letter of intent, second phase of formal due diligence commences.

4.2.4. Confirmatory Due Diligence

Red data room will be introduced to the buyer’s side at this particular stage. Strictly confidential material is exposed to a limited number of people. The second part of due diligence is the business due diligence. In this process, one of the major goals is to predict the purchase price. During the valuation process, buyers often include accounting companies to go through the financial aspects of the target company. Both of the parties’ management teams partake in meetings to deliberate on findings. If the buyer will be selected in a limited auction, seller prepares the first draft of the SPA and sends it to the bidders. Potential buyers make the final binding offer and the seller reviews final bids and make a decision on the bidder.¹⁴⁵

4.2.5. Negotiation and Signing

After a successful due diligence phase, depending on the structure of the agreement, parties sign a merger/acquisition agreement as we call SPA or an APA depending on the structure of the deal. The agreement is negotiated and endowed with certain representation and warranties, indemnity clauses, covenants such as non-compete agreements,

¹⁴³ Christian Herbst, ‘Austria - Negotiated M&A Guide’ (IBA Corporate and M&A Law Committee, 2014) < <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=77F93863-0705-4FC2-99A2-893276316811> > accessed 25 March 2014.

¹⁴⁴ Henry Peter and Jean-Christophe Liebeskind, *ibid.* p. 280.

¹⁴⁵ Clifford Chance, *ibid.*

determination of the purchase price and conditions precedent for closing which will be specifically explained in the following chapters.

Additionally to the components above, the typical SPA involves provisions of the transfer of the shares and the assets, 'recitals'¹⁴⁶ that identify the parties to the transaction, definitions such as *closing date*, *purchase price*, *working capital*, *GAAP*, *accounting policies and procedures*, *ordinary course of business*, *material adverse change*, or *material adverse effect*,¹⁴⁷ relevant agreements and items regarding post-closing purchase price adjustment mechanisms, earnouts (if any) and a disclosure schedule that seller issues to weaken the effect of representations and warranties so that buyer focuses on the disclosed items during due diligence.¹⁴⁸ The said disputes below are segregated into two sections comprised of the period before signing and after signing of the SPA prior to closing.

4.2.6. Possible Pre-Closing Disputes

4.2.6.1. Pre-Signing

Although it is a common understanding that most disputes emerge after the closing stage, it would be correct to state the pre-closing stage has also a substantial amount of disputes within. This section attempts to shed some light on possible disputes and remedies prior to closing. Who are the parties to the dispute at this stage? The conflicts will most likely arise from the buyers within themselves, one of which violated a consortium of some sort and acquired the target without the others or they could not reach a final agreement to buy the target.¹⁴⁹ Parties may claim damages for breaching the consortium contract in arbitration. However, depending on the circumstances, it could be more secure from the perspective of the consortium members to first receive a declaratory award that the party or parties did not perform accordingly to the initial agreement. Declaratory awards require legal interest in an existent legal relationship according to German law.¹⁵⁰ Swiss law also includes the concept of

¹⁴⁶ AICPA, *ibid*.

¹⁴⁷ *ibid*.

¹⁴⁸ *ibid*.

¹⁴⁹ Julien Fouret and Alexis Mourre, 'Pre-Closing Disputes', *Arbitration of M&A Transactions: A Practical Global Guide* (1st edn, Globe Law and Business 2013) 311, 313.

¹⁵⁰ Michael E. Schneider, 'Non-Monetary Relief in International Arbitration: Principles And Arbitration Practice', *ASA Special Series No.30* (1st edn, 2011) 3, 29.

legal interest and ties it to the condition that if the claimant party can claim performance from the defendant, there are no grounds for a declaratory award.¹⁵¹ Below is an arbitration case that was concluded with a settlement as an example of disputes involving a consortium agreement.

The claimant and defendants 1 and 2 had entered into a consortium agreement (shareholders' agreement) as well as into a purchase agreement regarding the transfer of a 20% interest by defendant 1 in company X (which held a controlling interest in the company Y) to each of the claimant and defendant 2. The parties further entered into an amendment to the consortium agreement whereby claimant and defendant 2 acquired the same amount of shares each in company Y. Years later, defendant 1 acquired from defendant 2 all its shares in X as well as its shares in Y. The parties were in dispute whether the transaction entered into by defendant 1 and defendant 2 complied with the provision of the right of first refusal as contained in the consortium agreement. The claimant claimed that the transfer of shares from defendant 2 to defendant 1 constituted a breach of the consortium agreement and a violation of the principle of good faith and of the fiduciary duty among the shareholders and was thus not valid. Further, the claimant claimed to have a right of first refusal to buy half of the shares held by defendant 2. Therefore, the claimant sought an award ordering defendants 1 and 2 to rescind the allegedly unlawful transaction by re-establishing the status quo ante in compliance with the consortium agreement. Further, the claimant sought an award ordering defendant 1 to transfer to the claimant 10% of the shares in company X for an adequate purchase price as well as an award prohibiting termination of the consortium agreement by defendant 1 as long as the acquisition by the claimant of 10% of the shares had not been completed. The dividends on the shares received by defendant 1 should, it was claimed, be

¹⁵¹ *ibid.*

*reimbursed to the company X for re-distribution in compliance with the arbitral award.*¹⁵²

Frequently, the disputes arise between the ‘buyer(s) and seller(s) during the pre-signing/pre-closing phase; and ... during the post-signing/pre-closing phase.’¹⁵³ Initially at the pre-signing phase, the disputes might arise out of a party, negotiating in bad faith.¹⁵⁴ Specific performance cannot be applied in this case, as there is no binding agreement unless the fundamental components of a valid agreement exist. During the negotiation of the LOI and/or the SPA, parties have the duty to inform and advise, and act honestly in order to carry out the negotiations in good faith, which give basis to pre-contractual rights and obligations under *culpa in contrahendo*,¹⁵⁵ provided that the award can only be claimed if the claimant party has a negative interest.¹⁵⁶ There are clearly irrefutable instances for a specific performance to be sought from the arbitral tribunal such as the seller, deliberately choosing not to disclose a related and imperative document during the due diligence phase.¹⁵⁷

As it has been previously mentioned in the LOI section, the wording of the agreement and intention of the parties determine the binding nature of these provisions and the LOI. An example of an ad hoc arbitration case given by Georg Von Segesser, the tribunal has reached a decision to deem the LOI as a final, binding agreement.

The parties had acquired joint ownership of a company and entered into a shareholders’ agreement governing their relations. Subsequently, their working relationship deteriorated to such an extent that the parties explored the possibility of either one of them acquiring 100% of the shares in the company. They entered into negotiations and one party made a detailed

¹⁵² Rudolf Tschäni, *ibid.* p. 31.

¹⁵³ Julien Fouret and Alexis Mourre, *ibid.*

¹⁵⁴ Pöllath + Partners, 'Settlement of M&A Disputes by Arbitration' (2015) <<https://www.pplaw.com/sites/default/files/publications/2007/04/070420-ci-ma-deals-dispute.pdf>> accessed 28 September 2015.

¹⁵⁵ Henry Peter and Jean-Christophe Liebeskind, *ibid.* p. 274.

¹⁵⁶ Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (Cambridge University Press 2000) 172.

¹⁵⁷ Henry Peter and Jean-Christophe Liebeskind, *ibid.* p. 277.

valuation of the company. Based on this valuation, it offered, in a telephone conversation with the representative of the other party, to buy the remaining shares for a specified price. At the end of the conversation, both representatives had reached an agreement and various conditions and points discussed were to be confirmed by letter. The letter specifying the purchase in broad terms was sent and the parties subsequently resumed negotiations to implement the points set out therein. The parties exchanged various draft heads of agreement, but after several more meetings, the sellers (respondents) refused to sign the agreement; at this point, the buyers initiated arbitration proceedings to enforce the alleged agreement reached by the parties in their telephone conversation and subsequently confirmed by letter. The arbitral tribunal held that the confirmation letter constituted a valid share purchase agreement. The seller's subsequent refusal to sign the full share purchase agreement was considered to be anticipatory breach of the obligations stated in the confirmation letter. Specific performance, i.e. the sale at the price stated, was ordered by the tribunal.¹⁵⁸

If the signed letter of intent has confidentiality and exclusivity provisions, parties can seek specific performance, injunctive relief and contractual remedies in case of breach. The breach of the exclusivity provision can make the costs and expenses incurred by the injured party the subject of an award claim as an apparent consequence of the party suffering from the counter party's bad faith in negotiations. However, it is worth considering to add an arbitration agreement to the LOI in order to avoid the submission of disputes regarding the pre-signing stage to State courts. That is why an arbitration agreement included in the LOI, bearing a parallel format to the SPA is a preemptive measure to resolve pre-signing and possible disputes that could arise on later stages without fragmenting to different dispute resolution mechanisms.

¹⁵⁸ Georg Von Segesser, 'Arbitrating Pre-Closing Disputes in Merger and Acquisition Transactions' *ASA Special Series No. 24* (1st edn, 2005) 24.

4.2.6.2. Post-Signing

The second stage of pre-closing disputes involves post-signing conflicts. The disputes have more of a contractual nature since there is an SPA signed. Specific performance is also envisaged more clearly due to the contractual rights and obligations of the parties. Failure to fulfill conditions precedent prior to closing makes up the majority of the disputes at this stage. Parties also engage in covenants as part of the SPA such as binding non-compete clauses. The covenants and the conditions precedent to the closing will be laid down in details.

4.2.6.2.1. Covenants

Covenants are the pre-closing and post-closing agreements that parties execute in order to ensure each other to do and not to do certain acts within a specific period after the closing. They become conditions precedent in the process and are excessively negotiated which could give rise to contractual obligations if not fulfilled. Covenants could be affirmative as in performing the specified acts and negative in the sense of disallowing the seller from conducting behavior that could potentially harm the buyer and the transaction.¹⁵⁹ It is certainly advised to include provisions such as prohibiting the seller from engaging in out of the ordinary business transactions but require the duty to maintain the business as usual until the closing period. The seller should be abstained from settling any litigation or starting one.¹⁶⁰ No solicitation clauses -provided that the jurisdiction permits such a clause-, non-compete, access to information, confidentiality, directors' and officers' indemnification and insurance, matters of employees and employee benefits, stockholder approval would be the typical covenants between the seller and the buyer.¹⁶¹

4.2.6.2.2. Conditions Precedent

¹⁵⁹ AICPA, *ibid.*

¹⁶⁰ Ballard Spahr, 'Covenants in M&A Transactions' (*Lexology.com*, 2012) <<http://www.lexology.com/library/detail.aspx?g=cb1ad8bb-9728-47e9-bffe-8b59107817f3>> accessed 29 September 2015.

¹⁶¹ *ibid.*

Conditions precedent are the specific events or acts in which the happening of will bind the parties to the SPA and lead to closing of the transaction. Conditions precedent include the following as Agaoglu lays out¹⁶²:

- *governmental, regulatory and similar authorizations, permits, concessions, etc.;*
- *correctness of representations, warranties, guarantees;*
- *no material adverse changes;*
- *satisfaction with the due diligence process, in particular receipt of reports or letters from the accountants, consultants, professional advisors, etc.; and*
- *receipt of required letters of consent, e.g., from licensors, the principle of a distributor relationship, banks, etc.*

4.2.6.2.2.1. Antitrust Arbitration

Government related requirements are one of the most important conditions precedent to closing. Parties usually set a date for conditions to be fulfilled, if not, closing does not occur. Industries may entail specific reports, permits, etc. Cross-border M&A deals are subject to competition rules and the investigation of the competent competition authority to receive clearance on moving forward with the transaction. If the merger appears to distort competition in the specific market of the country of transaction or the internal market as in EU, the authority will not give its authorization and the deal will not reach to the closing stage. European Commission monitors the M&A activity within the borders of the union. All horizontal and vertical agreements that have a value above the monetary threshold set by the Commission go through an investigation.

In an ICC arbitration, the conditions precedent, including an EU merger clearance from the European Commission, had to be obtained by a given date or else the deal would not occur. Since this clearance was not so obtained, the seller sued the buyer alleging that it did not take all the actions necessary to obtain the clearance and claimed for damages. On its part, the buyer

¹⁶² Agagoglu, *ibid.* p. 86.

*indicated that since the conditions precedent had not been met, the promissory agreement had expired and no closing could occur. Based on the facts of the case, the wording of the agreement and the intent of the parties considered under the applicable law, the arbitral tribunal held that the buyers had adopted a reasonable approach, under the circumstances, and that they were thus not negligent nor did they act wrongfully.*¹⁶³

As one can observe from this case, parties' actions do not amount to much when there is an external authority that can terminate the whole transaction and the dispute will be with the competent competition authority onwards. Claiming damages should be plausible if the party that applied for clearance from the competition authority was objectively negligent and did not conduct a decent diligence.

Anti-trust matters can be resolved in arbitration. The disputes could be between the partners, e.g. a joint venture, buyer and seller, third party conspiracy to damage the first party and of course between competitors.¹⁶⁴ It is important to consider the legislations and case law of the jurisdictions where the deal will be executed. For example, under Swiss law, arbitration of competition law is permissible.¹⁶⁵ The scope of arbitration in the dispute resolution clauses need to express clear intention on arbitrating antitrust issues.

In *Mitsubishi v. Soler*, the Supreme Court decided that regardless of the substantive law of the contract, arbitrators will apply the competition law rules of the country giving rise to the claims due to public policy.¹⁶⁶ Additionally, the parties need to include clear

¹⁶³ Julien Fouret and Alexis Mourre, *ibid*.

¹⁶⁴ Donald I. Baker and Mark R. Stabile, 'Arbitration of Antitrust Claims: Opportunities and Hazards For Corporate Counsel' (1993) 48 *The Business Lawyer* pp 398-400.

¹⁶⁵ ATF 118 II 193, decision of 28 April 1992.

¹⁶⁶ Robert B. Von Mehren, 'The Eco-Swiss Case And International Arbitration' (2003) 19 *Arb. Intl.* 465, 466

Also see Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) '...Respondent's antitrust claims are arbitrable pursuant to the Arbitration Act. Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question even assuming that a contrary result would be forthcoming in a domestic context. *See Scherk v. Alberto-Culver Co.*, *supra*. The strong presumption in favor of freely negotiated contractual choice-of-forum provisions is reinforced here by the federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce. The mere appearance of an antitrust dispute does not alone warrant invalidation of the

provisions to the arbitration agreement in regards to the arbitration of statutory rights that fall under Sherman Act.¹⁶⁷ From an EU perspective, if a party presents an issue under the EU competition law, the tribunal should investigate the issue by applying the EU law even though the substantive law is a non-member state law.¹⁶⁸ As a milestone case, the decision on *Eco Swiss*¹⁶⁹ showed that ECJ refrained from interfering with the arbitration as a dispute resolution mechanism in antitrust conflicts and an award that is enforceable and final. In order to avoid setting aside of the award due to public policy under the New York Convention, arbitrators should apply the relevant competition laws and the jurisdiction of such application should be given to do so in the dispute resolution agreement of the parties.

A third party may want to utilize the commitment of the merging party, in which the commitment is incorporated into the Commission's decision; opening the possibility of rejecting the third party's demands that will commence the dispute resolution proceedings.¹⁷⁰ *Vodafone Airtouch/Mannesmann* decision of EC is a great example of the Commission's recognition of arbitration in the form of a fast track dispute settlement mechanism.¹⁷¹

"In order to respond to the Commission's serious doubts regarding the market for the provision of advanced mobile telecommunications services to internationally mobile customers, Vodafone Airtouch has submitted undertakings aiming at enabling third party non-discriminatory access to the merged entity's integrated network so as to provide advanced

selected forum on the undemonstrated assumption that the arbitration clause is tainted. So too, the potential complexity of antitrust matters does not suffice to ward off arbitration; nor does an arbitration panel pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. And the importance of the private damages remedy in enforcing the regime of antitrust laws does not compel the conclusion that such remedy may not be sought outside an American court. Pp. 473 U. S. 628-640.'

¹⁶⁷ Phillip Landolt, 'Arbitration and Antitrust: An Overview Of EU And National Case Law' (2012) <http://www.landoltandkoch.com/wp-content/uploads/2012/07/Landolt_ArbitrationAntitrust_e-Competitions.pdf> accessed 29 September 2015.

Sherman Act is a federal statute in US antitrust law

¹⁶⁸ David Mamane and James U. Menz, 'Practical Challenges in Arbitrating Antitrust Claims' [2011] *Competition Law International* 16.

¹⁶⁹ ECJ Decision 1st of June, 1999, *Eco Swiss*, Case C-126/97, [1999] ECR I-3055.

¹⁷⁰ Paul Peyrot, 'Expert Determination of Competition Issues', *Practical Aspects of Arbitrating EC Competition Law* (1st edn, Schulthess 2007).

¹⁷¹ *ibid.*

*mobile services to their customers. These undertakings cover exclusive roaming agreements, third parties' access to wholesale arrangements, standards and SIM-cards and a set of implementing measures aimed at insuring their effectiveness. In particular, Vodafone Airtouch has proposed to set up a fast-track dispute resolution procedure in order to solve disagreements between the merged entity's group and third parties on third parties' access to roaming arrangements, third parties' access to wholesale arrangements, standards and SIM-cards."*¹⁷²

Marc Blessing points out the frequent decision of the Commission that gives rise to pathological dispute resolution clauses by stating 'arbitration by mutually independent experts.'¹⁷³ In antitrust conflicts, it is possible to resort to expert determination. Nevertheless, it is not wise to use an expert who is only endowed with technical knowledge to be entrusted with issues that might need legal interpretations. The fact that arbitration awards have finality and enforceability under the New York Convention and that there are far lesser grounds for challenging the decision of the arbitration panel makes it more appealing to choose arbitration as the ADR mechanism in case of antitrust disputes.

4.2.6.2.2.2. Material Adverse Change

Material adverse change clauses are one of the heavily negotiated conditions precedent to closing. No material adverse change provisions protect the buyer from the prospect of an occurrence that has a weighty adverse effect in the value of the seller's business. The buyer thus, gains the right to revoke the SPA and not to engage in the closing of the transaction. A typical no material adverse change clause is as follows:

No Material Adverse Change. Since the date of the Balance Sheet, there has not been any material adverse change in the business, operations, properties, prospects, assets or condition

¹⁷² Decision of 12 April 2000, Case Comp./M. 1795.

¹⁷³ Marc Blessing, 'Arbitrating Antitrust and Merger Control Issues' (2003) 14 Swiss Commercial Law Series 163.

*of any Acquired Company, and no event has occurred or circumstances exist that may result in such material adverse effect.*¹⁷⁴

As seen in the sample clause MACs can cover material changes in financial conditions as well as prospects etc. that would profoundly damage the company's worth to the purchaser. However, it is not advisable to have a broad MAC clause as it will be difficult to determine the intention of the parties in specific situations such as liabilities. A clause that would cover situations that have potential adverse effect on the target's business can be exemplified here:

*For purposes of this Agreement, a "Material Adverse Effect" shall mean any event, occurrence, change in facts, conditions or other change or effect which has resulted or could reasonably be expected to be materially adverse to any of the following: the Company, its business, its prospects, operations or results of operations, the condition (financial or otherwise) of the Company or any material asset (including, without limitation, any Material Contract). For purposes hereof, an event, occurrence, change in facts, conditions or other change or effect which has resulted or could reasonably be expected to result in a suit, action, charge, claim, demand, cost, damage, penalty, fine, liability or other adverse consequence of at least \$150,000 shall be deemed to constitute a Material Adverse Effect.*¹⁷⁵

The effect of a MAC clause is similar to a force majeure clause.¹⁷⁶ The buyer can withdraw from the transaction without any claims for damages from the target or break-up fees. Expert determination and arbitration are both viable dispute resolution mechanisms when a party invokes a MAC clause. If there is no need for legal interpretation of a financial condition to be determined, choosing an expert to determine the issue would be the cheaper

¹⁷⁴ Joseph B. Alexander, Jr., 'The Material Adverse Change Clause' [2005] *The Practical Lawyer* <http://files.alicicle.org/thumbs/datastorage/lacidoirep/articles/PL_TPL0510-Alexander_thumb.pdf> accessed 30 September 2015.

¹⁷⁵ *ibid.*

¹⁷⁶ Agagoglu, *ibid.* p. 90.

and faster option. A claim for a declaratory award is possible in order to establish the fact that a certain event that is in the scope of the MAC clause had diminished the value of the target company gravely.

Litigation is unpredictable in terms of MAC disputes and generalization of the disputes is difficult due to their complexity.¹⁷⁷ The most common objects of MAC can however be narrowed down ‘the company’s business, financial condition, and results of operations ... followed somewhat distantly by assets.’¹⁷⁸ There are also exceptions to MAC which the parties may choose to implement into the agreement such as ‘general changes in the economy, financial markets, or the industries in which the party operates, as well as changes in law or GAAP, or force majeure events like war, terrorism, or natural disasters.’¹⁷⁹ Since the parties have the choice to select an accounting/finance expert, he/she will properly decide the business’ capability of producing profits, compare earnings and calculate changes.¹⁸⁰ However, now there is the question of what time periods and financial statements should be taken into account when answering the parties’ question. If the contract is silent, interpretation might be required. Since expert determination is a contractual ADR mechanism, parties can mutually agree and let the expert interpret just as a court would.

4.3. Closing Stage of the Transaction

If the aforementioned stages went smoothly where covenants, conditions precedent such as no material adverse changes, acquiring necessary permits and clearances from governments and competition authorities, correctness of representations and warranties are fulfilled, the closing stage of the transaction is initiated. A satisfactory due diligence might be agreed on by the parties prior to closing since the target company now considers it more

¹⁷⁷ Robert T Miller, 'Canceling The Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements' (2009) 31 Cardozo Law Review 99, 122.

¹⁷⁸ Robert T Miller, *ibid.* p 116.

¹⁷⁹ Robert T Miller, *ibid.* p 118.

¹⁸⁰ Robert T Miller, *ibid.* P 127.

secure to disclose highly sensitive information and documents due to a binding SPA between the parties.¹⁸¹

At this stage, payment of escrow accounts and the transfer of assets or shares depending on the deal is made subsequent to the payment of the purchase price, possibly following the drafting of the final balance sheets and purchase price adjustment procedures as the payment of the purchase price might not be the final. Purchase price can be paid in cash, securities, a combination of both, or with a promissory note.¹⁸² If the buyer cannot pay up front in full amount, a promissory note is issued by the buyer to pay the purchase price over a specific time and the note is 'secured by certain assets of the buyer (including the assets of the target) and/or guaranteed by one or more affiliates of the buyer.'¹⁸³

Auditors are usually participating this process in order to 'asses the actual value of the target based on the agreed parameters (net asset value, discounted cash flow, turnover, EBIT or EBIDTA, etc., multiplied by an agreed number if appropriate)' and finalized in the drafting of the closing accounts.¹⁸⁴ The post-closing purchase price adjustments and its possible disputes will be extensively examined in its specific section below. Parties could also agree on earnout adjustments. Upon closing, the target company will go through an integration stage at the end in which company restructuring is almost a definite likelihood.

4.3.1. Post-Closing Disputes

Majority of the disputes arising out of M&A transactions happen during the post-closing stage. The parties to the dispute are generally buyer(s) and seller(s) and the post-closing disputes are mainly consisted of representations and warranties and purchase price adjustment though not exclusively. For instance, earnout adjustments and escrow arrangements, initiating of the put and call options can also give rise to numerable disputes.

¹⁸¹ Henry Peter, *ibid.*

¹⁸² Craig Circosta and Jocelyn K O'Brien, "Purchase Price and Post-Closing Adjustments | Lexology" (*Lexology.com*, 2012) <<http://www.lexology.com/library/detail.aspx?g=bae3540e-7799-481f-a0e2-4a5ce9d450f2>> accessed 22 February 2016.

¹⁸³ *ibid.*

¹⁸⁴ Henry Peter, *ibid.*

If a party terminates a deal after the signing of the SPA, the agreement might be silent in case of such a situation. The injured party may claim possible remedies from the arbitration panel for negative, positive, punitive (not in Swiss law) and liquidation damages.¹⁸⁵

4.3.1.1. Representations and Warranties, Indemnification Clauses

Representations and warranties give rise for potential disputes in post-signing but pre-closing as well as post-closing stage of the M&A transaction. Parties generally set time limitations for representation and warranty claims. Representations concern the current status and facts about the target and a list of statements regarding various issues of the past while warranties are the promises involve events of a future date. There are no definitive sets of representations and warranties as the provisions are altered accordingly to the businesses' practices and characters. An indemnity clause is aimed to protect the buyer and provide dollar for dollar compensation in case the seller breaches the covenants, representations or warranties¹⁸⁶ and thus, in case the buyer cannot claim damages due to remoteness of loss and mitigation, the indemnities still cover the losses – depending on the wording [i.e. indemnity as a debt claim].¹⁸⁷

What the representations and warranties cover is that 'the correctness of the company's financial statements [in accordance with GAAP] and all financial data, tax and social security, legal compliance, business authorizations, and all other relevant aspects such as, for instance, the assessment of ongoing contracts, change of control provisions, intellectual property rights, environmental issues, litigation, insurance and many others may be dealt with.'¹⁸⁸ Possible misrepresentations include issuing false statements by the target company either unintentionally or in a fraudulent or negligent manner that had a material effect on the

¹⁸⁵ Henry Peter, *ibid.* p. 12.

¹⁸⁶ Ross McNaughton and Matthew Poxon, *Company Acquisitions: Representations Warranties and Disclosure* (1st edn, 2014) <[http://www.paulhastings.com/docs/default-source/PDFs/wldoc-14-1-28-12_4-\(pm\).pdf](http://www.paulhastings.com/docs/default-source/PDFs/wldoc-14-1-28-12_4-(pm).pdf)> accessed 17 February 2016.

¹⁸⁷ David Gerber and Craig Hine, "Contractual Indemnities? Drafting Effective Clauses | Clayton Utz" (*Clayton Utz*, 2013) <http://www.claytonutz.com/publications/news/201305/01/contractual_indemnities_drafting_effective_clauses.p age> accessed 17 February 2016.

¹⁸⁸ Wolfgang Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes' (2003) 19 *Arb. Intl.* 493.

buyer to engage in the transactions, giving the entitlement to the buyer to not only revoke the agreement, but also claim damages in tort.¹⁸⁹ If the party does not wish to resort to any of these outcomes, it may be requested from the tribunal to adjust the purchase price in accordance to the deteriorated value in the target company. An arbitration case example with an unknown award decision due to the confidentiality clauses in the dispute resolution agreement is as follows:

*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 share price and claimed the breach of contractual warranties entitling it to a reduction in the purchase price.*¹⁹⁰

If parties fail to define the representations and warranties in detail, disputes may arise due to the blurry scope. Definitive agreements can tailor the seller's obligation as well as providing a minimum threshold for liability.¹⁹¹ Moreover, 'the parties can determine a materiality limitation, whereby they exclude the seller's liability below a certain minimum amount, and they can also cap it at a maximum amount. This minimum limitation can be a tipping basket, where a lower limit for damages and a minimum amount for each individual claim can be set forth before the seller is held liable to compensate the buyer. Further, the tipping basket can have a deductible structure, so the seller's indemnification obligation is limited to damages exceeding the lower limit. This is opposed to a first dollar tipping basket structure, where the seller's obligation to indemnify would cover all damages once the lower limit is reached.'¹⁹²

A case example that was settled before an award was made shows a typical

¹⁸⁹ Dechert LLP, 'English Law Sale and Purchase Agreements – Issues to Consider' (2015) <https://www.dechert.com/files/Uploads/Documents/M_and_A_Transactions_Seminar_ENG.pdf> accessed 30 September 2015.

¹⁹⁰ Bernd Ehle, *ibid.* p. 294.

¹⁹¹ Ismael Esin, Özgün Çelebi, et al., Chapter 10: Arbitrating M&A Disputes in Ismael Esin and Ali Yesilirmak (eds), *Arbitration in Turkey*, (© Kluwer Law International; Kluwer Law International 2015) 278.

¹⁹² *ibid.*

dispute that may arise from breach of representations and warranties:

In an ICC arbitration proceeding, the parties disputed whether a share purchase agreement was validly entered into (material error and/or wilful misconduct) and whether representations and warranties were complied with. The claimant sought, inter alia, an arbitral award for partial rescission of the share purchase agreement, i.e. for a reduction of the purchase price, for fundamental error. The claimant alleged that its decision to enter into the share purchase agreement was primarily based on a valuation conducted in accordance with the discounted cash flow method. The claimant relied upon the defendant's EBITDA and CAPEX forecasts, which were alleged to be wrong in view of the data available to the defendant already at the time the share purchase agreement was concluded. It was further alleged that the defendant breached his duty to inform the claimant with regard to the substantial deviation from the actual figures from the forecast.¹⁹³

On a different note, *Infinitel Ltd v. Artisan Contracting Ltd*.¹⁹⁴ established that if a buyer knows about the breach of representations and warranties at the time of the signing of the SPA, damage claim is not possible. The expectancy from the buyer to acquire knowledge of the disclosed issues and/or warranties should be reasonable. If the seller presented exceedingly complex documents that are buried underneath so many other documents and data, it cannot be objectively expected from the buyer to be informed. This is a good defense from a buyer's point which the seller should take special caution in disclosing of significant documents.

Parties may choose expert determination or arbitration depending on their situation and the dispute. If a warranty claim is either about 'improper recognition or classification of revenues or expenses in the accounts; overstatement or understatement of balance sheet items, such as inventories, receivables and liabilities; overstatement or

¹⁹³ Tschäni, *ibid.* p. 45.

¹⁹⁴ [2004] EWHC 955.

understatement of off-balance sheet items such as contingent liabilities¹⁹⁵ expert determination would provide an accurate result that is financially unburdening. Environmental warranty claims can also be submitted to expert determination as the issues need technical and scientific knowledge and is not connected to other contractual issues and disputes that may need the legal input of an arbitrator.

In case there are threshold clauses with time limitations, declaratory awards by an arbitral tribunal should be advantageous. For instance, when a warranty claim is ‘about to be time-barred, does not meet the necessary threshold value and if it cannot be ascertained yet whether there are any further claims relevant in relation to the threshold that will expire at a later date (eg. arising from later tax assessments), a declaratory award may be obtained for the determination of a warranty claim dependent on the existence of further claims.’¹⁹⁶

4.3.1.2. Earnouts

A portion of the purchase price to be paid to the seller can be dependent on the performance of the target’s business. The earnout provisions can be either drafted in the SPA or in a separate agreement. Why is it advantageous? First of all, it keeps the seller engaged in the business after the transaction as most customers/clients and sub-contractors might feel more inclined to keep their business with the target company. Secondly, if the target’s business does not prosper as it was advertised to be, the risk of paying excessively to a not so lucrative business decreases. Benchmarks are divided into two categories: financial and non-financial.¹⁹⁷

Financial benchmarks are consisted of ‘target’s net the target’s net revenue; net income; cash flow; earnings before interest and taxes “EBIT”; earnings before interest, taxes, depreciation and amortization or “EBITDA”; earnings per share; net equity’¹⁹⁸ whereas non-financial benchmarks are determined with positive publicity and awards that the target

¹⁹⁵ Zbigniew Jusiś, Witold Rzewuski, 'Calculation of Damages in M&A Arbitration Proceedings' *Arbitration E-Review* (2013).

¹⁹⁶ Wach, Meckes, *ibid.* p. 73.

¹⁹⁷ Leigh Walton and Kevin D. Krebs, 'Purchase Price Adjustments, Earnouts And Other Purchase Price Provisions', *American Bar Association Section of Business Law* (2005) 21.

¹⁹⁸ Leigh Walton and Kevin D. Krebs, *ibid.* 22.

achieve in doing its business. Submitting disputes regarding earnout provisions to expert determination is more practical since they are mostly accounting related.

4.3.1.3. Purchase Price Adjustments

The determination of the purchase price could be in a locked box mechanism where the purchase price is fixed with the foreseen adjustments, in which the buyer's interests are protected by no MAC clauses; but mostly, parties decide to select an adjustment process either with cash/debt free or working capital models.¹⁹⁹ Purchase price adjustment disputes are essentially the leading reason for conflict between the parties that resort to an ADR mechanism at the post-closing stage. It is basically the adjustment of changes in value based on the pre-closing financial statements and the final balance sheets (closing account) at the date of closing. The main advantage of the PPA is that the seller will try to maintain the business and keep it thriving with the incentive of a prospective positively adjusted purchase price.

Wolfgang Peter divides the purchase price adjustments into two categories. First distinction is the 'provisions dealing with the net asset value of the target company, which compare a closing balance sheet with a predefined earlier reference balance sheet, thus computing the difference of the net asset values between these two financial statements and adjusting the price accordingly.'²⁰⁰ The second distinction is based on earn-out provisions, as they were specified on the previous section above, and these provisions 'usually provide that a contractually defined portion of the purchase price will be determined by such future data, using a pre-established formula, respectively multiplier.'²⁰¹ What are the frequent disputes arising out of the process of determining the closing balance sheet? As Wolfgang Peter laid down:

- *governing accounting rules and principles [seller could have accounting practices that are in violation of GAAP. Wolfgang Peter also stresses on the point that if the buyer purposefully placed a bid in the auction for a purchase price that was exceeding*

¹⁹⁹ Clifford Chance, *ibid.*

²⁰⁰ Wolfgang Peter, *ibid.* p. 493.

²⁰¹ *ibid.*

their intention, and decisively implemented a PPA mechanism to lower the price at the closing stage due to the prior knowledge of the violation of accounting principles, it does not entitle a price reduction to the buyer.],

- *principle of continuity, in practice difficult and highly litigious,*
- *materiality standards,*
- *revenue recognition issues (at which point in time must the revenue be recorded? how to handle pre-invoicing?),*
- *amortization and depreciation issues, particularly inventory and receivables,*
- *deferred income and expenses,*
- *percentage of completion method in evaluating long-term projects,*
- *consolidation issues,*
- *impact of exchange rate fluctuations; and*
- *basis of provisioning for litigation or contingencies.*²⁰²

Sample dispute:

*Richard Hoeft III v. MVL Group, Inc. et al*²⁰³, the parties had agreed that the seller could, after paying a portion of the price for the purchased stock until the following year, 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 favour 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

²⁰² Wolfgang Peter, *ibid.* pp. 500-501.

²⁰³ Decision of September 2nd 2003, 343 F. 3d 57 (2nd Cir 2003).

*United States Court of Appeals for the second Circuit, however, reversed and remanded that decision, upholding the principle of finality in the arbitral process.*²⁰⁴

Expert determination is a common choice of ADR along with arbitration in purchase price adjustment disputes.²⁰⁵ It is highly critical to differentiate between expert determination and arbitration for the sake of an accurate and timely dispute resolution process and outcome. It will not be further explained here as they were pointed out in the expert determination chapter in detail. Before resorting to arbitration or expert determination, it is important to define the scope of disputes and items that are subject to ADR. Parties are not in the most amicable and cooperative dispositions when a dispute arises. The ADR clause should foremost leave it to the tribunal to interpret and determine the importance of the balance sheets and other accounting items before resorting to expert determination. Arbitrators can also distinguish whether the claim is a PPA claim or an indemnity claim for the breach of representations and warranties.²⁰⁶ This approach of a multi-tier dispute resolution mechanism would save time and considerable amount of money for both of the parties to the dispute.

4.3.1.4. Escrow Arrangements

If parties determine that closing will be combined together with an escrow arrangement, then the purchase price and 'the shares are deposited with the escrow agent who will pay the purchase price to the seller and deliver the shares to the buyer at the time of closing.'²⁰⁷ Escrow arrangements are increasingly used as a security measure in order to protect the buyer from a breach in representations and warranties.

An arbitral tribunal can render a specific performance that includes the escrow agent, paying the deposited purchase price to the selected parties by the tribunal, as well as handing the shares to the buyer. This is undesirable from the parties' point of view, since a

²⁰⁴ See Bernd Ehle *ibid.* 297. And

²⁰⁵ *ibid.*

²⁰⁶ Maia Mishveladze, 'Arbitration of Purchase Price Adjustment Disputes in M&A Transaction' (MLB, Bucerius/WHU 2012) 33.

²⁰⁷ Tschäni, *ibid.* p. 42.

third party joinder complicates the procedures.²⁰⁸ However, since litigation takes much more time and financial resources, an arbitration agreement that is drafted in a parallel manner to the SPA or the APA that reflects the parties' intention to consolidate possible future proceedings is a good idea. 'The scope of arbitration is a matter of agreement between the parties. A party can be compelled to arbitrate only those issues it has agreed to arbitrate ... the terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested.'²⁰⁹ Therefore, the drafting of the arbitration agreement and covering a broad scope of disputes as well as a broad time line are the determining factors here.

²⁰⁸ *ibid.*

²⁰⁹ *Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705

5. CONCLUSION

This dissertation is mainly concentrated on arbitration and expert determination as ADR mechanisms that could be applied to the disputes arising out of cross-border M&A transactions. It is intentionally not confined to a mere comparison of two jurisdictions in order to show the differences in legislations and practices and serve as a guide. It is understood with the complex nature of these transactions, the drafting of the dispute resolution agreement requires great care and caution. Certainly, it cannot be expected from the parties to predict every possible disputes that may surface from the beginning of the transactions. What can be done? First of all, an amicable negotiation of the dispute clauses prior to a conflict will accomplish the procedures to go through smoothly since it is almost unattainable to reach to a consensus after a dispute arises. The parties' negotiation powers and the amount of leverage they obtained have the dominant effect regarding the implementation of the dispute resolution terms.

Parties should make sure to draft an ADR agreement that comprises all the disputes with the stakeholders, as potential claims such as first refusal etc. should not result in parallel proceedings in courts or an unenforceable award. Referencing the ADR clauses with clarity in all the relevant transaction contracts is also a must in order to ensure a viable dispute resolution process. As it can be observed from the numerous court decisions above, the ambiguity of the scope of ADR mechanisms do result in undesirable outcomes as the courts could overturn awards. Arbitrators' and experts' scope of power should be clear.

The choice of seat of arbitration (especially for ad hoc arbitration) has the fundamental impact along with the substantive law to be applied to the dispute. For instance, if a jurisdiction does not allow the granting of an interim measure by the arbitrators and the possible disputes require a number of injunctive relief remedies, it would be best to either opt for a different law or submit some of the disputes to the State courts. Document production and taking of evidence clauses need to be carefully constructed in cross-border M&A cases which is due to the different law systems where excessive document production allowance can slow the process of settling the disputes. National arbitration and procedural laws that have a direct relationship with the transaction should be examined in utmost attentiveness in

order to refrain from creating invalid dispute resolution clauses that are enforceable under the New York Convention.

Multiparty and multi-contract situations are especially challenging for parties to obtain a desired and well executed ADR proceedings. It is also challenging for the arbitrators in terms of interpreting the intention of the parties. Consolidation, for example, if not drafted and referred in the related agreements, can require the consent of the other parties which in most case is virtually problematic. The agreements should have compatibility with one another. Again, an ADR agreement should be reflecting the clear intention and scope of disputes that provide a wide discretion to the arbitrators and prepared in conjunction with guidelines such as the IBA Guidelines and internationally recognized arbitration rules, e.g. UNCITRAL Rules or institutional rules. In practice, cross-border M&A disputes with high monetary values are increasingly referred to institutional arbitration. As suggested in this dissertation, due to the complexities of the transaction, advantages of an institution with a professional and experienced pool of arbitrators, and at the same time experts if possible, prevail as opposed to ad hoc arbitration. It may be vital to select an institution when the financial stakes are high and there are multi-party and contract issues such as consortiums.

Expert determination has been a widely popular ADR mechanism especially in countries such England. Advantages offer speedier and inexpensive results. In cross-border M&A disputes purchase price adjustment, earnout, intellectual property, representation and warranty disputes that require technical and/or accounting valuation are suitable to be submitted to expert determination. However, lack of procedural rules regarding expert determination complicate and slow down the development and evolution of the mechanism as there is no proper guidance as well as enforceability. The legislative systems need to adapt to the ever-changing dispute resolution mechanisms and their progress.

The fact that liabilities, procedural conduct and whether or not the outcome will be binding of the expert determination are purely left to contractual terms, result in creating blurry lines especially when used as a carve out dispute resolution method with arbitration. It is more than possible that parties slack off on drafting an efficient agreement and thus, courts and arbitrators have often face difficult tasks while attempting to interpret the intention as demonstrated with various court decisions. Therefore, while paying attention to the wording of the agreement, the parties need to clearly state the substantive law as well as the seat where

the determination will take its place, the scope of powers of the expert and the timeline in which the appointment of the expert will be executed. Also, it would be helpful if other agreements that have a connection to the SPA is endowed with similarly drafted ADR contracts in order to avoid parallel proceedings.

The needs of the parties and the structure of the transaction will shape the multi-tier/carve-out dispute resolution method. It is impossible to make a generalization without understanding the relationship of the parties and the what the deal includes. For instance, a Material Adverse Change that occurred might have merely a financial effect that only requires the valuation of an accountant. On the other hand, the change might be a new litigation on the target's side which has the probability of harming the prospects of the company to be acquired. In that case, a tribunal may rule whether a material adverse change has occurred according to the contract. There is a problem, however, if the parties draft the possible disputes and corresponding ADR mechanisms too specifically as it might cost them the opportunity of using multiple ADR mechanisms in a flexible way to achieve the fastest and most effective resolution.

Before resorting to expert determination first, it could be sometimes necessary to explicitly allow the arbitrators to make the necessary legal interpretations on items that are sensitive and vital that will be subject to expert determination could be beneficial so that courts cannot set aside the awards due to public policy and contractual breach. Depending on the issue, it could also be easier for the tribunal to appoint experts, if possible, and resolve the dispute. However, the terms of reference should not give rise to court intervention and interpretation of the said terms after the determination has been made, which would destroy the purpose of choosing expert determination. The expert's determination can be held as a proof if not agreed to be binding but it is indeed the arbitrators' or the judge's prerogative to appoint their own expert and determine the validity of the determination. Parties should create terms of reference that can be easily adjusted to their possible needs and make sure both parties have equal right to be heard since there are no witness testimonies and the taking of evidence is extremely limited.

In cross-border transactions, different laws and legal systems that are explained in the chapters above prove the need for a local counsel to understand the ADR mechanisms in different countries, overcome language and cultural barriers and oversights of information

that could be vital for the buyer/seller. Also, a well executed due diligence is the most important protection against litigation, unexpected liabilities and disputes that could have been avoidable as it will guard the buyer from engaging into a transaction that will be possibly financially draining. Representations and warranties, indemnities and PPA terms should be negotiated carefully as a result of the due diligence to minimize the risk of damages.

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ABSTRACT – ENGLISH

The thesis I have written attempts to inform the reader on two widely popular Alternative Dispute Resolution (ADR) Methods and their applications to disputes regarding cross-border M&A transactions. My methodology of research was mainly using the case law, various law journals, websites and books. I aimed to include different national arbitration laws as examples to demonstrate contrasts between international standards of the arbitral institutions and national laws. Even though arbitration and expert determination are frequently used in this type of transaction, parties often make drafting mistakes that lead to litigation. It partially stems from lack of knowledge of the national laws and arbitration practice of the other party's country, as well as drafting too detailed or too vague ADR provisions where the scope of the arbitration agreement or the terms of reference of the expert determination is uncertain. I have shown the contractual and consensual aspects of the said ADR mechanisms while stressing the importance of taking the intentions of the parties as priority in deciding which mechanism is to be used for the dispute at hand. That is why I emphasized the significance of clear drafting and the importance of internationally recognized rules in doing so. I hoped to portray the effectiveness – both financial and time wise – of these modern dispute resolution mechanisms, used as carve-out/multi-tier, as opposed to litigation in a traditional State court system. I have provided examples from different legal systems to prove the effect of national laws on the arbitration proceedings. As it is already common knowledge, some countries are rather restrictive and some are more arbitration friendly. Hence, parties need to gravely consider all aspects before selecting the seat of arbitration and the substantive law. Arbitration and expert determination are possible in every stage of the transaction. The agreements that are carried out in connection to the SPA should have parallel ADR agreements in order to avoid multiple types of proceedings. However, drafting a very good dispute resolution agreement does not suffice on its own; conducting a well-rounded due diligence and carefully negotiating indemnities, representations & warranties are important for the protection of the parties. Therefore, I reached to the conclusion that cross-border transactions benefit from legal counsels in terms of language, culture and proximity to information. As a consequence of my research, I have observed that legislations regarding the procedural rules for expert determination have not yet surfaced and we have only case law to rely on. Since case law is generally not binding in continental Europe, the problems that arise from lack of legislations on expert determination prove that law makers should catch up with the new methods of dispute resolutions.

ABSTRACT – GERMAN

Meine Masterarbeit hat zum Ziel den Leser über zwei alternative Streitbeilegungsmethoden - Alternative Dispute Resolution (ADR) Methods – sowie über deren Anwendung in Streitigkeiten im Bereich grenzübergreifender M&A Transaktionen zu informieren. Meine Forschungsmethodologie beruhte hauptsächlich auf Präzedenzrecht, diverser rechtlicher Fachjournale, Webseiten und Bücher. Ich habe beabsichtigt, unterschiedliche nationale Schiedsverfahren als Beispiele heranzuführen, um Gegensätze zwischen internationalen Standards der Schiedsgerichte und nationalem Recht aufzuzeigen. Obwohl Schiedsverfahren und Schiedsgutachten in dieser Art von Transaktionen häufig zur Anwendung kommen, begehen Parteien oft Formulierungsfehler welche zu Rechtsstreitigkeiten führen. Zum Teil ist dies auf die fehlende Kenntnis nationaler Rechtsvorschriften und Streitbeilegungs-Praktiken des Landes der anderen Partei zurückzuführen, aber auch auf zu detaillierte bzw. zu vage Formulierungen von ADR Bestimmungen, in denen der Geltungsbereich des Schlichtungs-Abkommens oder die Richtlinien der Schiedsgutachten ungewiss sind. Ich habe die vertraglichen und die auf gegenseitigen Einvernehmen beruhenden Gesichtspunkte der erwähnten ADR Mechanismen aufgezeigt, sowie die Wichtigkeit hervorgehoben, bei der Entscheidungsfindung hinsichtlich der im Streitfall anwendbarer Mechanismen die Absichten der Parteien als Priorität heranzuziehen. Aus diesem Grund habe ich die Bedeutsamkeit klarer Formulierungen und dabei die Wichtigkeit international anerkannter Regeln betont. Meine Absicht war es, die finanzielle als auch zeitliche Effektivität dieser modernen Streitbeilegungsmethoden (im carve-out/multi-tier Gebrauch) darzustellen, im Gegensatz zu Prozessen im traditionellen staatlichen Gerichtssystem. Ich habe Beispiele aus unterschiedlichen Rechtssystemen angeführt um den Effekt von nationalem Recht auf Schlichtungsverfahren nachzuweisen. Wie allgemein bekannt, sind manche Länder in dieser Hinsicht eher restriktiv, während andere Länder Schlichtungsverfahren gegenüber wohlgesinnter sind. Parteien müssen daher alle Aspekte gründlich bedenken bevor sie den Sitz des Schiedsgerichts und das anzuwendende materielle Recht wählen. Schiedsverfahren und Schiedsgutachten sind in jeder Phase einer Transaktion möglich. Abkommen, die in Verbindung mit dem Unternehmenskaufvertrag abgeschlossen werden, sollten parallele ADR Abkommen beinhalten, um mehrfache Verfahrensarten zu verhindern. Die Formulierung eines sehr guten Streitbeilegungsabkommens allein ist aber nicht ausreichend; das Umsetzen einer umfangreichen Sorgfaltspflicht sowie umsichtiges Aushandeln von Haftungen, Zusicherungen und Gewährleistungen sind zum Schutz der Parteien wichtig. Ich bin daher zum Schluss gekommen, dass grenzübergreifende Transaktionen hinsichtlich der Sprache, Kultur, und Nähe zu Information von Rechtsbeistand profitieren. Als Folge meiner Forschung habe ich festgestellt, dass Gesetzgebungen in Bezug auf Prozeduren und Regeln für Schiedsgutachten noch nicht ausgestaltet sind und man daher lediglich auf Präzedenzrecht zurückgreifen kann. Da Präzedenzrecht im Allgemeinen in Kontinentaleuropa nicht bindend ist, bezeugen die Probleme, die sich aus der fehlenden Gesetzgebung für Schiedsgutachten ergeben, dass Gesetzgeber mit den neuen Streitbeilegungsmethoden aufholen sollten.