



Arbitration in merger and acquisition transactions : problem of consent in parallel proceedings and in the transfer of arbitration agreements in merger and acquisition arbitration

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QUEEN MARY UNIVERSITY OF LONDON
SCHOOL OF INTERNATIONAL ARBITRATION

ARBITRATION IN MERGER AND ACQUISITION TRANSACTIONS

**PROBLEM OF CONSENT IN PARALLEL PROCEEDINGS AND
IN THE TRANSFER OF ARBITRATION AGREEMENTS IN
MERGER AND ACQUISITION ARBITRATION**

BY

CAHIT AGAOGLU

THESIS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

LONDON, 2012

Under the supervision of:
Prof. Loukas A. Mistelis

ACKNOWLEDGMENTS

This thesis is the product of years of research I conducted in London. In that time, I have worked with a great number of people whose contribution in assorted ways to the research and compilation of this thesis deserves special mention. It is a pleasure to convey my gratitude to them all in my humble acknowledgment.

I would like to record my gratitude to Prof. Loukas A. Mistelis for his supervision, advice, and guidance from the very early stage of research, in addition to his extraordinary insight, throughout the work. Above all, he provided me all the necessary facilities and support in various ways.

I take this opportunity to record my sincere thanks to all members of the School of International Arbitration for their enduring assistance. It was truly a pleasure to work with you all.

I would like to acknowledge the financial support of ARKAS Holding, particularly Önder Türkkani, CEO of Arkas Holding. The library facilities notably the Institute for Advanced Legal Studies have been indispensable.

Special thanks go to my friends Emre and Yasin for their support and encouragement and also for their kind friendships.

I wish to express my sincere appreciation to my family. This thesis would never have been completed without the encouragement and devotion of my family.

This thesis is dedicated to my family.

Cahit AĞAOĞLU

London

June 2012

ABSTRACT
ARBITRATION IN MERGER AND ACQUISITION
TRANSACTIONS
PROBLEM OF CONSENT IN PARALLEL PROCEEDINGS AND IN THE
TRANSFER OF ARBITRATION AGREEMENTS IN MERGER AND
ACQUISITION ARBITRATIONS

(Thesis for Doctorate of Philosophy)

Cahit AGAOGLU

Merger and acquisition (M&A) transactions have increased dramatically both in number and volume around the world in the last decades. Further to these increases, disputes regarding M&A transactions are often referred to arbitration as a consensual and private mechanism which is flexible, given the freedom of the parties to select arbitrators and to adjust the process according to their needs. This study undertakes to address and examine the long and complex processes in merger and acquisition transactions in light of the emerging preference for utilising arbitration in disputes arising therein. Therefore, M&A arbitration faces certain difficulties in coping with every dispute during the transaction, a number of which the author seeks to underline. In the thesis, two main problems of arbitration in M&A Transactions have been covered. Firstly, the problem of consent in consolidation of parallel proceedings during M&A transactions, and, secondly, parties consent validating arbitration agreements/clauses in “assignment” or “succession” after M&A transactions have been completed. The very approach of the thesis proposes whether academic analysis of the subject matter can be best conducted by separation along the many phases of the long and complex process of M&A and whether it is fruitful to examine these phases individually to obtain the greatest insight. Following the dissection of the different phases of M&A transactions, the nature and operation of arbitration in possible disputes arising out of different phases of M&A has been studied. It is also argued that the utilisation of arbitration will and should provide some ideas toward clarifying the content of consent of parties to a transaction. In demarcating the phases and critical stages in M&A transactions, perspective of the problems posed by parallel proceedings is enhanced. Developing on this rich background, argument develops the idea that the logic of consolidation in arbitration and can have pragmatic application to different alternative dispute resolution (ADR) clauses too. The expansive application of consent in M&A arbitration will be tested against those different ADR methods which do not have a binding effect. On the subject of consolidation in M&A transactions, it will be argued that it is necessary not only to focus on the intention of parties, but it is also unavoidable to concentrate on surrounding relevant facts arising in different phases of M&A transactions, given the recent doctrinal developments in academia and practice. Diverging views which have emerged in order to determine consent are explored alongside their respective theories of consent. The specific importance of consent in the transfer of arbitration agreements has been examined in respect of assignment and succession. The existing rules and approaches outlined in many publications will be challenged, and arguments against their automatic application in M&A transactions will be presented in favour of an expansive approach paying attention to the fluency of facts, similar to that employed in consolidation of parallel proceedings. In examining whether current regulation is suitable given the popular emergence of M&A arbitration, the author will propose how deficiencies and inconsistencies in the area can be rectified looking forward in the form of guidelines.

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ABBREVIATIONS

Institutions and Organisations and Rules

AAA	American Arbitration Association
ABA	American Bar Association
ASA	Association Suisse de l'arbitrage (Swiss Arbitration Association)
CEPANI	Belgian Centre for Arbitration and Mediation
CIETAC	China International Economic and Trade Arbitration Commission
CILS	Center of International Legal Studies
CMI	Comité Maritime International
COMECON	Council for Mutual Economic Assistance
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institute of Arbitration)
EC	European Commission
EEC	European Economic Community
EU	European Union
FIDIC	Fédération Internationale des ingénieurs-Conseils
Geneva Rules	Chamber of Commerce and Industry of Geneva Arbitration Rules
IBA	International Bar Association
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC
ICC Rules	ICC Rules of Arbitration
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for the Settlement of Investment Disputes
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration rules
NAI	Netherland Arbitration Institute
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration

SAA	Singapore Arbitration Act
Swiss Rules	Swiss Rules of International Arbitration
UNCITRAL	United Nations Commission for International Trade Law
UNCITRAL Model	Model Law on International Commercial Arbitration Law
UNIDROIT	International Institute for the Unification of Private Law

General Abbreviations

A.L.R.	American Law Report
ADR	Alternative Dispute Resolution
All ER	All England Law Reports
Arb. Int.	Arbitration International
Art.	article
art./arts.	Article/Articles
ASA Bulletin	Swiss Arbitration Association bulletin
ATF	Arrêt du Tribunal Fédéral
AIAJ	Asian International Arbitration Journal
Baylor L. Rev.	Baylor Law Review
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Entscheidungen des schweizerischen Bundesgerichts
BGH	Bundesgerichtshof (German Supreme Court)
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofs in
Zivilsachen	
Bull.	Bulletin
Cal.	California
CC	Swiss Civil Code
CCP	Code of Civil Procedure
Ch.	Chamber
Ch.	Chapter
Cir.	Circuit
Civ.	Civil
Clunet (JDI)	Journal de droit international
CO	Swiss Code of Obligations
Com.	Commercial
CPR	Civil Procedure Rules
D Mass	District of Massachusetts
Del.	Delaware
DFT	Decision of the Swiss Federal Tribunal
DIS-Materialien	DIS Collection of materials on arbitration
Doc.	Document

e.g.	exempli gratia, for instance
ed	Edition
Ed./Eds.	Editor / Editors
EDNY	Eastern District of New York
ER	English Reports
et al.	Et alii / and others
et seq.	Et sequitur
etc.	Et cetera, and so on
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
F Supp	Federal Supplement
FAA	United States Federal Arbitration Act
FLR	Federal Law Reports
Gen. ed.	General Editor
Genova Convention	European Convention on International Commercial Arbitration 1961 (Geneva)
HL	House of Lords
Ibid	Ibidem, in the same place
ICC Bulletin	International Chamber of Commerce International Court of Arbitration
ICSID Rev.-FILJ	ICSID Review – Foreign Investment Law Journal
ILA	International Law Association
Int. ALR	International Arbitration Law Review
Int. Const. Law Rev	International Construction Law Review
Int.	International
<i>Int'l A.L.R</i>	International Arbitration Law Review
Iran-US C.T.R.	Iran-US Claims Tribunal Reports
i.e.	id est, that is
J. Disp. Res	Journal of Dispute Resolution
J. Int. Arb	Journal of International Arbitration
LAD	Last Access Date
LJ	Lord Justice of Appeal
Lloyd's Rep.	Lloyd's Law Reports
Mealey's IAR	Mealey's International Arbitration Reports

Model Law	UNCITRAL Model Law on International Commercial Arbitration
N.Y. App. Div.	New York Appellate Division
NSWLR	New South Wales Law Report
NSWSC	New South Wales Supreme Court
NYLJ	New York Law Journal
NCPC	Nouveau Code de Procedure Civile (French Code of Civil Procedure)
New York Convention	1958 New York Convention on the Recognition and Enforcement
NJW	Neue Juristische Wochenschrift
No./ no.	Number
Nos./nos.	Numbers
NSWCA	New South Wales Commercial Arbitration
p. / pp.	page/ pages
para./paras.	Paragraph / paragraphs
PC	Privy Council
PIL Act	Swiss Private International Law Act
PIL	Private International Law
PILA	Private International Law of Arbitration
QB	Queens Bench
RDAI	Revue de droit des Affaires Internationales
Rep.	Report
Rev. Arb	Revue d'arbitrage
RTD Com.	Revue Trimestrielle du Droit Commercial
s./s.s	Section/Sections
S.D.N.Y.	South District of New York
sess.	Session
SJZ	Schweizerische Juristenzeitung
TGI	French Tribunal de Grande Instance
UCC	Uniform Commercial Code
UK	United Kingdom
UKPC	United Kingdom Privy Council
US	United States

USA	United States of America
Vol.	Volume
Y. B. Comm. Arb	Yearbook Commercial Arbitration
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

INTRODUCTION

This thesis will examine the problems of consent in merger and acquisition (M&A) transactions. Two different aspects of this theme are examined in particular: Firstly, the “consolidation of parallel proceedings” during M&A transactions; and second the problem of consent in “assignment” and “succession” after M&A transactions.

Dramatic increase of M&A transactions around the world

During a conference in 1969, T Wilson, referencing the report of the Monopolies Commission, announced that the number of mergers ranged from 939 in 1964 to 598 in 1968 but may appear to be so by the vast rise in sums expended from £502 million to £ 1,653 million in the same period, which is equivalent to about 8 per cent of the book value of the assets of manufacturing industry¹. It is relevant to observe that there has also been a dramatic increase of mergers in the US, where legislation against restrictive practices is no new thing. Moreover, the Federal Trade Commission keeps a sharp eye on horizontal and vertical mergers that would be the natural response to the ending of restrictive practices, and in 1968 conglomerate mergers accounted for 84 per cent of US Mergers and 89 per cent of the money expended². Starting in the early 1980s it is seen that the vast majority of transactions have larger amounts. As stated by Mr. Rock,

“by the mid 1980s, the practice of mergers and acquisitions had become fine business art, if not a science, a well planed, deftly executed business manoeuvre that stands in marked contrast to the legendary but often haphazard approach to corporate buying and selling of bygone years”³.

Until 2000, national and international markets for mergers and acquisitions reached an estimated volume of 2,800 billion Euros world-wide in 1999 with a European market of 1,200 billion⁴, in which Germany was the biggest⁵. The value of European

¹ International Conference on Monopolies, Mergers, and Restrictive Practices, Department of Trade and Industry, papers and reports Cambridge 1969, edited by J B Heath, p.63.

² Ibid.

³ The Mergers and Acquisitions Handbook, Milton L. Rock, 1987, p. XV.

⁴ The figures of Securities Data Corporation: Frankfurter Allgemeine, 12 November 1999, p. 25.

⁵ Germany has had an M&A transaction volume of 500 billion euro in 1999, Böhmert, Börsenzeitung, 12 February 2000, p.9.

deals peaked in 1999, when it equalled 38% of the total global M&A deal value⁶. The important role of Europe in the M&A market is underscored by the fact that the largest deal in history was the \$213 billion acquisition of Mannesmann AG by Vodafone Airtouch PLC in June 2000. The value of this deal was more than double the next largest European transaction, which was the \$82 billion acquisition of Telecom Italia SPA by Deutsche Telekom AG⁷.

Global merger and acquisition activity reached unprecedented levels in 2005, with a total volume of approximately \$2.9 trillion, up by 38% from 2004. This prolonged surge in activity has been result of several factors, including the general return of stable equity markets, accompanied by steady earnings growth, and a corresponding boost in corporate confidence in the United States (US), Asia and Europe. Strong US corporate governance and accountability reforms have come fully into effect in 2003, and while patience and caution still rule the boardroom, more companies are now willing to do deals⁸.

According to the bulletin of the Office for National Statistics, in United Kingdom published on 7th June 2011, in the first quarter of 2011, the statistics, value of acquisitions abroad by UK companies rose to £18.3 billion in the first quarter of 2011 from £3.8 billion in the fourth quarter of 2010. This is the highest reported value for outward investment since the fourth quarter of 2007⁹.

In 2010 Global M&A activity witnessed a strong comeback with aggregate volume and deal count figures surpassing 2009 levels. As of the end of November 2010, over 21,000 deals were announced with more than \$1.9 trillion in total volume. That year this represented a 12% increase from 2009 volume levels, and marked a sharp reversal in the two-year decline of deal making activity that began in 2008. Deal making opportunities are expanding beyond domestic borders, with over 8,100 cross-border deals worth roughly \$945 billion announced in 2010, a 41% increase in volume on the previous year. On average, targets of cross border transactions are

⁶ Patrick A. Gaughan, *Mergers, Acquisitions, and Corporate Restructurings*, 4th Ed., 2007, John Wiley & Sons Inc., p. 3.

⁷ Ibid, p. 6.

⁸ See website of Strategic Research Institute, available at www.srinstitute.com

⁹ Statistical Bulletin published in <http://www.statistics.gov.uk/pdfr/ma0611.pdf>

receiving slightly higher premiums, 24% on average compared to the 22% for all deals. Roughly 52% of all cross border volume is in the form of a company takeover, with 22% in asset sales, 14% in minority stake purchase, and 9% in majority stake purchases. Tender offers comprise 8% of cross border deals in 2010¹⁰.

The Asia Pacific region experienced significant growth in M&A activity, reporting over 8,700 deals that involved an Asian company as the target, seller, or buyer, eclipsing Europe as the second most active region following North America. Fuelling this growth is acquisition opportunities in China, with approximately 2,500 deals worth \$110 billion, a 29% increase in deal activity and 15% increase in volume from 2009, and a staggering 108% increase in deal volume since 2005. China's appetite for buying opportunities is also increasing, with \$145 billion worth of deals announced in 2010, a 453% increase from 2005 levels¹¹.

The North and South Americas region announced over \$1.1 trillion in transaction volume in 2010. This represented a 12% increase from 2009. Company takeovers (61.57% in 2010 and 62.2% in 2009), cross border deals (45.68% in 2010, compared to 39.88% in 2009) & asset sales (24.45% compared to 23.5% in 2009) remain the top three M&A transaction types¹².

The EMEA (Europe, Middle East and Africa) region reported over \$787 billion in transaction volume in 2010. This represented an 18% increase from 2009, a total of \$662 billion¹³. The European region kept most of its capital within the region, paying \$295 billion for other European targets in 2010. While the Middle East / Africa region acquired targets in North America for a total of \$2 billion. European targets were the second most pursued targets, attracting \$45 billion in 311 deals in 2010¹⁴.

Why arbitration in M&A Transactions?

¹⁰ The results of the Bloomberg Global Pool of over 1000 financial market professionals published in <http://about.bloomberg.com/pdf/manda.pdf>, p. 4.

¹¹ Ibid.

¹² Ibid, p. 16.

¹³ Ibid, p. 24.

¹⁴ Ibid, p. 25.

Arbitration, and in particular commercial arbitration, is a consensual and private mechanism for dispute resolution which leads to an enforceable arbitral award. The contractual foundations of arbitration constitute the fundamental difference between arbitration and litigation. These contractual foundations refer to “consent” depending on the basis of contract law. Therefore, consent is the common point for M&A transactions and arbitration. In both mechanisms, parties arrange the conduct regarding to their consent. This flexibility is the main reason for disputes regarding M&A transactions are often referred to arbitration.

As many statistics disclose, the rising amount of M&A transactions, naturally disputes arising out of such transactions increase. These disputes are typically referred to arbitration, with or without other alternative dispute resolution methods. Arbitration is more flexible, given the freedom of the parties to select arbitrators regarding the criteria such as language, familiarity with the industry or commercial experience and to adjust the process according to their needs which are essential for M&A transactions. As Watch and Mocks mention this creates scope for tactical manoeuvre which, if skilfully handled, can contribute significantly to the successful outcome of a dispute for a party¹⁵.

Literature Review

In spite of the existence of many problems during the M&A transactions, the interrelation between arbitration and M&A transactions remains largely under-researched. For instance, research shows there is only one book printed from the special ASA conference held in 2005 concerning Arbitration in M&A transactions¹⁶. Another study by an international team of lawyers titled “Tactics in M&A Arbitration”¹⁷ has also been reviewed. Of these two texts the ASA Conference book was utilised as a primary source, whereas Tactics in M&A arbitrations lacked depth in M&A transactions, focusing merely on arbitration generally. The ASA Conference publication was beneficial given that it focused on material issues, many of which

¹⁵ Dr. Karl J.T. Wach/ Frank Meckes (eds), *Tactics in M&A Arbitration*, German Law Publishers, 2008, p. VII.

¹⁶ ASA Conference “Arbitration of Merger and Acquisition Disputes” on 21 January 2005 printed as a book ASA Special Series No. 24, 2005, Edited by prof. Gabrielle Kaufmann-Kohler and Alexandra Johnson, hereinafter ASA Special Series No. 24, 2005.

¹⁷ See *supra* note 15.

are discussed in the first part of the thesis. The book also gives practical insight to expert determination.

Aside from the primary text, the remainder of the author's research of academic publications focus mainly on articles on specific subjects or practical problems of M&A transactions. While the number of studies is not large, these were by far the most beneficial academic writings available.

Given the lack of source material specific to arbitration in M&A transactions, each respective issue arising was examined using texts on broader subjects, with the approach of tackling target issues.

With regard to case law, parallel to literature, the publication of cases concerning M&A arbitration is very rare. Therefore, the author, with the assistance of Prof. Mistelis wrote to arbitration practitioners around the world seeking copies of awards. A number of "terms of reference" from French, American, English and Italian practitioners were received, but not awards thus analysis of the tribunals determination could not be made for these cases. However the benefit of long and advantageous discussions with professors and with practitioners contributed to the progress of the thesis.

Recent published cases from the ICC were sourced and are analysed in the last chapter. Unpublished cases are obtained from various books and articles written by many academics and practitioners. They are cited directly from summaries made in books or articles.

Problems focused on M&A Arbitration

M&A transactions are long and complex processes. The various phases outlined in the first chapter. Depending on the complexity of the transactions there are many disputes. These disputes are typically referred to arbitration. However, in cases where there are many proceedings in the different phases of M&A transactions it seems that arbitration faces difficulties in coping. Therefore, in spite of limited publication on M&A arbitration, the focus is mainly on consolidation of parallel

proceedings and the problem of succession and assignment which are the most pervasive problems currently in M&A arbitrations.

The subject gives rise to questions both during the M&A transaction and after the M&A transaction has been completed:

- How the consolidation of parallel proceedings, including multi-step proceedings, can arise in M&A transactions, and what is the effect of consent in order to deal with this problem?
- What is the role and importance of different phases of M&A transactions, in finding a solution for the problem of consent in M&A Arbitration?
- Are M&A arbitrations typical examples of multi-party, multi-contract arbitration? Is it possible to directly apply “consolidation” rules to M&A arbitration?
- If there are different proceedings on the same dispute which will be applied? What are the risks of multiple or parallel proceedings?
- What are the issues with the problem of consent of the parties concerning the liability of the obligations and responsibilities of the successor arising after the M&A transactions?
- Does current arbitration law and practice adequately deal with the challenges M&A disputes pose to arbitration? If not, are there any specific rules or specially drafted arbitration clauses that may evidence consent?
- How may coordination or synergy have some practical application on the basis of existing law? Do we need new rules?

There are many factors affecting the discussion of these problems, and in the author’s opinion the absence of a definition of terms is a main factor.

Terminology

Merger and acquisition as notions are frequently used together. It seems these notions are the same. It is remarked that the terms consolidation and takeover are used with merger. The main reason for this “traffic of notions” is the different aspects of merger. Further, merger has an effect in many different branches of law. The merger process utilises company law, tax law, capital markets law, and competition law under the title of “merger control”.

Mergers and acquisitions (M&A) are commonly used to describe an acquisition of an important portion or all of the operational assets of an enterprise, or an acquisition of an important portion or all of the shares of a legal entity operating an enterprise, or subscription for the newly issued shares of such a legal entity as a result of capital increase. Clearly, mergers and acquisitions are here to stay: the buying and selling of companies’ remains a common option for many companies. Yet, it cannot be emphasized enough how complex and risky the merger process can be¹⁸. Therefore, it seems better to try to give a definition of merger with a background in underlying fundamentals and to clarify the distinction between similar notions.

The first critical factor relates to inconsistency in the use of the terms and the different scope of the terms. For instance, the terms “merger” and “acquisition” are regularly used interchangeably. However, they have different meanings and scope. Other notions, such as “takeover” or “consolidation”, are also used with merger and acquisition.

- Merger:

According to Reed, merger has a strictly legal meaning and has nothing to do with how the combined companies are to be operated in the future¹⁹. A merger occurs when one corporation is combined with and disappears into another corporation. All

¹⁸ Stanley Foster Reed, Alexandra Lejoux, H. Peter Nesvold, *The Art of M&A*, 4th Edition, 2007, p. 2 (hereinafter Reed, Lejoux, Nesvold)

¹⁹ Ibid, p.3

mergers are statutory mergers, since all mergers occur as specific formal transactions in accordance with the laws of the states or countries where they are incorporated²⁰.

In contrast, OECD separate statutory mergers and subsidiary mergers give different definitions for them. A merger is the combination of two or more companies to achieve common objectives by pooling their resources into a single business. If the acquiring company assumes the assets and liabilities of the merged company and the merged company ceases to exist, it is called *statutory merger*. On the other hand, if the acquired company becomes a 100% subsidiary of the parent company, it is called *subsidiary merger*²¹.

Another definition proposed by Gaughan is different from consolidation. He asserts that

“a merger differs from a consolidation, it is a business combination whereby two or more companies join to form an entirely new company. In a consolidation, the original companies cease to exist and their stockholders become stockholders of the new company. A simple equation can be given to clarify the difference between a merger and a consolidation. In a merger, $A + B = A$, where company B is merged into company A. In a consolidation, $A + B = C$, where C is an entirely new company. Despite the differences between them, however, the terms merger and consolidation are generally used interchangeably in practice”²².

According to Prof. Horn, the term merger is used in a broad and in a narrow sense. In a broad sense, a merger can be defined as any business transaction by which several independent companies come under one and the same direct or indirect control²³. Such common control is in the hands of the shareholders of the acquiring company. This can be achieved through an acquisition or a take-over, or through a “merger among equals”. In a merger among equals, the shareholders of both participating companies are, in theory, equally offered shares of the new parent or holding

²⁰ Ibid.

²¹ OECD 2001: New patterns of Industrial Globalisation: Cross Border Mergers and Acquisitions and Strategic Alliances, Paris, p. 14.

²² Gaughan, *supra* note 6, p. 12.

²³ In German Law, common control is the criterion for the formation of a group of companies; if this control is used to coordinate the operations of all members of the group under one centralized business policy, the group is called a concern (Konzern); see article 18 of German Stock Company Law.

company. The official goal of such an even-handed distribution of new shares is that both groups of shareholders should have common and evenly distributed control over the new company or group of companies at the conclusion of the transaction. In many cases, the decision-makers are satisfied with corporate control based on shareholding and wish to continue the legal existence of the acquired company. The result of the transaction is a group or enlarged group of companies²⁴. Therefore, distinction between merger and consolidation is important.

In a narrower sense, a merger is a transaction by which one or more participating companies cease to exist as separate legal entities. A merger in this narrower sense results in only one surviving company. All other participating companies are merged into the surviving company, which may have been newly founded for that purpose or which may have been one of the participating companies (the acquiring or the target company)²⁵. Both scenarios are usually referred to as a statutory merger. A statutory merger is often a step or part of a merger in the broader sense.

The Oxford Dictionary of Law defines merger as “An amalgamation between companies of similar size in which either the members of the merging companies exchange their shares for shares in a new company or the members of some of the merging companies exchange their shares for shares in another merging company”²⁶. Larousse Encyclopaedia states that “merger is the group of two or more independent companies to assembling les “biens sociaux” (assets) of the first ones”²⁷.

National legal systems give different definitions of merger and regulate it in different aspects. For instance in the US, merger is defined as a procedure in which two or more ‘constituent corporations’ merge with and into a single corporation that is also one of the participating ‘constituent corporations’. The terms merger, ‘Constituent Corporation’ and ‘surviving corporation’ have generally accepted meanings. Some individual state merger statutes define these terms²⁸. The Delaware General

²⁴ Norbert Horn, Cross-Border Mergers and Acquisitions and the Law, 2001, Studies in Transnational Economic Law, Kluwer Law International, Ed. Norbert Horn, p. 4.

²⁵ Ibid.

²⁶ Oxford Dictionary of Law, 6th Ed., edited by Elizabeth A. Martin, Jonathan Law, 2006, p. 340.

²⁷ www.larousse.fr/encyclopedia

²⁸ For example New York Business Corporation Law s. 901 in the paragraph (a) (1) provides that two or more domestic corporations may merge into a single corporation which shall be one of the constituent

Corporation Law²⁹ does not define these terms, but uses them with their generally accepted meaning. In this regard Henn and Alexander describe the meaning of various merger terminologies³⁰. For example, while remarking the difference between merger and consolidation, they state that “the traditional distinction between a merger and consolidation is that in the case of a merger, one or more constituent corporations merge into another constituent corporation and cease to exist but such other corporation continues as the surviving corporation, whereas in the case of a consolidation, two or more constituent corporations consolidate to form a new consolidated corporation and cease to exist”³¹. The constituent corporation into which the other corporations are merged survives the merger, therefore it is termed the surviving corporation.

On the other hand, a merger in the UK has been defined as “an arrangement whereby the assets of two companies become vested in, or under the control of, one company (which may or may not be one of the original two companies), which has as its shareholders all, or substantially all, the shareholders of the two companies”³². The arrangement may be effected by the shareholders of one or both of the merging companies exchanging their shares (voluntarily or as a result of operation of law) for shares in the other company or in a third company, by a take-over bid by one of the companies for the shares of the other, or by a take-over bid by a third company for the shares of both companies³³.

Mergers in EU are governed firstly by the Third Directive of the Council of the European Communities³⁴. Only mergers of public limited liability companies are

corporations (**merger**); and in the paragraph (a) (2) provides that consolidate into a single corporation which shall be a new corporation to be formed pursuant to the consolidation (**consolidation**).

²⁹ Delaware General Corporation Law is the statute governing corporate law in the state of Delaware. Delaware is well known as a corporate haven. Over 50 % of US publicly-traded corporation and 60% of the Fortune 500 companies are incorporated in the state. For more information please see, http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Delaware_General_Corporation_Law.html

³⁰ Harry G. Henn, John R. Alexander, *Laws of Corporations*, 3rd Ed., West Pub. Co., 1983, §346, pp. 980-983.

³¹ *Ibid*, pp. 980-981.

³² See Weinberg, Blank, and Greystoke, *Weinberg and Blank on Take-overs and Mergers*, 4th Ed., Sweet & Maxwell, London, 1979, p. 4.

³³ H. Leigh Ffrench, *International Law of Take-overs and Mergers*, The EEC, Northern Europe and Scandinavia, p. 199. In this sense see also Stephen Kenyon Slade, *Mergers and Takeovers in the US and UK Law and Practice*, Oxford University Press, 2004.

³⁴ Third Council Directive 78/855/EEC of 9 October 1978 based on the article 54(3)(g) of the Treaty concerning mergers of public limited liability companies.

covered by the Directive. Two types of merger come within the Directive. These are the acquisition of assets and liabilities of one company by another company (and the issue of shares to shareholders of the company being acquired) and the winding up of several companies together with the transfer of all their assets and liabilities to a newly created company (and again the issue of shares to shareholders of the companies wound up). The merger defined is a total merger, involving the transfer of all assets and liabilities of the Transferor Company or companies to another company. Therefore, the definition does not embrace mergers as the term is generally understood in UK, that is, as the acquisition of shares of the one company by another but without a subsequent transfer of assets and liabilities from one company to the other.

The principle in the definition of a totality of transfer (of assets and liabilities) is important, for it assures continuation of business activity. It is not necessary, for example, to substitute a new debtor company for the old company. Thus, the provisions of the Directive serve to protect not only shareholders, but also creditors and employees.

For instance M&A transactions can take several forms, the most common of which are:

- Cash tender offers in which an acquirer offers cash to target shareholders in exchange for shares of target stock.
- Exchange offers in which acquirer offers securities of the acquirer to target shareholders in exchange for shares of target stock.
- Cash mergers or other business combinations in which the target is merged (A merger is a legal combination of a target company with an acquiring company that results in one surviving entity) or is otherwise combined with the acquirer or more typically, a subsidiary of the acquirer and the target shareholders receive cash.

- Stock for stock mergers in which the target is merged with the acquirer or more typically a subsidiary of the acquirer and target shareholders receive shares of stock in the acquirer.

- Negotiated share purchases in which the acquirer purchases shares of stock in the target for cash or other consideration pursuant to a negotiated agreement.

Negotiated asset purchases in which the acquirer purchases all or substantially all of the assets of the target for cash or other consideration pursuant to a negotiated agreement.

- Acquisition

Black's Law dictionary defines acquisition as a gaining of possession or control over something³⁵. Furthermore, Beyer defines acquisition as an act whereby a business entity acquires the common stock of another business enterprise for cash or an exchange of its own common stock³⁶.

According to Prof. Horn, the acquisition of a company is the purchase of all its assets or all its shares from its sole or main owner. A purchase of a company's shares may also be termed a take-over. Typically, however, take-overs refer to acquisitions where a listed company³⁷ is the target and its shareholders are approached through a public take-over bid issued by a bidder, who attempts to induce them to sell their shares to him³⁸.

³⁵ Black's Law Dictionary, Editor in Chief Bryan A. Garner, 8th Ed., 2004, p.25.

³⁶ Gerry W. Beyer, Modern Dictionary for the Legal Profession, 4th Ed., New York 2008, p. 10.

³⁷ A company is said to be "listed", "quoted" or "have a listing" if its shares can be traded on a stock exchange. To be more accurate, it is the securities that are listed, not the company. The phrase "listed company" is widely used to mean a company that has listed ordinary shares. In the UK inclusion, on the Official List is a pre-requisite for trading on an exchange. It is inclusion on the official list that defines a listed company. The Financial Services Authority (FSA) (as the UK Listing Authority under FSMA 2000) must maintain the Official List and may admit such securities as it considers appropriate. The FSA is authorised to make rules for these purposes and those that relate to the Official List are referred to as the Listing Rules. Listing Rules may provide that securities cannot be admitted to the Official List unless listing particulars have been submitted to, and approved by, the FSA and published.

³⁸ Horn, supra note 24, p.4.

An acquisition may be friendly or hostile. In the former case, the companies cooperate in negotiations. In the latter case, the takeover target is unwilling to be bought, or the target's board has no prior knowledge of the offer. Acquisition usually refers to a purchase of a smaller firm by a larger one. Sometimes, however, a smaller firm will acquire management control of a larger or longer established company and keep its name for the combined entity. This is known as a reverse takeover. Another type of acquisition is a reverse merger, a deal which enables a private company to be publicly listed in a short time period. A reverse merger occurs when a private company that has strong prospects and is eager to raise financing, buys a publicly listed shell company, usually one with no business and limited assets. Achieving acquisition success has proven to be very difficult; various studies have showed that 50% of acquisitions attempted were unsuccessful. The acquisition process is very complex, with many dimensions influencing its outcome.

The decisive step for an acquisition (as well for the merger), in the broad sense, is obtaining a majority of a target company's voting shares. The success of this goal depends on the free, personal decision of individual shareholders. A sufficient number of shareholders of the target company must be included to either to sell these shares or trade them for shares of the acquiring company. This can be achieved through direct negotiations with one or several large shareholders in a block deal, or through a public take-over bid. If the acquiring company is successful, it obtains corporate control based on majority voting power and becomes the parent company of the target company. Ultimately, it is the shareholders of the acquiring company that obtain corporate control of both companies through the direct holding of shares in the acquiring company and the indirect holding of shares in the target company.

- Takeover

Takeover is defined as "the acquisition of control by one company over another, usually smaller, company (the target company). This is usually achieved by buying shares in the target company with the agreement of all its members (if they are few)

or of only its controller; by purchases on the stock exchange or by means of a takeover bid”³⁹.

Additionally, takeover is the acquisition of ownership or control of a corporation. A takeover is typically accomplished by a purchase of shares or assets, a tender offer, or a merger⁴⁰. Beyer defines takeover as an acquisition of a corporation by another entity by purchasing a large amount of the target company’s common stock, or through a cash purchase. The target may be dissolved and its assets merged with those of the acquiring firm or it may be operated as a subsidiary of the new owner⁴¹.

Furthermore, a takeover occurs where a financial or industrial company makes a successful offer (or “bid”) to purchase the entire share capital of another company (the “target”). The bid is addressed directly to the shareholders of the target company; if the target’s board does not recommend the bid to shareholders, it is termed “hostile”. The bidder offers cash (which may be borrowed, in which case the takeover is said to be “leveraged”) or shares in itself, or a combination of both, in return for the shares⁴².

- A working definition of merger, acquisition, and takeover

According to the definitions given it could be held that there are some common points that can help us in developing a definition. For instance, it is clear that merger can occur in two ways. One way is that, during the merger process, one or more companies come under one company which is also one of the existing companies. Adding to this definition “to take the control” can change the definition and implicates the definition of takeover. Because all the mergers are not concluded to take the control.

The second way is that one or more companies are also participating as one company, but in this case they cease to exist as separate legal entities. So, in the end

³⁹ Oxford Dictionary of Law, supra note 26, p.526.

⁴⁰ Black’s Law Dictionary, supra note 28, p. 1493.

⁴¹ Beyer, supra note 36, p.890.

⁴² The New Oxford Companion to Law, Edited by Peter Cane, Joanne Conaghan, 2008, Oxford University Press, p. 1152.

there is only one surviving company. The author believes that all the participating companies are merged into the surviving company, which should be one of the participating companies. When it is proposed that this surviving company can also be newly founded, the main problem arises. This is also the definition of “consolidation”. “Consolidate” has been defined in Oxford English dictionary “as to combine into a single unit”. In Black’s Law Dictionary consolidation has been defined as “The unification of two or more corporations by dissolving the existing ones and creating a single new corporation⁴³. Therefore, the main point in consolidation is that the surviving company is different from the participating company or companies. On the other hand, in merger, the surviving company is one of the participating companies. Therefore, the definition of merger and the distinction between merger and consolidation in US Law seems preferable to explain the difference. It is noteworthy to mention that in this regard, “consolidation” should be considered as a type of merger and should be accepted that in terms of the terminology, there is no difference between a statutory merger and consolidation.

The complex structure and diversity of merger tends to increase the similarities with other notions. For instance, a reverse merger that was classified as a similar notion to merger appeared as a type of acquisition. As aforementioned, a reverse merger occurs when a private company that has strong prospects and is eager to raise financing, buys a publicly listed shell company, usually one with no business and limited assets. In this case, it should be asked whether acquisition is the reverse of merger. According to comparative law the common answer to this question is negative. All the national laws studied regulated acquisition as a “method” of merger. Therefore, the term acquisition is commonly accepted as a “method” of merger. However, all acquisitions are not concluded as a merger. Thus, acquisition can be defined as the purchase of all assets or shares of the owner company. It can be concluded as a merger, but not necessarily so. This conclusion does not effect the definition of merger.

Attention must be paid to the term “control” in the definition of acquisition; otherwise it can be confused with the definition of takeover. Takeover is also a

⁴³ Black’s Law Dictionary, supra note 35, p. 328.

“way” or “method” of merger. What is the difference between takeover and acquisition? For a takeover it is necessary to acquire the control of the corporation. In this regard acquisition seems larger than takeover. In other words, every takeover is an acquisition; however, every acquisition is not a takeover.

Working Hypothesis

The working hypothesis of the thesis relies on the questions below:

1) Examining whether there is a deficit in existing arbitration rules as applicable to M&A transactions

Coordination or cooperation of parallel proceedings in M&A transactions is undoubtedly necessary in order to avoid contradictory decisions. There are no specific rules for the coordination of parallel proceedings in much of the existing national legislation or institutional rules. Therefore, the “consent” of parties and its interpretation is crucial in M&A transactions. There are many different methods for interpretation of consent of parties which could be the subject of another study. However, with respect to these methods, the author does not believe that there currently is a unique irrevocable method which can be used in M&A transactions, because in order to interpret and limit the consent of parties it is absolutely necessary to understand notions used and focus not only on the current process but on all processes in M&A transactions. In examining the subject matter, M&A arbitration guidelines are proposed in order to decrease the complexity of M&A arbitrations and simultaneously limit the intervention of national courts in parallel proceedings.

2) How the transitory definition of consent significantly effects M&A arbitration?

The term consent is not fixed, but in constant development. A modern approach to consent is more concentrated on varied issues, such as general facts, parties’ intention, business practice, economic reality, and trade usages. Therefore, working guidelines which reflect the contemporary thinking are becoming necessary. Existing

rules for multi-party, multi-contract and consolidation cannot be applied effectively to the demands of M&A transactions, as examined in Chapter Three.

Moreover, it will be shown that affecting and assisting the interpretation of consent or intention of parties will also have a positive effect on “succession” or “assignment” after a merger or acquisition has been completed. Therefore, especially in M&A transactions the author will investigate whether the general rules of “succession” or “assignment” will impose an arbitration clause automatically. Attention will be paid to the fluency of facts in examining all the phases of the transaction.

Furthermore, it will be explored whether it is necessary to search for clear rules and/or clear arbitration agreements or guidelines in order to reveal “consent” in M&A transactions. Research will be focused on the areas which necessitate specific rules and/or specific guidelines in order to clarify M&A arbitration clauses or agreements. Technical analysis of the relation for direct or probable cause between specially drafted arbitration clauses and/or agreements, and evidence to consent will be conducted.

There is a lack of research in academia and practice specifically focusing on the area and current discussion in the field of arbitration concerning consolidation of arbitration clauses and “consent” issues in M&A arbitrations. Moreover, it is not uncommon that the parties’ consent establishes different dispute resolution mechanisms in different phases of M&A transaction. The subject gives rise to significant theoretical and practical questions arising at the stage of commencement of arbitration procedure.

3) If there are different proceedings in different phases of M&A transaction concerning the same dispute which one will be applied? What are the risks of multiple or parallel proceedings?

If the arbitration agreement in the pre-closing phase (letter of intent, due diligence) is different from that of the signing phase (purchase agreement), how will the coordination be assured? It will be explored how, in practice generally, parties do not

precise the scope of arbitration clauses; once the parties' consent to arbitrate has been established, the arbitration agreement is deemed to cover all disputes between the parties.

When interpreting the scope of an arbitration agreement, the thesis necessarily considers the applicable law, including the proper approaches to interpretation. It has long been recognized that under the doctrine of separability, an arbitration agreement may have a different applicable law to the balance of any contract within which it is found⁴⁴. If several documents contain arbitration clauses, they should be coordinated or consolidated so as not to conflict one another. Earlier clauses should be replaced by subsequent ones with an extended scope. Where the M&A agreement contains an "Entire-Agreement Clause", the arbitration clause must be drafted carefully to compromise all possible disputes related to the transaction.

4) Are M&A arbitrations typical examples of multi-party or multi-contract arbitrations? If not, how "consolidation" may be applied to related disputes in M&A Arbitrations? How "connection" is beneficial in decreasing the complexity of M&A Arbitrations?

On reviewing the arbitration institutions' rules it is remarked that there are only multi-party and/or multi-contract and consolidation rules. Using the foundation of the different stages of M&A transactions, the current operations of the institutional rules and the related problems analysed. Especially the problems related to "connection" between the contracts in spite of the absence of definition of "connection", parallel proceedings concerning the same or related disputes and the similar lack of rules concerning same, and finally the paramount issue of confidentiality.

Study reveals the gravity of the problems listed above, and how it is not convenient to directly apply existing institutional rules to M&A arbitration, by questioning whether there is automatic "connection" between the agreements signed in different stages of M&A transactions.

⁴⁴ Michael Pryles and Jeff Waincymer: "Multiple Claims in Arbitration Between the Same Parties" in Albert Jan van den Berg (ed), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin, Vol. 14 (Kluwer Law International 2009), p. 441.

Further technical analysis will probe specific issues in parallel proceedings, and the mechanisms of *lis pendens* and *res judicata*. While analysing these mechanisms one must assume the “same legal grounds” exist in both proceedings, which can be problematic for M&A arbitration. Another problem in these mechanisms is that the earlier and final adjudication by a court or arbitration tribunal is considered conclusive in subsequent proceedings, which is not suitable for direct application in M&A arbitration.

5) Given the issue of parallel proceedings can hybrid staged process involving ADR with arbitration serve as a practical mechanism in M&A arbitration?

The development of various ADR methods, which have proved successful in M&A dispute resolutions, can assist cooperatively with the arbitral process. The thesis will examine the flexibility of these ADR methods and how they can be effective at different stages of M&A transactions. The non-binding nature of these methods, however, necessitates a staged process which culminates in arbitration which is both binding and enforceable, should disputes not be resolved by ADR methods alone. In this case, an overview of the interrelation of ADR and arbitration and their respective competence will be made and the need of an interface will be explored through the proposed M&A arbitration guidelines.

6) Do we need guidelines specific to M&A Arbitration which can accommodate the complexities involved?

This study aims to significantly contribute to discussion and research on this subject matter both as an academic opinion and as an insight for practitioners. As a means of review at the close of each chapter, reform guidelines are proposed by the author as a practical solution to the variety of the problems uncovered throughout the research.

Methodology

In order to achieve its objectives, the thesis employs research and qualitative analysis of primary and secondary legal sources; these include national and international laws and rules, and the case law of national courts and arbitral tribunals, in addition academic publications.

This work further analyses and compares existing law and practice in the specialised area of arbitration concerning M&A transactions. All major arbitration conventions, many laws and rules, the practice of the main arbitration institutions, and of various national courts, as well as the views of several commentators are critically assessed. Moreover, the topic is dynamic, as it concentrates on an area of commercial arbitration practice that has seen rapid expansion in recent years, despite lacking a cohesive international framework. Given this reality the thesis pragmatically focuses on practical solutions over theories, relying on the fundamentals of existing and continuing practice over hypotheticals. Therefore, case law has been used extensively to provide a more beneficial alignment to current practices in the areas of commercial arbitration and M&A transaction, at both national and international levels.

In tackling the working hypothesis, practical considerations were addressed generally at the outset and particularly narrowed to problems in M&A arbitration, which are notably discussed under the title “Problems Focused in M&A Arbitration”.

Particularly, British and US lawyers who progressed earlier than Continental Europe on institutionalization of enterprises, played a significant role in establishing the legal structures of mergers and acquisitions with their experience that they carry on from the past⁴⁵. In comparative studies, the terminology of US and UK Law took priority in this study, not excluding civil law systems such as Switzerland, France and other countries. The choice of countries where greater attention focused in the thesis thus permits a comparison between jurisdictions with a civil law (France, Switzerland) and common law (England, US) legal background.

⁴⁵ İsmail Esin, Tunç Lokmanhekim, *M&A Transactions Under Turkish Law*, Beta, 2003, p. 2.

Moreover, other countries are considered when they are of particular interest to the analysis of the consensual nature of arbitration. For instance, when discussing consolidation in M&A transactions it is also other countries such as Hong Kong, Singapore, Netherlands, and Belgium are noted, because these jurisdictions have interesting solutions when dealing with this procedural mechanism.

The essential groundwork of researching the practical operation of M&A transactions across different countries is important to address the working hypothesis. The complex phases in M&A arbitration and their interface with arbitration were necessarily scrutinised in order to address the questions of cooperation and coordination and consent central to the thesis.

With respect to the arbitration institutions and their rules, research also targeted institutions based in the aforementioned countries, and institutions which have published their cases relating to M&A transactions. The ICC is the most used institution in this thesis because of their facility of making recent case publications available, unlike other institutions. Cases concerning the issues of consent, parallel proceedings, and M&A transactions where, naturally, particularly sought out.

In researching cases, the author principally relied on the ICC publication of their recent court reports, in addition to this, Swiss cases are also used because they are published. Many resources for case law proved fruitless regarding the subject matter given the highly confidential nature of M&A arbitration. Reports were often limited to terms of reference, which offer little insight. Given the aim of the thesis to address commercial reality in the area of M&A arbitration, together with Prof. Loukas Mistelis, this author surveyed and questioned practitioners, met with law firms and wrote to professors working in the area, in addition to drawing from experiences of the author and supervisor in commercial practice.

Research was conducted using the Institute for Advanced Legal Studies in Russell Square in London, which provided ample electronic and paper based resources. The author also travelled to Cambridge and Oxford to use library facilities. Additionally, the author travelled to Paris to avail of the library facilities of ICC and Paris I and II

and also travelled to Lausanne for use of the library of Swiss Institute of Comparative Law.

During the research, recent amendments have been considered carefully. For instance amendments in the 2011 Hong Kong Arbitration Ordinance and amendments made in 2010 to the UNCITRAL Rules have been analysed extensively. Furthermore, the amendments to ICC Rules in 2012 have been analysed.

Pragmatic and dynamic methodology of study was required throughout the research, given the limited materials specific to the subject. Primarily focusing on the most significant common and civil law jurisdictions proved necessary in examining the fundamental principles of contract law which form the basis of consent as understood in recent ICC Cases. Further research and attendance to the Freshfields Lecture Series in 2010, presented by Prof. Bernard Hanotiau presented the concept that a transitory definition of consent was emerging. Thus, it was necessary to revise findings accordingly, trace this development, and incorporate such findings in the thesis.

Indeed, paying close attention to conferences in the areas of M&A transactions and arbitration was required to obtain emerging ideas on the subject. While conference papers are often general and lack sufficient depth, they were highly beneficial in observing the landscape and emerging developments in the area.

Finally, a comparison of the different applications in the field of arbitration is of paramount importance in order to understand the varying operation various legal systems employ and the distinct problems faced in the different systems. From this analysis, it was examined which systems provide solutions to the problems of consent and parallel proceedings. Comparative assessment features throughout the study, from theoretical foundations to practical solutions.

Delimitation of the subject

Arbitration in M&A transactions covers a wide range of issues. Therefore, it is beneficial to indicate the scope of the thesis. M&A transaction is a long and complex

process and it concerns different fields of law: competition law, company law, law of obligation, tax law, capital market law etc. Therefore, arbitration as a means of dispute resolution in M&A transactions may have many effects in different fields. Reflections on competition law and capital market law are not examined with particular emphasis, but pointed to briefly where necessary.

The process of M&A has been regulated in the law of obligations and company law. However, this thesis is not a commercial law thesis. The definitions are necessary only in order to limit the scope of every notion and to clarify the differences of every notion from each other. In practice, the cooperation and collaboration of companies, the domination of one of the companies by others and allotting all facilities to the dominant or in the case of transfer of assets of enterprises, it is not possible to mention that all these transactions are mergers. Therefore in the author's opinion it is beneficial to clarify the stages of M&A transactions.

Research principally focuses on main problems of arbitration in M&A transactions; firstly, the problem of consolidation of parallel proceedings. Parallel proceedings may result before different arbitral tribunals (or between national court and an arbitral tribunal), with a resulting risk of conflicting decisions and awards⁴⁶. Secondly, the "sovereignty" of the arbitration clause in the problem of "assignment" and "succession" after the merger and/or acquisition has been completed and the role of "consent" in the resolution of these problems is addressed.

Structure of the thesis

There are two main parts in the thesis. The two chapters in the first part focus on the theoretical foundations of merger and acquisition and arbitration. The first chapter proves that M&A transactions are long and complex processes, by examining the process of merger and acquisition in a chronological order and clarifying the process and the relation of the different phases of merger and acquisition transaction.

⁴⁶ Bernardo M. Cremades, Ignacio Madalena, *Parallel Proceedings in International Arbitration*, Arb. Int., Kluwer Law International 2008, Vol. 24, Issue 4, p. 507 (hereinafter Cremades, Madalena)

In Chapter Two, parallel to the chronological order focused on in the first chapter, a series of potential and common disputes which arise during M&A transaction where arbitration can be used are listed.

The second part of the thesis titled “Challenges and Practical Solutions” focuses on the problems of arbitration, and discusses the potential risks of multiple and/or parallel proceedings in different phases of merger and acquisition transactions, alongside the possible solutions which can be provided. The second part consists of three chapters. Chapter Three focuses on the cooperation and coordination of arbitral proceedings in M&A transactions.

Adhering to the working hypothesis, parallel proceedings in M&A transactions are focused on in respect to multi-contract and group of contract issues. Research showed that the same dispute, or two closely related disputes, may result in parallel proceedings before different arbitral tribunals (or between a national court and an arbitral tribunal), often resulting in conflicting decisions and awards⁴⁷. Doctrines of *lis pendens* and *res judicata*⁴⁸ and their function of avoiding or mitigating the undesirable effects of conflicting decisions are examined, alongside their effects in M&A arbitration.

Parallel proceedings can occur where multiple contracts exist between two or more parties, without reference to one single dispute resolution agreement. In such situation, it is advised by doctrine that those drafting arbitration international agreements should ordinarily ensure that a single, unitary dispute resolution mechanism governs all of the parties’ various relations⁴⁹. Numerous national courts⁵⁰, and arbitral tribunals⁵¹, have nonetheless been willing to conclude in

⁴⁷ Ibid.

⁴⁸ Ibid, p. 508.

⁴⁹ Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 3rd Ed., 2010, p. 40 (hereinafter Born, *Drafting and Enforcing*); Philippe Leboulanger, *Multi-Contract Arbitration*, J. Int. Arb., 1996, Issue 4, p. 43, Fouchard, Gaillard, Goldman on International Commercial Arbitration, Gaillard and Savage Ed., 1999, para. 513 (hereinafter Fouchard, Gaillard, Goldman); Redfern and Hunter on International Arbitration, Oxford University Press, 2009, paras 2.57, 2.58 and 3.113 (hereinafter Redfern and Hunter); Bernard Hanotiau, *Complex Arbitrations*, 2005, Kluwer Law International, paras. 425-428 (hereinafter Hanotiau, *Complex Arbitrations*).

⁵⁰ See, e.g., *Judgment of 31 May 2001, UNI-KOD sarl v. Ouralkali*, XXVI Y.B. Comm. Arb. 1136 (Paris Cour d'appel) (2001) (arbitration clause in joint venture agreement applied to contracts implementing joint venture); *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16 (2d Cir. 1995) (disputes

principle that, disputes under one contract are arbitrable under an arbitration provision of a different contract. This is the commercially sensible result, which typically effectuates the true intentions of reasonable parties. Nonetheless, the extent to which this result will apply in particular cases depends on the parties' agreements and the nature of their dispute⁵².

If there is not a single, unitary dispute resolution mechanism chosen, solutions are proposed by doctrine and case law from different jurisdictions, including arbitration institutions for joinder of Parallel Proceedings, and these are studied in the Section 3. The common solution proposed is "consolidation" of the proceedings. This solution has undoubted advantages, however, there are also disadvantages, such as confidential issues. Therefore, while using the consolidation of parallel proceedings in M&A transactions, all the facts of the transaction and the intention of the parties should be taken into consideration. In the author's opinion automatic application of consolidation is not suitable for M&A arbitrations. It will be asked that how synergy will be created on the basis of existing law?

Consolidation of parallel proceedings in M&A transactions is not easy. There are many factors affecting it. Therefore, sometimes it is and it should be conceivable to carry out consolidation in a single arbitration (Section 4), which is once more related to the consent of parties. Intervention by the courts in this respect should be limited.

under one agreement are arbitrable, at least in part, under arbitration clause in second agreement; arbitrators to consider issue more fully); *ARW Explor. Corp. v. Aguirre*, 45 F.3d 1455 (10th Cir. 1995) (where five of six related agreements included arbitration clauses, disputes under sixth agreement could be arbitrated); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA*, 863 F.2d 315 (4th Cir. 1988) (arbitration clause in distribution agreement applied to subsequent contracts implementing distributorship); *Associated Brick Mason Contractors, Inc. v. Harrington*, 820 F.2d 31 (2d Cir. 1987) (arbitration clause in collective bargaining agreement encompassed disputes under related agreement); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39 (3d Cir. 1978) (dispute over subsequent oral agreement subject to arbitration provision in prior written agreement); *B.F. Goodrich Co. v. McCorkle*, 865 S.W.2d 618 (Tex. Ct. App. 1993) (dispute under one contract subject to arbitration under arbitration clause in separate contract); *Judgment of 19 October 2000*, 16 Sch 01/00, reported at www.dis-arb.de (Oberlandesgericht Schleswig) (arbitration clause in framework agreement applicable to subsequent sales orders). *Compare Nova (Jersey) Knit Ltd v. Kamgarn Spinnerei GmbH* [1977] 1 Lloyd's Rep. 463 (House of Lords). See also Daniel Cohen, *Arbitrage et groupes de contrats*, Rev. arb., 1997, p. 471.

⁵¹ See, e.g., *Award in Zurich Chamber of Commerce, Case No. 273/95 (31 May 1996)*, XXIII Y.B. Comm. Arb. 128 (1998); *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal, ICSID Award No. ARB/82/1 (25 February 1988)*, XVII Y.B. Comm. Arb. 42 (1992) (two contracts held part of single economic project, with arbitration clause in one contract applying to the other); Hanotiau, *Complex Arbitrations*, para. 259-262 & Appendix at 330.

⁵² Gary Born, *International Commercial Arbitration*, 2009, Kluwer Law International, p. 1111 (hereinafter Born, *Int. Comm. Arb.*).

Any consolidation must entirely depend on the consent of the parties involved in order to solve their disputes in the most efficient way in order to avoid the potential disadvantages of the consolidation and unconformity with party autonomy.

Chapter Three examines the problems arising from convergent decisions. Conversely, Chapter Four explores the second option open to parties of M&A transactions, alternative dispute resolution (ADR)⁵³. Section One focuses on multi-step processes in M&A transactions. In conformity with the view of consolidation, multi-step processes concentrate on the interaction between different ADR Procedures and arbitration in M&A Transactions. Discussion concerns the most used ADR procedures such as conciliation, mediation, med-arb or arb-med, and expert determination. Expert determination is the most used in M&A transactions. Unless otherwise agreed by the parties; experts have the power to make binding determinations regarding a particular fact⁵⁴. However, as a rule, expert determinations do not result in an enforceable decision, in contrast to the situation with an arbitration award⁵⁵. Thus, confusion can arise when separate documents in a single transaction make reference to both expert determinations and arbitration without clarifying how their relationship interacts. There are no harmonized rules regarding the proceedings, the power of the expert, and the proceedings to the challenge of the expert. Therefore, referring to Chapter Three, it is essential to focus on the intent of the parties, rather than applying court intervention. However, it will be noted that like “consolidation” the main disadvantage of multi-step processes is confidentiality.

Throughout Chapters Three and Four, it is remarked that for the resolution of problems occurring during interaction between parallel proceedings and/or between ADR and arbitration, respect for the consent of parties conflicts with intervention of the courts.

⁵³ For different ADR Processes see Doug Jones, Various Non-binding (ADR) Processes, in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Volume 12 (Kluwer Law International 2005), pp. 367 – 414.

⁵⁴ Georg Von Segesser, *Arbitration Pre-Closing Disputes in Merger and Acquisition Transactions*, in ASA Special Series No. 24, 2005, p. 32. This is in contrast to determinations made by experts appointed by a tribunal or a court which are not binding.

⁵⁵ For Swiss law see decision of the Swiss Federal Tribunal 117 Ia 365 quoted in Segesser *ibid*, p. 32 and Jean François Poudret, Sébastien Besson, *Comparative Law of International Arbitration*, 2nd Ed., 2007, para. 15.

The last and largest chapter (Chapter Five) of this thesis focused on “Consent” in M&A arbitration. Chapter Five’s the first section focuses on the identification and manifestation of consent in M&A transactions. The second section focuses on the consent in the transfer of the arbitration agreement. Relying on the previous chapters’ findings concerning the transfer of arbitration agreements, “assignment” concerning consolidation of parallel proceedings and “succession” are concentrated on. This was in order to study the situation of the arbitration agreement after merger or acquisition or takeover of companies has been completed.

Research for Chapter Five focuses mainly on “assignment” and “succession” on the transfer of the arbitration agreement, despite many books which study novation, subrogation, etc., alongside the transfer of arbitration agreements⁵⁶.

Based on practical M&A arbitration examples, “incorporation by reference” is the focus-point regarding the identification of consent, and also whether consent to an underlying contract constitutes consent to an arbitration agreement. Furthermore, related to the consolidation of the arbitration agreements in different phases of M&A transactions, consent in related agreements is highlighted. Additionally, the defects of consent, such as fraud and mistake, as seen in recent ICC Case No. 11961 of 2009⁵⁷, are explored.

Chapter Five analyses implied and/or tacit consent in M&A arbitration. In practice, depending on different cases there is also another aspect of proving consent without any written document – presumed intent. It may be presumed that specially drafted arbitration clauses and/or agreements may be evidence of parties’ consent, but it is not a mandatory written document in order to prove consent. This point is also analysed in terms of the different phases of M&A Transactions. This highlights the importance of the different stages of M&A transactions in M&A arbitration, because

⁵⁶ In this sense, see Stavros L. Brekoulakis, *Third Parties in International Commercial Arbitration*, Oxford Univ. Press, 2010, para. 2.13.

⁵⁷ Final award in Case No. 11961 in Albert Jan van den Berg (ed), *Y. B. Comm. Arb.*, 2009 – Vol. XXXIV, (Kluwer Law International 2009), pp. 32 – 76. This case has been studied in details in the Chapter V.

while determining consent of the parties, their activities, or their position taken in the previous phases, should be taken into consideration.

PART I: THEORETICAL FOUNDATIONS

The first part of the thesis discusses the theoretical foundations of M&A transactions. As seen from ascertaining the working definition in the introduction, merger, acquisition, and takeover have differences from each other and address different issues. As mergers and acquisitions are long and complex processes, analysis has been separated into different phases for a practical view (Chapter I). Disputes arising during these different phases are in majority resolved by arbitration. After the examination of the chronological order of M&A transactions, the relation between arbitration and M&A disputes will be reviewed (Chapter II).

CHAPTER I: CHRONOLOGICAL PHASES OF MERGER AND ACQUISITION TRANSACTIONS

A) Introduction

The last decades have witnessed an ever-increasing amount of mergers and acquisitions (M&A), as companies worldwide are seeking to enhance their competitive positions in their respective business systems. The prevailing mantra is that mergers and acquisitions remain fraught with high failure rates⁵⁸. Since the mid-1980s a large literature on M&A has emerged, dealing with M&A from different theoretical perspectives, including strategy, finance, organizational theory, communication, and gender. Despite the advances made in our knowledge of M&A, over the last years, calls have been made for merger and acquisition researchers to develop sounder theories and more robust research on the phenomenon of mergers and acquisitions, especially as regards their challenges in cross-border contexts⁵⁹.

It is the author's opinion to revisit established M&A theories in order to prove the complexity of an M&A process. Due to the existence of some empirical findings, which suggest that mergers under-perform the market, this literature has been divided into two broad schools – the value increasing, efficient market school, and value decreasing agency schools.

The Value-Increasing Theories

According to the value increasing school, mergers occur, broadly, because mergers generate “synergies” between the acquirer and the target, and synergies, in turn, increase the value of the firm⁶⁰.

⁵⁸ King, D. R., Dalton, C.M., Daily, and J.G. Covin, J.G., Meta-analyses of post-acquisition performance: Indications of unidentified moderators. *Strategic Management Journal*, 25, p. 189 et seq.

⁵⁹ 8th Euram, 14-17 May 2008,; Perspective on M&As: Theories, Methods and Experiences, in http://www.euram2008.org/Dokumenti/tracks/Teerikangas_TP54.pdf

⁶⁰ Hitt, M.a., J.S. Harrison, and R. D. Ireland, *Mergers and Acquisitions: A Guide to Creating Value for Stakeholders*, Oxford University Press, 2001, p. 68 et seq.

The theory of efficiency suggests, in fact, that mergers will only occur when they are expected to generate enough realisable synergies to make the deal beneficial to both parties; it is the symmetric expectations of gains which results in a “friendly” merger being proposed and accepted. If the gain in value to the target was not positive, it is suggested, the target firm’s owners would not sell or submit to the acquisition, and if the gains were negative to the bidders’ owners, the bidder would not complete the deal. Hence, if we observe a merger deal, efficiency theory predicts value creation with positive returns to both the acquirer and the target. Banerjee and Eckard⁶¹ and Klein⁶² evidence this suggestion⁶³.

Most of the recent literature concludes that operating synergies are the more significant source of gain⁶⁴, although it does also suggest that market power theory remains a valid merger motive. Increased “allocative” synergies is said to offer the firm positive and significant private benefits because, *ceteris paribus*, firms with greater market power charge higher prices and earn greater margins through the appropriation of consumer surplus. Indeed, a number of studies find increased profits and decreased sales after many mergers – a finding which has been interpreted by many as evidence of increasing market power and allocative synergy gains⁶⁵.

In an efficient merger market the theory of corporate control provides a third justification, beyond simply synergistic gains, for why mergers must create value. It suggests that there is always another firm or management team willing to acquire an

⁶¹ Banerjee, A and E.W. Eckard, Are mega-mergers anticompetitive? Evidence from the first great merger wave. *Rand Journal of Economics*, 29, p. 807 et seq.

⁶² Klein P. G., Were the acquisitive conglomerates inefficient? *Rand Journal of Economics*, 32, p. 752 et seq.

⁶³ Utz Weitzel, Killian J McCarthy, Theory and Evidence on Mergers and Acquisitions by Small and Medium Enterprises, Utrecht School of Economics Tjalling C. Koopmans Research Institute Discussion Paper Series 09-21, August 2009, p. 4.

⁶⁴ See e.g., Devos E. P.R. Kadapakkam, and S. Krishnamurthy, S., How Do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies, *Review of Financial Studies*, doi:10.1093/rfs/hhn019, 2008; Houston J. F. , C. M. James, and M.D. Ryngaert, Where Do Merger Gains Come From? Bank Mergers from the Perspective of Insiders and Outsiders, *Journal of Financial Economics*, 60, 2001; Murkherjee T. K., H. Kiymaz and H.K. Baker, Merger Motives and Target Valuation: A survey of Evidence from CFO’s, *Journal of Applied Finance* 14, Mukherjee et al. Find that 90% of managers identify operative motives as a reason to merge, and Devos et al., suggest that, of a total 10.3% synergy gain, some 8.3% arise through operative synergies quoted in Theory and Evidence on Mergers and Acquisitions by Small and Medium Enterprises, Utz Weitzel, Killian J McCarthy, *ibid*.

⁶⁵ See Gugler K., D.C. Mueller, B. B. Yurtoglu and C. Zulehner, The Effects of mergers: an international comparison, *International Journal of Industrial Organization* 21, 2003, p..633 et seq.

underperforming firm, to remove those managers who have failed to capitalise on the opportunities to create synergies, and thus to improve the performance of its assets⁶⁶.

From the bidder's perspective, the theory of corporate control is partially based on efficiency theory, although there are two important differences. First, it does not assume, per se, the existence of synergies between the corporate assets of both firms, but rather between the bidder's managerial capabilities and the target assets. Hence, corporate control predicts managerial efficiencies from the re-allocation of under-utilized assets. Second, it implies that the target's management team is likely to resist takeover attempts, as the team itself and its managerial inefficiency is the main obstacle to an improved utilization of assets⁶⁷.

The Value (Decreasing or) Destroying Theories

Value – Destroying Theories can be divided into two groups: the first assumes that the bidder's management is "boundedly rational", and thus makes mistakes and incurs losses due to informational constraints despite what are generally value-increasing intentions. The second assumes rational but self-serving managers, who maximise a private utility function, which at least fails to positively affect firm value.

Within the first category, the theory of managerial hubris suggests that managers may have good intentions in increasing their firm's value but, being over-confident, they over-estimate their abilities to create synergies. Over-confidence increases the probability of overpaying⁶⁸, and may leave the winning bidder in the situation of a winner's curse⁶⁹ which dramatically increases the chances of failure⁷⁰. Empirically

⁶⁶ Weston F. J., M. L. Mitchell and H. J. Mulherin, *Takeovers, Restructuring and Corporate Governance*, Pearson Prentice Hall, Upper Saddle River, New Jersey, 2004, p. 157 et seq.

⁶⁷ Weitzel, Mc Carthy, *supra* note 63, p. 5.

⁶⁸ Hayward, M. L. A., and D. C. Hambrick, Explaining the premiums paid for large acquisitions: Evidence of CEO hubris. *Administrative Science Quarterly*, 42, 1997, p. 111 et seq.; Malmeinder U., and G. Tate, Who makes acquisitions? CEO overconfidence and the market's reaction, *Journal of Financial Economics* 89, 2008, p. 26 et seq.

⁶⁹ The winner's curse is a phenomenon that occurs in common value auctions with incomplete information. If the auctioned item is worth roughly the same to all bidders, the winner is the bidder who makes the highest estimate of its value. If we assume that the average bid is accurate, the winning bidder overpays quoted by Weitzel, Mc Carthy, *supra* note 63, p. 6.

⁷⁰ Dong, M., D. Hirshleifer, S. Richardson, and S.H. Teoh, Does Investor Misvaluation Drive the Takeover Market? *Journal of Finance* 61(2), 2006, p. 732 et seq.

speaking, Berkovitch and Narayanan⁷¹ find strong evidence of hubris in US takeovers and Goergen and Renneboog⁷² find the same in a European context. The latter estimate that about one third of the large takeovers in the 1990s suffered from some form of hubris. Malmeinder and Tate⁷³ show that overly optimistic managers, who voluntarily retain in-the-money stock options in their own firms, more frequently engage in less profitable diversifying mergers, and Rau and Vermaelen⁷⁴ find that hubris is more likely to be seen amongst low book-to-market ratio firms – that is, amongst the so-called “glamour firms” – than amongst high book-to-market ratio “value firms”.

Jensen’s theory of managerial discretion claims that it is not over-confidence that drives unproductive acquisitions, but rather the presence of excess liquidity, of free cash flow (FCF). Firms whose internal funds are in excess of the investments required to fund positive net present value projects, it is suggested, are more likely to make quick strategic decisions, and are more likely to engage in large-scale strategic actions with less analysis than their cash-strapped peers. High levels of liquidity increase managerial discretion, making it increasingly possible for managers to choose poor acquisitions when they run out of good ones⁷⁵. Indeed, several empirical studies demonstrate that the abnormal share price reaction to takeover announcements by cash-rich bidders is negative and decreasing in the amount of FCF held by the bidder. Moreover, it is suggested that the other stakeholders in the firm will be more likely to give management the benefit of the doubt in such situations, and to approve acquisition plans on the basis of fuzzy and subjective concepts such as managerial “instincts”, “gut feelings” and “intuition” based on high past and current cash flows⁷⁶. Thus like Hubris Theory, the Theory of FCF suggests that otherwise well-intentioned managers make bad decisions, not out of malice, but

⁷¹ Berkovitch, E., M. P., Narayanan, Motives for Takeovers: An Empirical Investigation, *Journal of Financial and Quantitative Analysis* 76 (1), p. 351 et seq.

⁷² Goergen M., and L. Renneboog, Shareholder Wealth Effects of European Domestic and Cross-Border Takeover Bids, *European Financial Management* 10 (1), 2004, p. 14 et seq.

⁷³ Malmeinder U., and G. Tate, CEO Overconfidence and Corporate Investment, *Journal of Finance* 60 (6), p. 2662 et seq.

⁷⁴ Rau, P. R., and T. Vermaelen, Glamour, Value and the Post-Acquisition Performance of Acquiring Firms, *Journal of Financial Economics* 49, p. 107 et seq.

⁷⁵ Martynova, M., and L. Renneboog, A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand? *Journal of Banking and Finance*, 32(10), 2008, p. 2150 et seq.

⁷⁶ Rau, P.R. and T. Vermaelen, *supra* note 75, p. 111 et seq.

simply because the quality of their decisions are less challenged than they would be in the absence of excess liquidity⁷⁷.

It is generally agreed that managerial self-interest does play a role in M&A; research has shown that bidder returns are, for example, generally higher when the manager of the acquiring firm is a large shareholder⁷⁸, and lower when management is not⁷⁹.

The theory of managerial entrenchment for example, claims that unsuccessful mergers occur because managers primarily make investments that minimise the risk of replacement. It suggests that managers pursue projects not in an effort to maximise enterprise value, but in an effort to entrench themselves by increasing their individual value to the firm. Entrenching managers will, accordingly, make manager-specific investments that make it more costly for shareholders to replace them, and value will be reduced because free resources are invested in manager-specific assets rather than in a shareholder value-maximising alternative. Amihud and Lev empirically support this notion, and suggest that managers pursue diversifying mergers in order to decrease earnings volatility which, in turn, enhances corporate survival and protects their positions⁸⁰.

Entrenchment is not only pursued for job security itself, but also because entrenched managers may be able to extract more wealth, power, reputation and fame. While entrenchment theory primarily explains the process of how managers position themselves to achieve these objectives, the theory of empire-building and other related, well-tested theories provide both the motivations and evidence behind these objectives. According to empire theory, managers explicitly motivated to invest in

⁷⁷ Weitzel, Mc Carthy, *supra* note 63, p. 6.

⁷⁸ Lewellen, W. C. Loderer, and A. Rosenfeld, *Decisions and Executive Stock Ownership in Acquiring Firms*, *Journal of Accounting and Economics* 7, 1985, p. 212 et seq.

⁷⁹ Lang, L., R. Stulz, and R. Walkling, *A Test of the Free Cash Flow Hypothesis: The Case of Bidder Returns*, *Journal of Financial Economics*, 29(2), 1991, p. 317 et seq. ; Harford, J., *Corporate Cash Reserves and Acquisitions*, *Journal of Finance* 54(6), 1999, p. 1977 et seq.

⁸⁰ Shleifer and Vishny (1991) suggest that during the third merger wave risk diversification played a large role in M&A policy as prior to the 1980s managers had insufficient incentive to focus on shareholder concerns and it has been suggested that the rise of the conglomerate may be an outgrowth of this principal-agent problem (Martynova and Renneborg, 2008) quoted in Weitzel and McCarthy, *supra* note 63, p. 7.

the growth of their firm's revenues (sales) or asset base, subject to a minimum profit requirement⁸¹.

The merger theories described above have clearly demonstrated that merger is a complex process depending on the strategies of companies involved.

Merger is a complex and long procedure which also mandates careful study of each step. In the first chapter, these steps are examined to clarify the process. These steps are examined in chronological order to lay a foundation to allow focus on the disputes arising at these different stages in the process and arbitration for the resolution of these disputes.

Consent by the parties indicates their intent to submit their disputes to an agreed forum for dispute resolution. Consent is the central point for interrelation of arbitration clauses and/or agreements between the different phases in M&A transactions. Therefore it is important to analyse the phases of the process of M&A Transactions in order to find a solution for problems concerning consent in M&A Arbitration.

This chapter will examine whether M&A transactions tend more to follow a standardised model, given that there is no codification, and whether they are subject to variations depending on the circumstances. According to H. Peter, who suggests that there is a standardised practice, this is simply the pragmatic outcome of a somewhat Darwinist evolution more than the result of dogmatic studies as to why such transactions should occur in this manner. Practitioners have thus progressively developed a process which provides a balance between the often conflicting interests of the seller and those of the buyer⁸².

⁸¹ Mueller introduced mergers as a vehicle for growth maximization (not profit maximization), and Williamson complements this by introducing company cars, excess staff or prestigious investments as complimentary motives. Rhoades analyses the third merger wave, and shows that managerial power serves as an explanation of firm growth through M&A, and concludes that the power motive replaced the profit motive as the driving force behind large companies' behaviour in Mueller D. C. , A Theory of Conglomerate Mergers, Quarterly Journal of Economics 83, 1969, p. 643 et seq. quoted in Weitzel and McCarthy, *supra* note 63, p. 7

⁸² Henry Peter, M&A transactions: Process and possible disputes, in ASA Special Series No. 24, 2005, p. 1.

According to Whalley and Semler, once the commercial decision has been taken to proceed, there are five clear stages in most international acquisitions⁸³:

- Initial identification of the target and negotiation of the broad terms of the deal, possibly leading to an exchange of heads of agreement or a letter of intent;
- A “due diligence” examination of the target; either before or after the exchange of a formal agreement;
- Negotiation and drafting of formal agreements;
- Obtaining third party and government consents or licences; and
- Finalization of the transaction (referred to variously as closing, completion or settlement)

This chapter will follow the chronological order of the transaction stated above in its analysis and examination of the deficit in existing regulation. The first stage in an M&A transaction requires the buyer or its adviser to look at a number of major legal issues which are common to most jurisdictions throughout the world. Those issues determine the structure of the acquisition and whether there are any major impediments to it⁸⁴.

The first two stages are crucial to the buyer, because a decision to complete the transaction should only be made once a proper assessment has been made of the target and its business. During the first stage, the buyer needs to decide on the structure of the proposed deal, and identify any legal issues associated with the acquisition. Consent appears for the first time in the intent of the parties. In the second stage, the buyer needs to satisfy itself that everything which it has been told, or which it has assumed, about the target is correct⁸⁵. Every phase of the process occurring in parties’ offer or negotiations contributes to the consent of parties.

⁸³ Ibid, p. 2.

⁸⁴ Ibid.

⁸⁵ Ibid.

Therefore, all actions taken by the parties will certainly have effects on arbitration regarding consent in the resolution of disputes.

It is important to know and understand this process, keeping in mind that, over the years and sometimes questionably, practitioners have come to believe that there is no alternative to established practice. One can safely say that there is currently an opinion which necessitates respect to the standardised way of doing M&A deals⁸⁶. In order to deal with coordination and cooperation problems in M&A transactions, it is absolutely necessary to focus on the entire process. Further discussion of this problem takes place in Chapter Three, however different arbitration clauses or parallel proceedings may occur throughout the process.

Therefore, the management of the process is essential in order to prevent the problem of different arbitration clauses or parallel proceedings. In order to manage the process it is essential to determine each and every phase, beginning with the negotiation phase.

1) Negotiation phase

a) Preliminary Contacts

The process usually starts when the management of one firm contacts the target company's management. On the other hand it is common for third parties, such as investment or merchant banks of each firm, to be involved. Sometimes this process works smoothly and leads to a quick merger agreement. As Gaughan states "a good example of this was the 1995, \$19 billion acquisition of Capital Cities/ABC Inc. by Walt Disney Co. In spite of the size of this deal, there was a quick meeting of minds by management of these two firms and a friendly deal was completed relatively quickly. ... A quick deal may not be best. The AT&T acquisition of TCI is another good example of a friendly deal where the buyer did not do its homework and the seller did a good job of accommodating the buyer's (AT&T's) desire to do a quick

⁸⁶ Ibid, p.1.

deal at a higher price. Speed may help ward off unwanted bidders but it may work against a close scrutiny of the transaction”⁸⁷. Therefore “consent” becomes relevant as soon as preliminary contacts begin.

During preliminary contacts, the selling process is a sensitive process with respect to the target and must therefore remain secret. A confidentiality agreement may be executed between the parties during the initial part of process. This confidentiality agreement allows the parties to exchange confidential information that may enable the parties to better understand the value of the deal⁸⁸.

Although most M&A agreements contain arbitration clauses, arbitration proceedings for pre-closing conflicts are still rather rare. The few that do occur are for reasons of confidentiality, and are seldom published⁸⁹.

Pre-closing disputes include all disputes related to M&A transactions which arise before the object of the transaction has been transferred and paid for. Disputes sometimes arise with respect to the breaches of pre-signing confidentiality or exclusivity provisions giving rise to important questions of proof of the breach and of the resulting damages. Compliance with confidentiality or exclusivity obligations can sometimes already be secured successfully through interim measures⁹⁰.

To prevent subsequent difficulties with regard to the substantiation and proof of damages caused by non compliance, it is preferable, with confidentiality and exclusivity obligations, to provide for contractual penalties or liquidated damages⁹¹. Damages generally include loss of profits (*lucrum cessans*), as well as a decrease of assets or increase of liabilities or expenses (*damnum emergens*). Further types of

⁸⁷ Gaughan, *supra* note 6, p. 19.

⁸⁸ For example following the eventual sale of Guidant to second bidder Boston Scientific for \$27 billion, J&J sued Boston scientific and Abbott Laboratories in September 2006. J&J alleged that Guidant leaked confidential information to Abbott which had agreed to purchase Guidant’s cardiac stent business for approximately \$4 billion thereby reducing antitrust concerns. J&J alleged Guidant’s release of this information violated its original agreement with J&J. This underscores another risk of M&A- the release of valuable internal information see also Gaughan, *ibid*, p. 20.

⁸⁹ Segesser, *supra* note 54, p. 17.

⁹⁰ Alexander Jolles/Maria Canals de Cedie, Confidentiality, in Kaufmann-Kohler / Stuck, *International Arbitration in Switzerland: A Handbook for Practitioners*, Kluwer Law International, 2004, p. 101.

⁹¹ Peter R. Isler, Letter of Intent, in Rudolf Tschani (Ed.), *Mergers & Acquisitions VI*, Zurich 2004, p. 16.

damages that an arbitral tribunal might have to decide on include compensation for the loss or opportunity, or moral damages. According to Mr. Segesser in M&A transaction disputes, the difficulties which the parties normally encounter in substantiating and proving damages which go beyond costs incurred should not be underestimated⁹².

A confidentiality clause in M&A agreements would generally also apply to dispute resolution proceedings arising under such agreements. However, parties are well advised to examine this aspect carefully, and to insert the appropriate language or reference into the agreement where needed⁹³.

Generally, the confidentiality of arbitral proceedings is cited as one of its important advantages in commercial disputes, and parties often presume confidentiality as given. However, some court decisions have made clear that confidentiality is not considered to be an inherent feature of arbitration in all jurisdictions⁹⁴.

Moreover, only a few national laws and some arbitration rules grant general confidentiality for arbitration proceeding⁹⁵. Therefore, confidentiality agreements and confidentiality clauses in M&A agreements should be drafted in a way so as to cover the various aspects of confidentiality in arbitral proceedings. When choosing a set of arbitration rules, preference may be given to those that provide for a strict duty of confidentiality⁹⁶.

On the other hand, it is also possible that after preliminary discussions, the potential buyer depending on his bargaining power, may require from the seller an exclusive right to negotiate, at least for a certain time. Exclusivity arrangements would then also be made.

⁹² Segesser, *supra* note 54, p. 46.

⁹³ *Ibid.*

⁹⁴ See the decisions *United States v. Panhandle Eastern Corp. Et al.*, 118 FDR 346, 10 Fed R Serv 3rd 686 (D. Del. 1998); *ESSO/BHP v. Plowman* (1995) 128 ALR 391; or *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.* (Swedish Supreme Court Case No. T-6-111-98).

⁹⁵ For an overview of the various rules and jurisdictions see Expert Report of Dr. Julian Lew (in *ESSO/BHP v. Plowman*), *Arb. Int.*, 1995, pp. 283-296.

⁹⁶ For example see art. 43 of the Swiss Rules.

Unless, for any reason the negotiations collapse, the parties usually reach a stage where the seller has identified a purchaser with whom there exists a common intent to implement a specific deal. At that point the parties often deem it useful to execute a “letter of intent”, sometimes called “heads of agreement”, “memorandum of understanding”, or “term sheet”⁹⁷.

b) Letter of Intent

With the increasing number of merger and acquisition transactions, the letter of intent, which precedes most forms of acquisitions of businesses, has become a widespread tool. Indeed it is often considered as a sine qua non condition of any merger or acquisition⁹⁸.

Many M&A transactions start with an invitation by the seller, or its investment banker, to potential buyers to submit their offers. In virtually all M&A transactions, parties then sign a preliminary document at the beginning of negotiations in the form of a letter of intent, or a memorandum of understanding. In this document, parties typically confirm their intention to continue, or begin, negotiations in good faith, and specify a set of provisions to govern the negotiation process⁹⁹.

The main characteristics of letter of intents are:

- a letter of intent has no codified meaning, as such, neither with respect to its content nor to its nature or legal consequences. Caution should therefore prevail; what matters is the letter’s substance and the circumstances surrounding its execution;
- in particular, the question as to whether a letter of intent has any binding effect depends on its content, and on the parties’ intentions (whether expressed or implied);

⁹⁷ H. Peter, *supra* note 83, p. 2.

⁹⁸ H. Peter and Jean Christophe Liebeskind, Letters of intent in the M&A Context, in ASA Special Series No. 24, 2005, p. 265 (hereinafter Peter and Liebeskind).

⁹⁹ See Isler, *supra* note 92, p. 2 et seq.

- usually the parties state that the only purpose of the letter of intent is to outline their intentions. They sometimes expressly state it shall have no binding effect and that it is “subject to contract”. However, this is usually untrue, at least in part. Most letters of intent probably do have legal implications;
- Any letter of intent usually describes the deal’s subject matter (the “target”), the price range or at least the methods or parameters which will enable the determination of the price, the nature of the deal (a share deal, an asset deal, a merger, a spin-off, etc.); the parties’ intention to enter into the envisaged deal; the procedure that will be followed in order to implement the deal (due diligence, signing, closing, adjusting, etc.); as well as the relevant timetable. If the parties have not yet entered into confidentiality or exclusivity agreements, provisions governing these two aspects are usually included in the letter of intent¹⁰⁰.

In a letter of intent, rights and obligations are established to the extent intended by the parties. However, the core provisions of a letter of intent are frequently non-binding in nature: the parties are not bound to conclude a transaction, but are merely expressing their intention to continue or commence negotiations. On the other hand, a letter of intent usually includes a number of “accessory” obligations, with regard to which the parties clearly intend to be bound. Because in international transactions, it is important to provide for the law which governs the letter of intent, and issues arising there under, as it is not always easy to determine which party is rendering the characteristic performance and laws of different jurisdictions may vary considerably in this area¹⁰¹.

As the core of a letter of intent does not create a binding obligation to conclude a transaction, it is not possible to insist successfully on a continuation of the negotiations, nor to interfere when one side abandons the negotiations without giving valid reasons. Claims for costs caused by an undue prolongation of negotiations, or in cases of behaviour which violates the principle of good faith, are the only

¹⁰⁰ Peter, *supra* note 83, p. 2.

¹⁰¹ See for example art. 117 of Federal Act on private International Law (PILA).

remedies available based centrally on a letter of intent, and are rather seldom successfully pursued. In contrast, claims based on a violation of an “accessory” obligation are more frequent, e.g. for breach of confidentiality, or the exclusivity granted to the buyer. In a reported ICC arbitration, claimant sought to recover a contractual penalty, in the amount of 25 million USD, on the basis that the seller had breached an exclusivity clause stipulated in a letter of intent by selling the target company to a third party buyer¹⁰².

Some of the “accessory” obligations include provisions which govern the negotiation process, or define a certain behaviour, which the parties, and in particular the seller, must follow during the negotiation process, up to the signing of a purchase contract, or even through the completion of the agreed transaction upon closing. Where such accessory obligations are violated the parties may consider an application for interim relief or preliminary measures to the court due to the time constraints and in order to safeguard the opportunity which the potential transaction represents.

Letters of intent are usually executed between the end of the exploratory negotiations and the beginning of due diligence. Thus, they govern due diligence, but also the contractual negotiations which will flow, from and frequently overlap, the due diligence process, ultimately resulting in the acquisition contract¹⁰³. The letter of intent has developed over the years into the appropriate instrument to satisfy both parties’ concerns. It plays a significant role from a psychological standpoint, by documenting the facts and reassuring the parties that the negotiations, which often involve considerable expenses and commitment, are based on a serious and shared intent.

Hence, the letter of intent may be defined as a declaration of intent by one, or more, parties to conclude a transaction, in which certain fundamental aspects of the envisaged transaction, and of the procedure that should lead to its conclusion, are

¹⁰² Klaus Sachs, “Schiedsgerichtsverfahren über Unternehmenskaufverträge” – unter besonderer Berücksichtigung kartellrechtlicher Aspekte, *Schieds VZ* 3/2004, 126 (hereinafter Sachs, *Schiedsgerichtsverfahren*)

¹⁰³ Peter, Liebeskind, *supra* note 99, p. 265.

recorded¹⁰⁴. Letters of intent can portend any kind of deal, for instance the acquisition of shares, of assets, of a business, as well as a merger, or a joint venture.

In the author's opinion, this declaration of intent would be a way of coordination or synergy with next phases of M&A transactions. On this assumption, the letter of intent can be strengthened as an agreement and also a roadway for dispute resolution because, as mentioned in the next chapters, in order to reduce the complexity of arbitration problems during M&A transactions the binding effect of letter of intent is an important critical juncture. Therefore, the author believes that arbitration institution rules should recognise declaration in letter of intent as a binding arbitration clause. This can be one of the important clauses which can be pointed out in a guideline for M&A arbitration.

b-1) Delimitations of the notion

A first delimitation may be drawn between letters of intent and other instruments, known under the same name but pursuing a fundamentally different purpose. In fact, in French the term "letter of intent" is sometimes used to designate "comfort letters" (letter de confort, letter de patronage, Patronatserklärung) i.e. letters issued by a party in favour of another, by which the issuer makes certain statements and/or supplies certain information, typically regarding its shareholding and the solvency of a subsidiary. Some authors consider that the use of "letter of intent" in the sense of "comfort letter" is improper¹⁰⁵; while other authors however do acknowledge the double meaning of this expression¹⁰⁶.

¹⁰⁴ Rolf Watter, *Unternehmensübernahmen*, Zürich 1990, pp. 130-132.

¹⁰⁵ Peter and Liebeskind *supra* note 99, p. 266-267

¹⁰⁶ Thus in French, such an institution appears to be indifferently known as "lettre d'intention", "de patronage", "de confort" or "de parrainage". For Swiss law, see e.g. Anne Schollen, *Les Lettres de parrainage ont-elles toujours de bonnes intentions?*, RDAI 1994, p. 793; Roland Ruedin, *La Lettre d'intention en droit Suisse*, in *Hommage a Paul-René Rosset a l'occasion de son 70eme anniversaire*, Neuchatel 1977, p. 213-228 (on comfort instruments). For French Law see Philippe Simler, *Cautionnement et garanties autonomes*, 2nd Ed., Paris (Litec) 1991, p. 28; Michel Cabrilac /Christian Mouly, *Droit des Suretés*, 5th Ed., 1999, p. 387. For U.S. Law, see Larry A. Dimatteo /Rene Sacasas, *Credit and Value Comfort Instruments: Crossing the Line From Assurance to Legally Significant Reliance and Toward a Theory of Enforceability*, 47 *Baylor L. Rev.* 357.

Although the boundaries are often unclear, other possible sources of confusion include instruments, at times improperly called “letters of intent”, which are actually gentlemen’s agreements¹⁰⁷.

b-2) Related Instruments

Letters of intent have further to be distinguished from other instruments which pursue, at least in part, the same purpose, but perform a different function, such as option agreements or confidentiality agreements¹⁰⁸.

1) Options

The option agreement has been defined as an agreement by which one of the parties grants the other a discretionary right to generate, by its sole declaration of intent, a given contract¹⁰⁹. In order to determine the binding effect of “consent”, it is important to analyse the dispersion between parties just in the beginning of the M&A transaction. In the author’s opinion this discretionary right directly effects arbitration clauses too. It is very complicated to see the real consent of a party who gives discretionary rights to others. Therefore, as it is discussed in the next chapter, an arbitration clauses injected into different contracts are not direct evidence of “consent” of parties.

2) Confidentiality Agreements

The apprehensions with respect to confidentiality have to be dealt with at an early stage, usually before the parties are even ready to execute a letter of intent. This is

¹⁰⁷ The gentlemen’s agreement has been defined as an understanding by which the parties commit themselves to moral obligations, i.e., to refrain from resorting to judiciary enforcement. See Ralf Schlosser, *Les Lettres d’intention: Portée et sanction des accords précontractuels*, in Jérôme Bénédict et al. (eds.), *Etudes en l’honneur de Baptiste Rusconi*, Lausanne (Bis&Ter) 2000, p. 348 and footnote 14.

¹⁰⁸ Peter Liebeskind, *supra* note 99, p. 267.

¹⁰⁹ See Schlosser, *supra* note 108, pp. 346-347 and footnotes 6 and 7. Besides all which are more or less standardised, put and call options, such agreements are found e.g., in the context of technology transfers, where the potential buyer shall have the right to appraise the know-how of the potential seller, and then to exercise his option at the time it believes appropriate.

why, although the confidentiality provisions can be part of the letter of intent, they often take the form of a separate and preliminary document¹¹⁰.

The key provisions of a confidentiality agreement generally are¹¹¹:

- **Identity of the parties:** These are usually the buyer and the seller. Occasionally, the target is also a party, so that it may directly claim performance or compensation in the event of breach. Third parties may be required to sign the confidentiality agreement, such as advisors, or managers of the parties, including sometimes those of the target.
- **Scope:** The parties undertake to keep the confidential information secret and to use it strictly in compliance with the purpose of the agreement, i.e. the acquisition of the target.
- **Confidential information:** The definition of what is deemed to be confidential is a key provision. The mere existence of negotiations between the parties is often expressly designated as confidential.
- **Abortion:** The fate of the information, and the related documents, is usually provided for should the acquisition not ultimately take place.
- **Applicable law and dispute settlement:** Applicable law and jurisdiction are, in most cases, specified.

3) Variations in Terminology

Several other expressions, such as memorandum of understanding, memorandum of agreement, heads of agreement, or term sheet, are encountered. The situation is no

¹¹⁰ Peter, Liebeskind, *supra* note 99, p. 267.

¹¹¹ *Ibid*, p. 268.

clearer in other languages: “Punktuationen” in German, “protocole d’accord” in French, etc¹¹².

There seems to be no general understanding on whether these expressions represent substantially different instruments, or are only variations in terminology¹¹³.

In any event, pursuant to a well-established national legislation of different countries, intent prevails over wording¹¹⁴. Thus, what matters is not the title of the document, but its actual content as construed taking into account the parties’ intentions¹¹⁵.

4) Pre-Contractual Agreements and Promises to Contract

Pre-contractual agreements are defined as agreements made between two or more negotiating parties, seeking to arrive at the conclusion of a final contract¹¹⁶.

Promises to contract are regulated by art. 22 CO, pursuant to which the parties may contractually commit themselves in order to conclude a contract in the future¹¹⁷.

5) Bilateral (or Multilateral) and Unilateral Letters of Intent

Letters of intent are usually bilateral, i.e. they are executed by two parties the (potential) seller and the (potential) buyer. Occasionally, they may be signed by more parties, for instance by several companies, which are acting in concert or belong to the same group, or sometimes by the target, in which case the letter of intent may be described as multilateral¹¹⁸.

¹¹² Schlosser, supra note 108, pp. 347-348 and footnotes 11 and 13.; Ralph Lake/ Ugo Draetta, *Letters of Intent and Other Precontractual Documents*, 2nd Ed., Salem 1994, p. 5.

¹¹³ Lake/ Draetta, *ibid*, p. 9 and footnote 27.

¹¹⁴ For example art. 18 of Code des obligations in Swiss Law.

¹¹⁵ Peter, Liebeskind, supra note 99, p. 268.

¹¹⁶ Schlosser, supra note 108, p. 345. Also known as “preliminary agreements” in Anglo-Saxon legal terminology, “contrats de négociation” in French and either “Vorausvertrag” (to distinguish from “Vorvertrag”, i.e. promise to contract), or “Vertragsverhandlungsvereinbarung” in German.

¹¹⁷ In Latin “pactum de contrahendo”; in french “précontrat”, in German “Vorvertrag” (to distinguish from “Vorausvertrag”, i.e. pre-contractual agreement). In order to avoid confusion, this paper shall exclusively use the expression “promise to contract”.

¹¹⁸ Peter, Liebeskind, supra note 99, p. 268.

Less frequently, a letter of intent may be unilateral, i.e. emanate from only one party, either the seller or the buyer, expressing a party's intent to sell or to buy¹¹⁹.

b-3) Content

For the content of letter of intent there is no standard pattern. Letters of intent vary considerably in form and substance. Certain basic provisions may, however, be identified and classified as “necessary” clauses, and all others as “optional” clauses¹²⁰.

1) Necessary Clauses

Necessary clauses usually include the following items¹²¹:

- identity of parties: who are the envisaged seller and the purchaser of the target;
- object of the transaction: the business, or part thereof, the transaction relates to;
- nature of the transaction: what kind of transaction do the parties envisage? A share deal, an asset deal, a capital increase, a spin off, a leveraged buy-out, the setting up of a joint-venture (e.g. whether corporate or contractual);
- Process: how is the envisaged transaction going to be achieved? (a due diligence first, then the signing of a purchase agreement, thereafter the closing, etc.) what will the calendar be, etc.

2) Optional Clauses

¹¹⁹ Schlosser, *supra* note 108, pp. 356-357.

¹²⁰ Peter, Liebeskind, *supra* note 99, p. 269.

¹²¹ *Ibid.*

Optional clauses may include the following items¹²²:

- sale price: (sometimes an exact figure, more often an estimate, or range, valuation principles, or the formula for determining the price, etc.)¹²³;
- Due diligence (scope, time schedule, and procedural or methodological issues);
- Exclusivity (“lock in”¹²⁴ and/or “lock out”¹²⁵)¹²⁶;
- Non-inducement¹²⁷;
- Costs;
- Confidentiality (if not the subject matter of a separate agreement);
- Applicable law and dispute settlement , including forum;
- Compulsory nature of the letter of intent (none/partial/total)¹²⁸.

3) Legal Nature

The letter of intent is, as indicated by its very name, voluntary in nature. Whether it has binding effect is a delicate and often controversial issue. It will be discussed whether it can be considered a “full” contract, a promise to contract, or an offer¹²⁹.

3.1. Does the Letter of intent amount to a Contract?

¹²² Ibid.

¹²³ Rudolf Tschäni, Andreas Von Planta, Matthias Oertle, *Corporate Acquisitions and Mergers in Switzerland*, Zürich 2000, pp. 83-84, § 395 to 400 consider the price (or a formula enabling to determine the price) as an “essential point” of the letter of intent (hereinafter Tschäni, Planta, Oertle)

¹²⁴ The seller must negotiate with the buyer during a certain period of time.

¹²⁵ The seller must negotiate with third parties during a certain period of time.

¹²⁶ This provision generally specifies that it shall cease to be binding as soon as a party declares in writing its intent to depart from the negotiation.

¹²⁷ The potential buyer undertakes not to hire or induce away managers or employees of the target.

¹²⁸ Peter/ Liebeskind, *supra* note 99, p. 270.

¹²⁹ Ibid.

It is usually considered that a letter of intent is not an agreement. This is due to the fact that, in a standard M&A pattern, letters of intent are meant to describe an envisaged transaction, not to confirm an agreed one. To dispel any doubts in this respect, this concept is often expressly indicated in the wording of letters of intent, by stating, for instance, that the deal is “subject to contract”. The parties thus only express intentions, not decisions. The intent is to negotiate and to possibly conclude a final contract, without prejudice to the parties’ discretionary right not to do so¹³⁰.

The answer is a question of interpretation for which the rules of good faith play a central role. Applying the “principle of trust”, the parties’ intent will be interpreted according to their actual understanding, with a particular view to that of the addressee, bearing in mind the overall circumstances¹³¹.

In order to assess whether the letter of intent qualifies as a contract, a number of preliminary distinctions should be made with respect to its provisions. Firstly, the provisions typically contained in a letter of intent, as listed above, whether necessary or optional, can be divided into two categories: those which govern the negotiation of the final contract, irrespective of its outcome; and those which pertain to its actual implementation¹³².

- (i) The provisions belonging to the first category (negotiation) involve the way negotiations will be conducted and related issues. These are, in particular, description of the process, confidentiality, exclusivity, costs, applicable law and dispute settlement, and finally, non-inducement¹³³.

In most cases, such provisions are intended to be binding, and whether this is expressed or implied is not relevant. To this extent, the letter of intent is, therefore, an agreement¹³⁴.

¹³⁰ Ibid.

¹³¹ Ibid, p. 271.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

- (ii) The second category (actual implementation) includes all clauses contained in the letter of intent which describe the actual (intended) deal, especially the envisaged target and the price. These provisions are not necessarily vague, and, on the contrary, sometimes the object and the price of the transaction, i.e. its *essentialia negotii*, are already quite clearly identified. What characterises a letter of intent is that the parties wish to preserve their discretionary right whether to complete the deal or not, at conditions which could be different from those initially envisaged¹³⁵.

The (yet to be performed) due diligence will play a fundamental role in that respect. Thus, the actual purchase agreement still has to be agreed on and stipulated. This is never a formality in M&A transactions, quite the opposite. Any practitioner who has experienced how fierce negotiations can be at this later stage, especially with regard to the representations, warranties, and indemnification provisions, to the extent that the author would suggest that, in M&A transactions, such clauses should be considered *essentialia negotii*¹³⁶.

Assuming that, in whole or in part, the contractual nature of a letter of intent has been assessed, a further question which might arise is the nature of the contractual relationship. Is it (i) synallagmatic, i.e. giving rise to an exchange of certain things (e.g. shares against cash), or rather (ii) something akin to a partnership, whereby it is considered that both parties are joining their efforts in order to achieve a common goal (e.g. setting up a joint venture)?¹³⁷

This author agrees with H. Peter and Liebeskind that, the answer will be fact-driven here also. If, for instance, the parties' intention is to enter into a share purchase agreement, the nature of the relationship is undoubtedly synallagmatic¹³⁸. If on the other hand, their purpose is to set up a

¹³⁵ Ibid.

¹³⁶ Ibid, pp. 271-272.

¹³⁷ Ibid, p. 272.

¹³⁸ Yves Guyon, *Traité des contrats*, Paris 1997, p. 359 et seq.; R. Besnard-Goudet, *Promesse de Société*, Ed. de Jurisclasseur 2001, fasc. 7-30, §10 et seq.

contractual joint venture, to the extent that a letter of intent is binding, if anything by analogy, it could be considered that the provisions governing partnerships apply¹³⁹. This said, it would probably be wrong to consider that the simple fact that the parties are willing to achieve a common goal (a certain M&A transaction) means that they are joining efforts to achieve this common goal¹⁴⁰ amounting to a quasi-partnership, or partnership.

If a letter of intent is not considered a contract, in whole or in part, the question can arise as to whether it may qualify as a promise to contract¹⁴¹.

3.2. Does the Letter of Intent amount to a Promise to Contract?

Traditionally, the Swiss Federal Court has deemed that a promise to contract had to include all the “essentialiae” of the final contract¹⁴². A minority of scholars dissented, maintaining that a promise to contract may contain only part of the main elements of the final contract, or all of them but with a lesser degree of precision¹⁴³.

The Swiss Court, in a 1977 case, found that since the promise to contract contained all the main elements, it was equivalent to an enforceable final contract¹⁴⁴. In obiter dictum, the Court cast serious doubts about the very purpose of promises to contract. Acknowledging the scholar’s criticisms, the Court stated the following alternative: either an agreement contains all essentialiae, and therefore is a final contract, not a mere promise to contract, or there is no agreement on all essentialiae, and therefore, the parties cannot be bound to execute a contract, the main content of which is not sufficiently clear. Even though the Court was cautious not to rule on such an

¹³⁹ For example this is the case in Swiss Law. In this regard see Claude Reymond, *Le contrat de “Joint Venture”*, in *Innominatverträge*, Zürich 1988, pp. 383-396.

¹⁴⁰ Peter, Liebeskind, *supra* note 99, p. 272.

¹⁴¹ *Ibid.*

¹⁴² See ATF 31 II 640 (1905).

¹⁴³ *Ibid.*, p. 273. ATF 103 II 190 (1977) c. 1 =JdT 1978 I 157 (summary). The judge may, however, exceptionally fix disagreements in accordance with the rule of good faith, i.e. by applying the principle of confidence.

¹⁴⁴ ATF 103 III 97 (1977), *Blum v. Bancofin*, at 106 and 107.

alternative, this jurisprudence can probably be regarded as voiding any practical substance in the promise to contract¹⁴⁵.

Accordingly, if a letter of intent contains a commitment to conclude the final contract, then the following distinction should be made: either the letter of intent contains all the *essentialia negotii* and might, therefore, qualify as a binding agreement, or it does not and is not a contract, and thus not binding¹⁴⁶.

3.3. Is the Letter of Intent an Offer?

Conceivably, the letter of intent may express only the intent of its author. This happens when one party (usually the potential buyer) is invited by the seller to express the conditions at which it would be ready to acquire the target. This may occur at any point in time, usually in the initial phase of the process, often in a bidding context¹⁴⁷.

For a contract to be concluded, an offer has to be accepted. If the offer contains a deadline for its acceptance, the author is bound until the expiry thereof. Absent such a time limit, the offeror will be bound until he can, according to business usages, reasonably expect a reply. Tacit acceptance is only exceptionally admitted; it will however be excluded if it is customary, in the relevant business, to expect a written answer¹⁴⁸, which is typically the case in the field of M&A¹⁴⁹.

Consequently, provided that all other conditions are met, a unilateral letter of intent may qualify as an offer. If the offer is accepted, and it contains all essential points and is not subject to other discretionary conditions, the letter of intent may give rise to a contract¹⁵⁰.

b-4) Legal Effects

¹⁴⁵ Schlosser, *supra* note 108, p. 350 and footnote 23; Pierre Engel, *Traité des obligations en droit suisse*, Bern 1997, pp. 181-182.

¹⁴⁶ Peter, Liebeskind, *supra* note 99, p. 273.

¹⁴⁷ *Ibid.*

¹⁴⁸ ATF 100 II 18 (1974) = JdT 1974 I 354.

¹⁴⁹ Peter, Liebeskind, *supra* note 99, p. 274.

¹⁵⁰ Schlosser, *supra* note 108, pp. 356-357 and footnote 50.

Firstly, obligations derive from the rules of good faith on the basis of the principles elaborated by doctrine and case law with respect to culpa in contrahendo¹⁵¹.

As soon as they start to negotiate, the parties must observe pre-contractual duties, i.e. each party must take utmost care to behave fairly and to avoid any undue damage to the other party. This is sometimes expressly indicated in clauses of the letters of intent stating that the parties shall “negotiate in good faith”, or “endeavour their best efforts”, to achieve the envisaged transaction¹⁵².

The author suggests going further and considering that the letters of intent should be interpreted as a reinforced commitment of the parties to act and, in particular, to negotiate in good faith¹⁵³. By signing a letter of intent, the parties create qualified expectations. This implies the need for qualified good faith in M&A cases¹⁵⁴.

There are two situations in which pre-contractual duties may arise: (i) during the negotiation of the letter of intent itself, and (ii) during the negotiation of the final agreement, following the execution of a letter of intent. If, however, the duty to negotiate in good faith is provided for by the letter of intent, it could also be treated as a contractual obligation, not as a pre-contractual duty¹⁵⁵.

According to the jurisprudence of the Swiss Federal Court pre-contractual obligations include:

- A duty to act honestly¹⁵⁶: the parties should not negotiate without the genuine intent to conclude a final contract¹⁵⁷.

¹⁵¹ Peter, Liebeskind, supra note 99, p. 274.

¹⁵² So called “best endeavours” or “best efforts” clauses. See Schlosser, supra note 108, p. 360.

¹⁵³ See Rudolf Tschäni, M&A-Transaktionen nach Schweizer Recht. Zürich, 2003, p. 17. N.4 (hereinafter Tschäni, Transaktionen), quoted in Peter, Liebeskind, supra note 99, p. 274, footnote 44.

¹⁵⁴ Peter, Liebeskind, *ibid*, p. 274.

¹⁵⁵ *Ibid*, pp. 274-275.

¹⁵⁶ ATF 105 II 80 (1979) = JdT 1980 I 71.

¹⁵⁷ ATF 46 II 373 (1920) = JdT 1921 I 42.

- A prohibition to deceive: a party may not deceive the other party. A culpa in contrahendo would exist in the event a party alleges or implies that it is concluding parallel negotiations, where this is untrue. This behaviour sometimes occurs in an attempt to create a “fake auction” process in order to increase (or decrease) the price¹⁵⁸.
- A duty to inform: each party must inform the other of facts that the latter does not know¹⁵⁹, which may recognisably have an impact on its decision to enter into the deal, or on the terms thereof¹⁶⁰. Also, each party has a duty to inform the other whenever it has decided not to conclude the agreement. In the case of mergers and acquisitions, the reinforced requirement of good faith, noted above, would imply that the range of such information covers anything which significantly contributes to the decision making of the parties, unless the other party can be expected to obtain such information on its own¹⁶¹.

Issues concerning the duty to inform in connection with a letter of intent frequently arise in the case of parallel negotiations¹⁶². Authors, however, diverge as to whether conducting parallel negotiations is admissible at all¹⁶³, and if so, as to whether there is a duty to inform the other party and to what extent. Schlosser, for instance, believes that the parties to a letter of intent have a reinforced duty to inform their counterparty where parallel negotiations, arise i.e. not only of their existence, but even of the content of any offer¹⁶⁴.

The Swiss Federal Court has ruled that a subsidiary that negotiates for months without informing its counterparty that the final decision lies with a third party

¹⁵⁸ Peter, Liebeskind, supra note 99, p. 275.

¹⁵⁹ ATF 102 II 80, 84 (1976).

¹⁶⁰ ATF 105 II 80 (1979).

¹⁶¹ Tschäni, Planta, Oertle, supra note 124, N. 397. For a detailed assessment of the information the seller has a duty to disclose or the buyer has to find out by himself, see Markus Vischer, Due Diligence bei Unternehmenskäufen, SJZ 96 (2000) No: 10, p. 229. Vischer focuses on due diligence, but the principles he identifies apply mutatis mutandis to the letter of intent.

¹⁶² Tschäni, Transaktionen, supra note 154, p. 17, N.4 to 6.

¹⁶³ E. Allan Farnsworth, Precontractual liability and Preliminary Agreements: Fair Dealings and Failed Negotiations, 87 Columbia Law Review, 1987, p. 279; see also Farnsworth, Negotiations of Contracts and Precontractual Liability: General Report, in Conflits et harmonisation, Mélanges en l'honneur d'Alfred E. Von Overbeck, Fribourg 1990, p. 657, especially, p. 672 et seq.; Marcel Fontaine, Les lettres d'intention dans la négociation des contrats internationaux, Droit et pratique du commerce international 1977, p. 99 et seq., especially p. 108 et seq.

¹⁶⁴ Schlosser, supra note 108, p. 361.

(in this case it's mother company) is liable in the event such a decision is ultimately negative and thereby causes prejudice to the other party¹⁶⁵. On the contrary, the Court rejected a claim from the seller on the grounds that the buyer had not informed the seller of its intention to re-sell the company immediately after the (initial) acquisition¹⁶⁶.

- a duty to advise: particular knowledge held by one party must benefit the other. The duty to advise may be seen as a particular form of the duty to inform¹⁶⁷.

b-5) Contractual Interpretation and Completion

Once the contractual nature of the letter of intent has been determined, the letter of intent will be interpreted whenever the parties are in disagreement as to the scope of their rights and obligations. The rules governing contractual interpretation and completion are a typical expression of the general principle of good faith¹⁶⁸.

When the parties' intent is expressed but unclear, the parties and, as the case may be, the judge, will assess it. When such intent is not expressed and cannot be construed, and provided all *essentialia negotii* are agreed on¹⁶⁹, the judge will complete the contract¹⁷⁰.

For instance, pursuant to article 18 §1 CO, the judge will seek the real and common intention of the parties. The judge will consider the overall circumstances surrounding the contract, its conclusion and performance. If the intent of the parties is neither expressed nor implied, the judge will have to decide the hypothetical intent of the parties, considering the nature of the deal (art. 2 §2 CO) and relying on the rules of good faith (art 2 §1 CC). In doing so, he will consider what is customary in

¹⁶⁵ ATF 105 II 75 (1979), 80.

¹⁶⁶ Peter, Liebeskind, *supra* note 99, pp. 275-276.

¹⁶⁷ *Ibid*, p. 276. ATF 68 II 302 (1942). See also Pierre Tercier, *Le droit des obligations*, Zurich 2004, p. 124, N. 577 et seq.

¹⁶⁸ *Ibid*.

¹⁶⁹ For instance, sometimes the parties state that "customary representations and warranties" shall apply. We have suggested that, in M&A transactions, "Reps and warranties" are *essentialia negotii*. Thus, if the provision is not sufficiently clear, we believe that it will be difficult to deem that there is a contract.

¹⁷⁰ ATF 115 II 484, JT 1990 I 210; Pierre Tercier, *supra* note 168, p. 176, N. 860 et seq.

the field of M&A in general, taking into account the relevant transaction in particular¹⁷¹.

Parties to a letter of intent are also liable if they breach their pre-contractual obligations. Unlike contractual liability, culpa in contrahendo entitles the parties to negative interest only¹⁷².

Hence, the nature of the letter of intent is, in many ways, ambiguous. This derives from the fact that (i) it almost always combines binding and non-binding clauses, and (ii) it in any event triggers at least behavioural obligations. As such, it therefore does not enter into any particular category, as any determination of its nature is extensively fact driven. It often lies somewhere between legally non-existent and a legally binding instrument. Moreover, as put by Fontaine, anarchy in terminology still seems to be prevalent in this field¹⁷³.

Among the remedies theoretically available in case of non-performance, specific performance can be envisaged only in exceptional circumstances. Whenever a letter of intent produces binding effects, positive damages might be claimed. In all other cases, in view of the pre-contractual nature of its effects, only negative interests may be sought¹⁷⁴.

c) Due Diligence

The “due diligence” process usually begins following the letter of intent being formalized. It amounts to a phase during which the potential buyer is given access to further information in order to decide whether to actually go through with the acquisition, and if so, under what conditions. This applies to all aspects of the target’s business (financial, tax, legal, environmental, intellectual property, real estate, etc.)¹⁷⁵.

¹⁷¹ Tercier, *ibid*, N. 866 et seq.

¹⁷² Peter, Liebeskind, *supra* note 99, p. 280. See also ATF 105 II 75 (1979), 81 = JdT 1980 I 67.

¹⁷³ Fontaine, *supra* note 164, p. 99.

¹⁷⁴ Peter, Liebeskind, *supra* note 99, p. 280.

¹⁷⁵ Peter, *supra* note 83, p.3.

In a due diligence procedure, the target company and its business will be examined by the prospective buyer. Due diligence covers a number of areas (business due diligence, legal due diligence, tax due diligence, financial due diligence etc.). For the purpose of documents and data are compiled and made available to the buyer. The question arises immediately whether the knowledge the buyer has gained from the due diligence can be held against him, i.e. that a buyer cannot bring a claim for breach of a warranty if such a breach has already been apparent from the due diligence.

According to H. Peter, the term due diligence is derived from an obligation or at least incumbency of the buyer: during this particular and by essence preliminary phase, the buyer must display the diligence reasonably required from (or “due” by) any potential purchaser in investigating, understanding, and therefore, knowing, the “object” which he envisages to buy. ... “Due diligence” is thus the part of the more global M&A process during which the potential buyer must be duly diligent about fully understanding the target, and is, or should be, put in the appropriate conditions to do so¹⁷⁶.

This explanation should help understand better the complex nature and multifaceted purpose of due diligence. In scope, it is broader than a plain audit. In effect, it aims to supply the buyer with information about the target that is not only of an objective nature (pure facts), but also a subjective nature, to help him understand the target and whether it will fit with his business, strategies, or even, intentions or tastes. A target that might seem perfect by auditing standards (whether financial, environmental, or tax) could very well be deemed to be subjectively inappropriate by the potential buyer after due diligence. Therefore, due diligence often includes direct contacts with the target’s management (“management meetings”) to enable the purchaser to get to know the target’s culture and understand how its management is likely to react, should the transaction be implemented¹⁷⁷.

To enable the buyer to perform due diligence, the seller often organises a “data room”. This is usually a room where all relevant data is put at the disposal of the

¹⁷⁶ Ibid.

¹⁷⁷ Ibid, pp. 3-4.

purchaser or his appointed agents. In view of the sometimes highly confidential nature of the process, this often takes place in a secret location, most likely a place which is known only to a few people and is totally outside the target's or seller's premises. With the new technology available, a data room can take the form of a CD Rom containing all relevant information or documents. In transactions of a certain complexity or importance the parties often draw up a protocol which governs issues, such as access to the data room and the right to copy documents¹⁷⁸.

By enabling the buyer to better understand the target, due diligence also inevitably has a direct effect on the terms and conditions of the purchase agreement. It is, in fact, only once he has better understood the subject matter of the deal that the purchaser and his advisors will be able to decide how the transaction should be structured and which conditions should be included in the agreement. This regards, in particular, the representations and warranties that the buyer will request. In many cases, the due diligence findings will, indeed, have a substantial influence on these provisions¹⁷⁹.

Sometimes, due diligence enables the parties to identify conditions that will have to be fulfilled before the execution, and/or completion, of the envisaged agreement can take place. These are sometimes called "signing", or "completion", conditions precedent¹⁸⁰.

In any event, due diligence often leads parties to start or intensify their negotiations regarding the content of the actual purchase agreement¹⁸¹.

2) Signing Phase (Purchase Agreement)

Where buyer decides to proceed with the transaction in view of what he has learned as a result of the due diligence, i.e. if the latter has proven "satisfactory" and provided the parties have managed to agree on all terms and conditions of the deal, the parties proceed to execute the "real" agreement: usually called the "purchase

¹⁷⁸ Ibid, p. 4.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

agreement”, or “share purchase agreement” (“SPA”) in the case of share deal, as opposed to an asset deal. One also encounters “merger agreements” (in the case of a merger as opposed to a plain acquisition) or “share swap agreements” (if consideration is paid through shares of another entity)¹⁸².

This is, in any event, the contractual instrument pursuant to which the parties, in a binding manner, implement, or agree to implement, the transaction, and list all terms and conditions thereof. It necessarily includes the subject matter of the deal (shares, whole or part of the business, only assets, etc.), as well as the price, or at least the way the price will be (objectively) determined (pricing formula), and the nature of the consideration (cash, shares or a combination thereof). It also comprises of provisions, governing the representations and warranties made by the seller, as well as detailed clauses on the buyer’s indemnification, should the “representations and warranties” prove inaccurate. It customarily contains “boilerplate clauses”¹⁸³.

In order to attenuate the obligations of the seller, deriving from its “reps and warranties”, and therefore, limit the rights of the buyer in such respect, it is not unusual for the seller to qualify them in the clauses themselves¹⁸⁴, or to issue a “disclosure letter”, in which the seller outlines facts that will thereafter be considered as known to the buyer, to prevent the buyer from the later denying his awareness of them¹⁸⁵.

3) Closing Phase (Completion)

In the vast majority of cases, the transaction is not actually implemented upon signing. There are many reasons for this, usually because the parties have provided for various kinds of “condition(s) precedent”. Some of the most common ones include¹⁸⁶:

¹⁸² Ibid.

¹⁸³ Ibid, pp. 4-5.

¹⁸⁴ This is usually done in the following way : “subject to the following the seller represents...” or “to the best of seller’s knowledge ...”.

¹⁸⁵ Peter, *supra* note 83, p. 5.

¹⁸⁶ Ibid.

- in any deal of a certain size there will almost inevitably be competition law filing requirements, which will make it advisable, or necessary, to obtain clearance from the relevant authorities before the transaction can be completed;
- sometimes the buyer, but more often the seller, will have to take steps in order to implement the deal. This can include restructuring the business, for instance by assigning some assets to or from the target, refinancing it, or taking out all or part of the available free cash;
- the parties may recognise upon signing that the due diligence has not been completed and that it will be concluded thereafter. This can occur, for instance, when the buyer was deliberately not granted full access to very sensitive information before a truly binding agreement was executed. This is sometimes referred to as “satisfactory (post-signing) due diligence” condition precedent.
- Under the “no material adverse change” (“MAC”) clause, the seller represents that, at closing, the business will not be materially different to that known to the buyer through the information memorandum, due diligence, and/or share purchase agreement;
- The fact that all representations (and warranties) shall be true on the date of closing.

If a condition precedent is not satisfied, not fulfilled in the agreed time, or if the parties have agreed that the buyer could step out after signing and before completion (discretionary walk-away right, the granting of which is relatively rare), the signed agreement will not be “closed”¹⁸⁷.

In a normal pattern of events, auditors often step in at this stage to assess 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

¹⁸⁷ Ibid, p. 6.

appropriate). The result of this financial audit usually leads to the drawing up of “closing accounts”¹⁸⁸.

Whether or not an audit takes place, assuming that all conditions precedent, if any, have been satisfied (or waived), the deal is then actually completed (in French “exécuté”; in German “durchgeführt”) and the closing occurs. The transaction can be extremely simple (for instance cash against shares). It is often relatively complex due to numerous steps. A “closing agenda”, or “completion list”, might be useful in such cases. It describes what has to be done, by whom and when¹⁸⁹.

4) Post-Closing Phase

Although many scenarios can be envisaged at this stage, the closing is usually not and sometimes by far the end of the transaction¹⁹⁰.

First of all, the amount which has been paid at closing is not necessarily the final price. In fact, it might be an approximation based on pro forma, or non-audited accounts. In such cases, in accordance with the purchase agreement, a post-closing audit is often performed in order to assess what the actual and final price will be. This leads to so called “post-closing adjustments” of the price¹⁹¹.

“Earn-out clauses” do give rise to an inherent conflict of interest: in order to avoid, or limit, any price increase, the buyer might endeavour to reduce (or defer) the success of the target at least to the extent that this shall be reflected in its financial statements; on the other hand, the seller might try to artificially improve, or accelerate, the relevant financial results in order to benefit from the highest possible adjustment. The seller often plays, or can be suspected to play, an active role in this respect, if he continues to manage the business for a certain time following the closing¹⁹².

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid, p. 7.

5) Representations, warranties and indemnification

At this stage, the transaction is still far from over. Even when due diligence has been smoothly carried out and the purchase agreement well drafted, problems often arise because the target is not perfectly in line with the buyer's expectations. This is when the representations and warranties come into play, an almost inevitable, and often unpleasant, phase which can sometimes start many years after closing, depending on the provisions of the purchase agreement or relevant statutes¹⁹³.

The purpose of this set of clauses is to ensure that, should the promised qualities of the target not exist, the buyer will be indemnified by the seller to the extent that he has suffered prejudice.

B) Conclusion of Chapter I

The complex structure of the M&A transactions provides many theories depending on different point of view for academicians. Therefore the author found necessary to revisit these theories in order to demonstrate that, focus purely on the theories is not satisfactory to understand and resolve problems during the M&A process; but it is also important to examine in details the entire process in practice.

The entire process of an M&A transaction can last months and, sometimes, years or even decades, from the beginning of negotiations to the end of the time frame for making claims under representations and warranties clauses and the resolution of possible disputes.

Advancing the third question framed in the hypothesis, research has found that depending on which phase the controversy arises in the process, the applicable rules (whether contractual, or statutory) might provide a different answer to the same question, such as whether or not specific performance can be successfully claimed by either of the parties, or whether they can terminate the contract for breach, error, or

¹⁹³ Ibid.

fraud. Specific performance can assist an M&A transaction by spurring the parties on to complete the transaction; progressing to the forthcoming stages, in spite of a dispute arising at an early phase in a transaction. This matter will be highlighted in subsequent chapters which address the connection which links the transactional phases and the absence of a definition of this connection.

Therefore, the importance of understanding and appreciating the phases and their impact on dispute resolution cannot be understated. Flowing from this reasoning, the notion and operation of M&A transactions across different countries was examined.

From the analysis of many jurisdictions, it has been shown that a multitude of different phraseology and terminology has been employed in M&A transactions in these different jurisdictions. Very often, corresponding definitions for terms will be found, which can be hugely problematic for ever-increasing international M&A transactions. It has been shown for “merger” and “acquisition” that courts employ expansive definitions for such terms, allowing for the use of the broad term “M&A transaction” as a working definition.

In spite of inconsistencies in the nuances of definitions, it is understood that the broad definition of a merger encompasses the more narrowly defined acquisitions and takeovers. One should bear in mind, however, that while all takeovers are acquisitions, the reverse is untrue.

Differences in nomenclature, however, are not reflected in practice. In adhering to the working hypothesis, and examining the nature of M&A transactions in the absence of legal codification on the subject, similar practice methods can be traced across most jurisdictions. Furthermore, the phases of M&A transactions are somewhat consistent.

Further to the working hypothesis, examining whether there is a deficit in existing arbitration rules as applicable to M&A transactions, research indeed found there to be such a deficit, which itself is central to the *raison d'être* of this thesis. In facing this deficit, it can be useful to distinguish the different phases in M&A transactions for various reasons, including *inter alia*, the fundamentally different legal regime that applies to each of them.

In order to clarify the resolution of the disputes with arbitration in M&A transactions, it is necessary to clarify the process and the relation of different phases of M&A transaction. There are no codified rules for the process, however practitioners have developed a process which provides a balance between the often conflicting interests of the seller and those of the buyer. The process is the same in merger and acquisition. Therefore, these terms are not used separately when referring to an “M&A transaction” or “M&A arbitration”.

Addressing the second question in the working hypothesis in reviewing the phases of M&A transactions, “consent” of the parties becomes relevant as soon as the process starts in the negotiation phase. During negotiation the preparation of the letter of intent especially, is key in order to strengthen the future of the process and the development of the M&A transaction. But, is the letter of intent an agreement? As an agreement, one should consider contract principles when analysing the letter of intent. Similar to an arbitration agreement, practitioners can rely on fundamental contract law in deciding whether parties to the letter of intent are bound by its provisions.

If the letter of intent is, in fact, manifestation of the consent of the parties, it must be considered whether the primary elements of contract are present: (i) offer, (ii) acceptance, (iii) consideration, (iv) capacity, and (v) intention to create legal relations. Research of commercial practice has shown that often a unilateral letter of intent is present. This opens the question further as to whether a binding agreement has been formed between the parties. Could one party be considered to be bound by acting in accordance with the letter of intent, i.e. progressing to the next phase of the transaction? Perhaps, even continuation with negotiations would bind a party to a unilateral letter of intent?

These questions aside, recent ICC cases have shown that contract principles have been relied on in deciding whether the letter of intent can evidence the parties consent. Therefore, the letter of intent is the roadway in order to decrease complexity in M&A arbitration because, it is an important issue concerning the parties’ consent from the outset.

Notwithstanding the reliance by the ICC on contract principles when dealing with consent, recent opinion has stated the contrary. Consent can be considered as dynamic, rooted in contract law, but developing beyond in recent years¹⁹⁴. How this transitory definition of consent significantly impacts M&A arbitration will be discussed further in forthcoming chapters.

This writer opines that consent during different phases of M&A is comparable to consent given in an arbitration clause. Therefore, arbitration institutions should perhaps recognise declaration in the letter of intent as binding, similar to an arbitration clause? In the author's opinion arbitration institutions should produce some guidelines for M&A arbitrations, including for instance, that the letter of intent has binding effect.

Consequently, the M&A transaction is a complex process. As the sources and nature of possible disputes are numerous, they are unusually difficult to resolve, and because of the peculiarities and intricacies involved in M&A transactions, there is often no clear answer. Different answers may be given to the same queries, *inter alia* depending on at which stage the issue arises in the process. Time is usually of the essence.

Submitting M&A disputes to arbitration is probably often the most appropriate way to deal with these many difficult, specialised, sensitive, urgent, multinational, and highly controversial problems. This is undoubtedly why most M&A agreements contain an arbitration clause, and why such a high proportion of arbitration awards concern such disputes.

The following chapter will display that, while it has many strengths, arbitration is not without difficulties. The restraints of the arbitration process are further developed, with particular emphasis on procedural restraints.

¹⁹⁴ In this sense see Bernard Hanotiau, *Consent to Arbitration: Do we Share a Common Vision*, *Arb. Int.* 2011, Vol. 27, Issue 4, p. 539, footnote 2 (2010 Annual Freshfields Lecture, London, 21 October 2010, hereinafter, Hanotiau, Freshfields Lecture)

CHAPTER II : ARBITRATION AND MERGER AND ACQUISITION TRANSACTIONS

A) Introduction

Following the discussion of the complex and lengthy process in M&A transactions in the previous chapter, one can appreciate that this process often gives rise to disputes at each of those different stages, and thus arbitration can arise at any of the different phases of an M&A transaction.

As it would be too voluminous to address every possible dispute which may arise, therefore, this author suggests a list of matters which commonly form the basis of disputes, and more closely relate the objective of this thesis.

This chapter acts as a bridge from the analysis of the phases of M&A transactions to specific problems of M&A arbitrations. In discussing these arbitration problems, the chapter is organised parallel to the phases of M&A transactions. It will be shown how arbitration can best serve dispute resolution at particular points. For instance no material adverse changes, price adjustment arbitration, expert arbitration, representations and warranties, put and sale options will be highlighted.

Continuing from the foundations laid in Chapter One, this chapter further contextualises the M&A transactions specific to arbitration in order to address the questions framed in the working hypothesis. Following chapters examine whether M&A arbitration is a suitable example of multi-contract arbitration or is it possible to use directly the method of “consolidation” regulated in arbitration institutions’ rules? Additionally, the text will explore how the cooperation of different arbitration clauses or different but parallel proceedings would be realized, namely, should attention be paid to parallel proceedings depending on the same dispute or related disputes in order to find a solution, which also broaches the question of connection. These complex topics can only be fully appreciated following the understanding of the fundamentals of arbitration occurring in M&A transactions.

The current chapter proceeds to analyse how arbitration can effectively resolve disputes in M&A. Throughout this analysis, the problems and limits of arbitration as a dispute resolution mechanism for certain specific issues are addressed. This discourse seeks to remedy the existing void in current discussions on arbitration law and practice specifically concerning the challenges posed by M&A disputes. Finally, it will be seen that it is necessary to have some guidelines.

Continuing analysis of the author's research from Chapter One, the chronological order employed is that followed in the previous chapter, which is practical in allowing the reader to navigate through the M&A transaction as it would naturally occur in practice.

It is reiterated in this chapter that careful drafting of arbitration clauses or agreements is very important and particularly recommended in order to organize, if not avoid, disputes in M&A Transactions. A well drafted dispute resolution clause will efficiently address issues of consent of parties, discourage the initiation of parallel proceedings and decrease complexity of M&A arbitration. This is important to bear in mind from the outset of an M&A transaction, initiated in the pre-signing phase.

B) Arbitration in Pre-Signing Disputes

Pre-signing disputes typically arise during one of the most hectic phases of an M&A transaction, when the parties are struggling to prepare all the necessary documents and striving to comply with all the conditions to be met for the closing. The buyers are often busy obtaining financing for the planned transaction and might suddenly have second thoughts about the deal. Thus, in many substantial M&A transactions, the closing is something of a balancing act on a knife's edge, and, the parties are often not sure whether the deal will go through or not up to the last minute¹⁹⁵.

Although most M&A agreements contain arbitration clauses and the number of M&A arbitration proceedings has increased since the late 1990s, arbitration

¹⁹⁵ Segesser, *supra* note 54, p. 17.

proceedings for pre-closing conflicts are few occurred by the reasons of confidentiality, rarely published¹⁹⁶.

Pre-closing disputes include all disputes arising before the M&A transaction has been completed i.e. before the subject of the transaction has been transferred and paid for¹⁹⁷. Pre-signing disputes arise between buyers and seller, however, after they have entered into negotiations, but also among buyers who have formed a consortium to realise an acquisition, or among partners in a contract which provides for the acquisition of shares or assets in a company under specific circumstances¹⁹⁸.

Parties in a consortium for an acquisition may end up in a conflict which can put the closing of the transaction at risk.

In a recent, unpublished ICC Arbitration case¹⁹⁹, the arbitral tribunal decided that the memorandum of understanding was a binding agreement which provided for negotiating the acquisition of the target company and imposed on the parties an obligation to negotiate in good faith the terms of the shareholders' agreement. It held that the memorandum of understanding had expired, but that the continuing negotiations constituted a pre-contractual relationship that, again, imposed an obligation to negotiate in good faith. It considered that respondent had breached both its obligation to negotiate in good faith and the exclusivity provision by acquiring the target company. The arbitral tribunal awarded compensation for costs and expenses incurred but not for loss of profit or moral damages²⁰⁰.

In this case two buyers formed a consortium to prepare a bid to acquire a particular company. To formalise their cooperation, they concluded a memorandum of understanding which also constituted the basis for a shareholders' agreement to be concluded once the target company had been acquired. The shareholders' agreement was intended to cover such issues as the level of shareholding of the two buyers, the appointment of the chairman of the board of the acquired unanimity. The

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, p. 19.

¹⁹⁸ Ibid.

¹⁹⁹ ICC Case No. 11404, 20 May 2003.

²⁰⁰ Case reported by Segesser, *supra* note 54, p. 20.

memorandum of understanding further included an exclusivity clause prohibiting the buyers from acquiring the target company individually. The buyers and the seller had signed a letter of intent to secure an exclusivity period for negotiations. The buyers initiated the due diligence process of the target company and began negotiating a stock purchase agreement. At the same time, the buyers started to negotiate the shareholders' agreement and exchanged several drafts. The letter of intent between the seller and the two buyers expired without a share purchase or shareholders' agreement having been signed, but the parties continued to negotiate. After several unsuccessful meetings between the two buyers, one of them terminated the memorandum of understanding, arguing that they could not agree on a shareholders' agreement, and acquired the target company alone. The other buyer filed a request for arbitration and claimed that its partner had breached its obligations under the memorandum of understanding, had not attempted to negotiate a shareholders' agreement in good faith, acted in violation of the exclusivity provision of the memorandum of understanding on acquisition of the target company alone, and benefited from the work, information, and data produced during joint negotiations with the seller. Based on these allegations, the aggrieved buyer claimed full compensation for damages suffered, including loss of profit and moral damages. The Respondent contended that the memorandum of understanding was only a preliminary agreement (an agreement to negotiate) subject to further negotiations with the seller and the agreement on a shareholders' agreement. The Respondent claimed that the only obligation it had under the memorandum of understanding was to negotiate in good faith towards a joint bid for the target company and a final shareholders' agreement, and that it had fulfilled these obligations in good faith. It further disputed the claimant's claim for damages²⁰¹.

In an LCIA case²⁰², several companies had concluded various agreements and founded a consortium in order to regulate their dealings in connection with a possible acquisition of rights relating to the exploration, appraisal, development, production and/or disposal of hydrocarbons. An exclusivity / non- circumvention obligation binding upon the parties and their affiliates provided that the parties should not seek to acquire directly or indirectly any rights relating to the exploration of..., etc. At an

²⁰¹ Ibid, pp.19-20.

²⁰² LCIA Arbitration no. 9178, 20 December 2000 reported by Segesser.

early stage of the bidding process, one of the consortium parties acquired a competitor. The other consortium members argued that the newly acquired competitor had become an affiliate and was thus also bound by the exclusivity /non-circumvention obligation. They started arbitration proceedings aimed at prohibiting the newly acquired competitor from getting involved in the bidding process and requesting that an order be issued to the consortium member not to induce the “new affiliate” to declaratory and injunctive relief, and damages were sought. While the arbitral tribunal denied the request for injunctive relief, it issued a declaratory award which defined the permitted behaviour for the bidding process²⁰³.

These cases are excellent examples of the problems which can arise in the pre-signing phase of M&A transactions.

1) Conflicts Arising Out of a Letter of Intent

As mentioned in the previous chapter, in a letter of intent rights and obligations are established to the extent intended by the parties. However, the core provisions of a letter of intent are frequently non-binding in nature. Sometimes, preliminary contract, heads of agreement, or even a letter of intent or a memorandum of understanding, may already constitute a binding sale and purchase agreement, even though the terms of merger or acquisition have not yet been fully negotiated. It is sometimes difficult to ascertain in an individual case whether binding sale and purchase obligations already exist if the essentials of the sale and purchase agreement (*essentialia negotii*) are already circumscribed in a form which, although characterised as preliminary, is nevertheless fairly detailed. Where an explicit “non-binding clause” is absent, the tribunal will have to determine the parties’ intent based on the specific situation, circumstances, negotiations, purpose of the contract, and past communications of the parties²⁰⁴.

²⁰³ Segesser, *supra* note 54, p. 20.

²⁰⁴ *Ibid*, p.24.

In a case decided by an ad-hoc arbitral tribunal under the UNCITRAL Rules²⁰⁵, 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 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 tribunal²⁰⁶.

2) Conflicts arising out of Due Diligence

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

²⁰⁵ Unpublished award of 26 February 2002, T. v. C. et al. reported by Segesser in ASA Bulletin, *ibid*, p. 24.

²⁰⁶ *Ibid*.

assess all relevant economic and financial aspects of the target company and enables both parties to draft the appropriate representation and warranty provisions²⁰⁷.

The outcome of any due diligence is critical to the parties' further negotiations and generally has far-reaching consequences for the deal. The due diligence process therefore frequently gives rise to disputes. The most common area of controversy is the scope of the pre-contractual duties of disclosure of the seller. Questions that frequently come up concern the completeness of the information provided by the seller in the data room and the obligation of the seller to disclose sensitive information or certain difficulties at that early stage, without being expressly asked to do so by the buyer²⁰⁸. On the other hand, the seller might argue that the buyer conducted the due diligence only cursorily or not at all, the latter thereby having waived its right to notification of defects in the target company that it could have discovered in the data room²⁰⁹.

A conflict may arise if the due diligence process which precedes the bidding is incomplete or favours one bidder over the other. A participating bidder may argue that it has incurred costs unlawfully caused by the seller²¹⁰.

Where the bidder in an auction procedure submits a lean mark-up of the share purchase agreement as part of its bidding offer in order to obtain exclusivity, a subsequent request for material changes of the contract may cause a dispute, e.g. the seller may no longer have the possibility to switch to another buyer²¹¹.

C) Arbitration in Post-Signing: Disputes Arising From Merger or Purchase Agreements

²⁰⁷ Bernd D. Ehle, Arbitration as a Dispute Resolution Mechanism in Merger and Acquisitions, extended and reviewed version of a speech given at the conference "International Business Transactions" organised by the Center of International Legal Studies (CILS) in Salzburg, 20-23 November 2004, published in *The Comparative Law Yearbook of International Business*, 2005, (pp. 287-309), p. 292.

²⁰⁸ Sachs, *Schiedsgerichtsverfahren*, supra note 103, p. 126.

²⁰⁹ Ehle, supra note 208, pp. 292-293.

²¹⁰ Segesser, supra note 54, p. 23.

²¹¹ Ibid.

The majority of M&A arbitrations occur after the parties have signed the merger or purchase agreement and closed the deal by the transfer of assets, that is “post M&A”²¹².

Naturally, the question of the validity of an M&A agreement may also be a source of dispute, for example, arising from one party’s lack of power of attorney, missing approvals, unfulfilled conditions precedent, exercise of rights to withdraw or formal objections. For instance, in the arbitration between Reteitalia Spa (Italy) and Lagardère SCA (France), the parties were at odds over whether a contract for the sale of shares in the French television channel, La Cinq, was void for legal impossibility. As a result of the acquisition, Reteitalia’s holding would have exceeded the maximum twenty-five per cent threshold permitted under the applicable French Law. The three-member arbitration panel dismissed Lagardère’s request for the recognition of an option in its favour to sell the shares because it concluded that the parties’ agreement was indeed invalid²¹³.

In the period between the signing of the agreement and its execution, however, disputes may arise if certain conditions have not been fulfilled or, for example, the buyer has negotiated for a force majeure clause and suddenly seeks to exit the deal²¹⁴.

According to Segesser the execution of most M&A agreements is subject to certain conditions, known as the “conditions to closing”. Typically these conditions are drafted as conditions precedent, with a suspensive effect, i.e. providing that the agreement will only become binding if and when a particular condition has been complied with. Before closing the share purchase agreement is in abeyance and the parties may not do anything that might prevent them from duly executing their obligations to consummate the agreed transaction²¹⁵.

²¹² Sachs, *Schiedsgerichtsverfahren*, supra note 103, p. 125.

²¹³ *Reteitalia Spa (Italie) v. Lagardère SCA (France)*, Swiss Federal Tribunal, 1st Civil Chamber, Decision of 26 May 1999, ASA Bulletin 2000, at p. 331-336. Upon review, the Swiss Federal Tribunal held that the principle of *pacta sunt servanda*, as part of public policy, had not been violated and refused to set the award aside.

²¹⁴ Ehle, supra note 208, p. 293.

²¹⁵ Segesser, supra note 54, p. 25. The author gives the example of the Article 156 of the Swiss Code of Obligation.

Conditions precedent to closing include²¹⁶:

- governmental, regulatory and similar authorisations, 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.

Conflicts may arise in situations where it is not clear, whether or not a condition for closing has been met, which of the parties has the right to waive the fulfilment of the condition, or which party bears the risk if a condition precedent has not been met. If clauses have been drafted vaguely, a dispute can arise over the interpretation of broadly expressed terms²¹⁷.

In an ICC Arbitration, parties entered into a “promissory purchase agreement”, the closing of which was subject to a number of conditions precedent, including obtaining the necessary merger clearance from the EU Commission. The conditions precedent had to be satisfied by a certain date; otherwise the agreement would automatically expire. EU merger clearance was not obtained. The sellers argued that the buyers, in the purchase agreement, had assumed the risk of failure of obtaining clearance and, therefore, were legally obligated to proceed with and complete the intended transaction. Alternatively, if the purchase was not legally possible, the seller wished to claim compensation for the damages suffered due to the buyers’ insufficient diligence in their attempts to obtain the EU Merger clearance²¹⁸.

In another case, which was tried before a DIS arbitration tribunal, the share purchase agreement was subject to several conditions precedent, and especially to the

²¹⁶ Ibid., p. 25-26

²¹⁷ Ibid., p. 26.

²¹⁸ Case reported by Sachs in Sachs, Schiedsgerichtsverfahren, p. 126 and quoted in Segesser, *ibid.*

condition that if the buyers could not provide the sellers by an agreed date “with written, unconditional, and legally binding commitments for one or several banks to loan the Purchase Price to the buyer on the closing date”, they would have to pay DEM 20 million as compensation for the sellers’ willingness to stop auction proceedings and grant the buyers exclusivity in the negotiations. On the agreed date, the buyers submitted to the sellers a letter from their bank in which the bank declared its intention to support the intended acquisition by providing a credit facility to the buyers on the basis of an attached term sheet. The term sheet contained the conditions for the credit facility and the material terms of a credit agreement still to be concluded. The arbitral tribunal held that the buyers (respondents) had forfeited the contractual penalty of DEM 20 million, as they had not provided a written, unconditional, and legally binding commitment from a bank to lend the purchase price²¹⁹.

Conditions for closing may imply a contractual obligation for one of the parties; later, between signing and closing, the parties may disagree as to whether or not the obliged party has made all due efforts to have the condition fulfilled. In other situations, pre-closing conflicts can arise when one of the parties (usually the buyer) realises the implications of the intended transaction and, having undergone a change of mind with regard to the acquisition, “boycotts” the closing by not complying with its obligations or tries to find another way or rescinding the contract²²⁰.

Closing conditions may include the obligation of the seller to provide the buyer with a financial statement as at the closing which is often used to definitively determine the purchase price. Other conditions precedents to be provided by the parties may include all necessary approvals by the corporate bodies and the delivery of documents such as environmental reports, auditors’ statements, etc²²¹.

1) Violation of Covenants

²¹⁹ Ibid.

²²⁰ Segesser, supra note 54, p. 26.

²²¹ Ibid, p. 27.

Generally non-violation of the post-signing covenants of the share purchase agreements is made a condition precedent to closing. These covenants usually deal with the seller's business conduct from signing to closing and its compliance with obligations necessary for closing (such as timely filing with and notification of authorities), non-solicitation obligations, communication with employees, repayment of inter company financing, remuneration to executives, payment of interim-dividends, etc²²².

2) No Material Adverse Changes

Another important condition precedent in M&A Agreements is the "No Material Adverse Changes Clauses" ("MAC clauses"). These clauses provide the buyer with the possibility of rescinding the purchase agreement and of refusing the closing if a material adverse effect occurs that has a significant negative consequence for the target company²²³. A material adverse effect is sometimes described in purchase contracts as an event, fact, or issue, which gives rise to a material change in the financial conditions, assets, liabilities, or operational results of the company as a whole, that is so substantial and averse as to fundamentally impair the company's value to the buyer²²⁴.

In this clause, the seller represents that from a particular time on the company being sold and its subsidiaries have not suffered any changes which would result in a material adverse effect. The reference date is usually the end of the last financial year for which audited financial statements are available. The no material adverse change-representation would thus cover the period from the financial year end up to closing. The material adverse change is defined as an occurrence or event having a substantial

²²² Ibid, p. 28.

²²³ Patrick Schleiffer, No Material Adverse Change, in *Mergers and Acquisitions VI*, Rudolf Tschäni (Ed), p. 54 et seq.

²²⁴ Segesser, *supra* note 54, p. 28. The author also gives the example of the article 16 of the Ordinance of the Swiss Takeover Board on Public Takeover Offers of 21 July 1997 (Takeover ordinance; SR 954.195.1) provides buyers with the possibility of withdrawing the offer if he or she has expressly reserved such right by inserting one or more suspensive conditions pursuant to Article 13 of the Takeover ordinance. The offeror may not have a decisive control over the suspensive conditions. If the suspensive conditions require a contribution from the offeror, he or she must take all reasonable steps to ensure that the condition is fulfilled (Article 13 (1) of the Takeover Ordinance). With the approval of the Takeover Board, the offer may also be made subject to resolutive conditions (Article 13(4) of the Takeover Ordinance). See also Schleiffer, *ibid*, p. 81 et seq.

negative impact on the business, assets, income or financial situation and, from time to time, prospects of the company and its subsidiaries. In some cases, the parties quantify the adverse change in terms of turnover or income or limit or extend the scope of the clause by defining more specifically or excluding certain causes for the material adverse effect²²⁵.

If the parties do not quantify the negative impact, the arbitration panel is confronted with the necessity to interpret the contract. Certain guidance can be found in cases decided abroad. In those cases, the courts have rejected the applicability of the no material adverse change clause. They held that the change must be analysed from the long term perspective of a strategic investor. Accordingly, a short-term hiccup in earnings was not considered to suffice. However, when referring to those cases, one must bear in mind that the clause had a different function there, namely it would have allowed the buyer to abstain from consummating the transaction. In the context of a representation and warranty the interpretation might be different²²⁶.

The no material adverse change clause is of great importance. It protects the buyer to a certain degree for a period of uncertainty, from the end of the last financial year for which audited financial statements exist up to closing²²⁷.

In many M&A contracts, the no material adverse change clause has been transformed into a clause named “Absence of Certain Changes”. It is only stated that the business of the company and its subsidiaries has been conducted in the ordinary course of business consistent with past practices, and that there has been conduct in the ordinary course consistent with past practices, and that there has been no material adverse change, but rather certain specific events are singled out and listed, such as the absence of dividend payments and like payments, changes in the financial position (such as incurrence of new debt or security), the absence of material new commitments to employees, no change of accounting practice, etc. Accordingly, this clause is extensively debated in the process of negotiations. Given that this representation and warranty must also be true at the time of closing, it puts

²²⁵ Rudolf Tschäni, Post-closing Disputes on Representations and Warranties, in ASA Special Series No.24, 2005, p. 71 (hereinafter Tschäni, ASA Conference).

²²⁶ Ibid.

²²⁷ Ibid.

considerable constraints on the seller in his running of the business from the time of signing up to closing. The exact definitions of the changes, therefore, vary from case to case²²⁸.

MAC Clauses allocate the risk of an event that is beyond the control of the parties and are deployed between the signing and the closing. Their effect is thus similar to that of a force majeure clause²²⁹.

In practice, the seller is often almost forced to make further concessions and reduce the purchase price if the buyer invokes the MAC clause, as it will have difficulty in finding another buyer willing to pay the originally envisaged price²³⁰.

The question of whether an event, fact or issue is of such relevance that it has substantially negatively impaired the value of a target company, may give rise to disputes and, where it hinders the consummation of the transaction, may result in a damages claim²³¹.

If not directly addressed by MAC clauses, other issues may arise due to an unforeseen and material change of circumstances with a disruption of the contractual equilibrium providing a party with the remedies stemming from the *clausula rebus sic stantibus* rule²³².

In many situations, there is an inherent conflict surrounding the signing, with respect to the determination of the final purchase price and the due diligence. The seller wants to set a definite purchase price as early in the process as possible, while the buyer's intentions are to keep the determination open as long as possible and to

²²⁸ Ibid.

²²⁹ Segesser, *supra* note 54, p. 28.

²³⁰ Ibid.

²³¹ Ibid. Such disputes may be avoided or at least the risk that they end up in litigation may be mitigated by providing in detail what would constitute a relevant negative impact on the business of the target company (e.g. a decrease of gross revenues of more than 30%) and provide an expert with the authority to make a determination thereon, quoted in footnote 30.

²³² Ibid, p. 29. For instance due to a devaluation of a currency, a collapse of an economy; see in general Martin Burkhardt, *Vertragsanpassungen bei veränderten Umständen in der Praxis des schweizerischen Privatrechts*, Bamberg 1996.

obtain from the seller as much information as possible before a final agreement is reached on the price²³³.

Parties generally include a price adjustment clause if a due diligence is to take place after signing. Frequently, disputes on price adjustment clauses are due to a lack of clear descriptions of accounting methods, discrepancies in methods and concepts applied in asset and share deals, insufficient time allowed for compliance with certain obligations, or vagueness in the delimitation of accounting methods from legal methods²³⁴.

3) Price Adjustment Arbitration

Generally, and ideally, full due diligence is performed before contract signing in order to assess all relevant economic and financial aspects of the target company, and to draft the appropriate representation and warranty provisions. Finally, the ‘closing’ of the transaction takes place. This is normally the moment when the shares or title documents are delivered against payment. Thereafter, a closing balance sheet, or other reference factors, such as the target company’s earnings, will be established and serve as the basis for price adjustment²³⁵.

Purchase agreements are generally lengthy and complex, drafted in the Anglo-Saxon style, comprising of many schedules and annexes. Reading may require some experience, as the deal’s specific provisions are often drowned in lengthy boilerplate language. Further M&A deals usually involve a host of contingent or ancillary contracts. The contract terminology is highly specific, including detailed financial and accounting concepts²³⁶.

This thesis will focus on disputes where it is possible to use arbitration as a dispute resolution. According to W. Peter, one particular element makes the price adjustment

²³³ Ibid.

²³⁴ Wolfgang Peter, Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes, Arbitration International, 2003, Issue 4, p. 494 (hereinafter W. Peter, Arb. Int (2003)). See the same article also in “Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Arbitrations”, in ASA Special Series No.24, 2005, p.55 et seq. (hereinafter W. Peter, ASA Conference)

²³⁵ Ibid.

²³⁶ W. Peter, Arb. Int. (2003), p. 491.

process potentially litigious: it is the open-ended nature of the agreement. As there is money to be gained, parties have an obvious incentive to construe the adjustment process in their favour, and in addition to use to the largest extent their policy influence in terms of accounting and management of the company, in order to achieve the most favourable result²³⁷.

Price adjustment provisions can be divided into two main categories:

- a) 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.
- b) The price adjustment may be based on earn-out provisions based on the future turnover, gross margin, EBITDA, or EBIT. 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 multiplier²³⁸.

3-a) Reasons for price adjustment clauses

It seems necessary to review the reasons for price adjustment clauses in order to clarify dispute resolutions on that matter.

Purchase price adjustment provisions based on net asset value are included in acquisition agreements for a variety of reasons. There is, in particular the time lag between the execution of the purchase agreement and the closing, often due to competition law problems or tax considerations, or the necessity of obtaining consent from third parties or from the board of directors, not to speak of the need for confirmatory due diligence. A price adjustment provision mitigates the buyer's risk

²³⁷ Ibid, pp. 492-493.

²³⁸ Earn-out provisions can overlap with representation and warranty provisions. Where representations and warranties guarantee the buyer that revenue or EBIT targets will be reached, these representations and warranties have the same economic result as earn-out clauses, as both are designed to adjust a purchase price and are triggered by the same financial (earnings) criteria. See W. Peter, Ibid, p. 492, footnote 1.

of suffering from the target company's financial deterioration in the event that the seller should fail to manage the company efficiently until the closing of the transaction. Further, the balance sheet, on the basis of which the provisional purchase price is determined, is obviously drawn up well before closing and unless the target company is a static enterprise, there will invariably be changes by the time of closing²³⁹.

Purchase price adjustment (earn-out) provisions based on future earnings of the company (which can be determined by EBITDA, EBIT, turnover, or gross margin) are inspired by a different philosophy. Essentially, the buyer wants to ensure that the company's future income is in line with projections. If not, these earn-out provisions will adjust the provisional price accordingly, but this can obviously play in favour of either the seller or the buyer²⁴⁰.

These two adjustment mechanisms rely on different financial data. Net asset value is calculated on the basis of the target company's balance sheet, while earn-out provisions focus on the profit and loss account. This latter approach is considered, in economic terms, a more efficient method for determining the economic value of the target company²⁴¹, but it creates uncertainties if the contractual reference period is long and is thus more vulnerable to attempts to manipulate the result by the buyer who controls the company. Therefore, more transactions rely on valuation based on net assets (also called net equity). Furthermore, in a net asset-based transaction a buyer will not ignore the issue of future earnings. On the contrary, it will certainly do its own estimate of future EBIT, and it will want to be comforted by the careful review during due diligence of the past earnings record of the company, and its own estimate may influence the net asset value negotiations²⁴².

3-b) Frequently Disputed Issues on Price Adjustments

²³⁹ Ibid, pp. 494-495.

²⁴⁰ Ibid, p. 495.

²⁴¹ While net equity can be seen as a balance sheet definition of the value of the company, it does not, as such, provide information about future earnings. However, acquisitions are in principle not made for the net asset value of the company, but its capacity to generate future income. Therefore EBIT or EBITDA, wither under a valuation of discounted cash flow or by applying an industry-specific multiplier, is considered a better valuation method of a company in economic terms. See W. Peter, Ibid, p. 496, footnote 2.

²⁴² Ibid.

Purchase agreements regularly state only a provisional price and, in addition, provide for “open-ended” adjustment mechanisms and procedures. By far the most common M&A disputes centre on earn-out provisions and purchase price adjustment calculations. Earn-out clauses provide for an additional purchase price that the seller will receive, based on the future earnings of the target over a stipulated period (earn-out period). Such clauses may engender dissension between the parties when the future performance needs to be assessed objectively²⁴³.

Typical issues concern the type of performance indicator that is to be taken into consideration or the seller’s contention that the buyer tried to “manipulate” earnings, for example, by changing the accounting policies or by altering the operations of the business after the purchase, making it difficult to prepare accurate earn-out calculations consistent with the terms of the agreement. In an international setting, the parties’ different cultural backgrounds and accounting or reporting practices may produce additional complications²⁴⁴.

Similarly, purchase price adjustment clauses are litigious. Providing for a post-closing mechanism to adjust the price based on a change in a specified benchmark, such as the net asset value of the target company, between the date of the financial statements, used to negotiate the purchase price, and the closing balance sheet, upon which the purchase price is ultimately determined²⁴⁵. The following two examples demonstrate the kind of complications that might originate from purchase price adjustment clauses.

In an international arbitration administered by the Zurich Chamber of Commerce, the claimant company had sold its shares in the defendant company to the defendant and its holding company under a contract subject to German Law. The defendant then changed its Articles of Association and increased its share capital by issuing new shares to a third company. The arbitral tribunal, appointed to interpret the price increase clause included in the share purchase agreement, ruled that, although the

²⁴³ Ehle, *supra* note 208, p. 295.

²⁴⁴ W. Peter, *Arb. Int.* (2003), *supra* note 235, p. 494.

²⁴⁵ *Ibid.*, pp. 491-492.

clause did not expressly cover the increase of the share capital, such increase – which was to be considered under Swiss Law – nevertheless constituted a betterment improvement that came within the scope of application of the price increase clause. Consequently, the arbitral tribunal ordered the defendants to pay the claimant additional amounts to the purchase price plus interest. The defendants’ motion to set the award aside was denied by the Swiss Federal Tribunal²⁴⁶. In the facts section of the decision the Federal Tribunal cites the definition of a price purchase adjustment clause (Besserungsabrede) used by the arbitral tribunal in its award:

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

In the 2003 case from the United States, *Richard Hoeft III v. MVL Group, Inc. et al*, the parties had agreed that the seller could, 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 United States Court of Appeals for the second Circuit, however, reversed and remanded that decision, upholding the principle of finality in the arbitral process²⁴⁷.

Another important issue in the context of earn-out clauses and price adjustment calculation is the question as to whether any benefits or burdens of operating the

²⁴⁶ Swiss Federal Tribunal, 1st Civ.Ch., Decision of 16 March 2004, 4P14/204, ASA Bulletin 4/2004, at pp. 770-781, quoted in Ehle, supra note 208, p. 296.

²⁴⁷ *Richard Hoeft III v. MVL Group, Inc. Et al.*, United States Court of Appeals for the Second Circuit, Decision of 2 September 2003, 343 F. 3d 57 (2nd Cir 2003) quoted in Ehle, ibid, p. 297.

business during the period between the signing of the agreement and closing give rise to a claim for compensation between the buyer and the seller²⁴⁸.

Earn-out clauses can give rise to disputes when they are not drafted in enough detail, for example as to which type of performance indicator is to be taken into consideration (EBIT or EBITDA?), what the reference period will be, which accounting principles should be used in a multi-jurisdictional transaction, or whether specifically defined GAAP of a particular reference country (for instance, UK GAAP, or French GAAP) will prevail under any circumstances over the seller's past accounting practices²⁴⁹.

A part earn-out clauses dispute arises when proceeding to establishing the closing balance sheet or the profit and loss account in order to adjust the price. Frequently disputed issues include²⁵⁰:

- governing accounting rules and principles,
- 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?),
- amortisation 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

However, disputes are clearly not confined purely to accounting and valuation questions, but are frequently legal in nature, as the following example shows. Where a seller wishes to obtain a certain minimum price level for the target company it can initiate a bidding procedure involving several potential buyers. According to the

²⁴⁸ Ibid.

²⁴⁹ W. Peter, *Arb.Int.* (2003), *supra* note 235, pp. 498-499.

²⁵⁰ Ibid, pp. 499-500.

experience of W. Peter, disputes where one of the bidders makes a high offer and secures the deal, although it does not wish or intend ultimately to pay the bid price. After closing, this buyer purports to obtain a substantial price adjustment by pointing out certain accounting practices of the seller which were in violation of applicable GAAP. This would normally lead to a price adjustment. However, if the auditors' working papers reveal that this buyer had knowledge of these facts relied on to reduce the price prior to placing its bid, the buyer should be precluded from claiming a price reduction²⁵¹.

3-c) Expert Arbitration

In M&A transactions, the contract frequently provides for an expert who, in the event of a price adjustment dispute, will determine the adjustment by reviewing the situation on the basis of a procedure and criteria generally defined in detail in the contract²⁵².

Most purchase or sale agreements, particularly in cross-border transactions²⁵³, contain valuation²⁵⁴ or purchase price adjustment clauses providing for a two-stage dispute resolution mechanism. At the expert determination system, if the parties cannot agree upon a valuation or the adjustment, an independent third party (forensic) accountant will be retained to determine the resolution of certain specific questions that are well circumscribed and generally fact-based²⁵⁵.

Generally, expert determination ('expertise arbitrale'; 'Schiedsgutachten') is the determination of a material fact by one or more expert(s), as opposed to the final resolve of the disputes as a whole, which is the role of an arbitral tribunal. In many jurisdictions, expert determination is not legally regulated. In order to ensure that the

²⁵¹ Ibid, p. 500.

²⁵² Ibid.

²⁵³ Francisco Orrego Vicuña, Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation, Dispute Resolution Journal, 2002, p. 68.

²⁵⁴ With respect to the valuation of shares, see Partial Award made by the Permanent Court of Arbitration (PCA) dated 22 November 2002, Case number 2000-03, Horst Reineccius, First Eagle SoGen Funds, Inc, Pierre Mathieu and la Société Hippique de la Châtre (Claimants) v. Bank for International Settlement (Respondent), ASA Bulletin 2004, at. pp. 116-131: partial award, inter alia, on the applicable standards for the valuation of shares at p. 120-122.

²⁵⁵ Anke Sessler and Corina Leimert, The Role of Expert Determination in Mergers and Acquisitions under German Law, Arb. Int., 2004, Issue 2, pp. 151-165.

function of such an expert is clearly distinguished from that of an arbitrator, the parties should put special care into spelling out the expert's terms of reference; (since in assessing whether the parties' intention was to resort to expert determination or arbitration proper, regard will be given to the contents of the agreement, i.e., for example, the tasks entrusted to the expert or arbitrator, rather than to the terminology to be used). Unless the contract provision is so ambiguous that it could be construed as an arbitration proper, an expert's determination is not an arbitral award and consequently not subject to the New York Convention²⁵⁶.

The accountant acts as an expert, not as an arbitrator, that is, he neither tries to achieve resolution of the dispute as a whole, nor does he render an award that could be enforced against an uncooperative party²⁵⁷. However, the expert's determination does bind the arbitral tribunal dealing with the same case, in the sense that, the latter will not have the right to revisit the factual outcome settled on by the expert²⁵⁸.

On the second level, the arbitration stage, the dispute is resolved as a whole, in a binding legal determination, proceeding on the facts established by the expert²⁵⁹. In some cases, however, the arbitrators may have to determine the content and signification of a certain balance sheet item impacting upon an evaluation, before the expert can determine the correctness of a financial statement²⁶⁰.

In addition, the arbitrators are frequently called upon to resolve disputes arising when one of the parties obstructs the expert determination process, for example, by appointing the expert or a new expert if the first has been challenged. As the determination of the expert is often crucial to the outcome of the dispute, the resolution of such preliminary issues is very important²⁶¹.

Under an agreement to merge *American Medical Electronics, Inc. (AME)* with *Othello* to form Orthofix, Inc., the determination of the amounts payable to the

²⁵⁶ W. Peter, Arb. Int. (2003), supra note 235, p. 500- 501.

²⁵⁷ Sessler, Leimert, supra note 256, p. 152.

²⁵⁸ Bernardo M. Cremades, Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, Arb. Int. 14/2 (1998), p. 163, footnote 9 (hereinafter Cremades, Interactive Arbitration)

²⁵⁹ W. Peter, Arb. Int. (2003), supra note 235, pp. 503- 504.

²⁶⁰ Sachs, Schiedsgerichtsverfahren, supra note 103, p. 124.

²⁶¹ Ehle, supra note 208, p. 298.

shareholders pursuant to the contractually specified formulae was entrusted to a Review Committee, the decision of which would be final and binding. If the Review Committee was unable to agree by a majority decision on the correct pay-out, the matter could be submitted by the Committee to binding arbitration. The Review Committee decided that the appropriate pay-out was US \$6million. As part of its decision, the Committee specified that its pay-out determination would be conditional upon submission to and approval by an arbitrator. An arbitrator was appointed and rendered a “consent award”, adopting the settlement in its entirety. Dissatisfied with the pay-out, AME shareholders filed a suit in Colorado against the Committee’s members and against Orthofix, asserting inter alia, claims for breach of fiduciary duty and breach of contract. The AME shareholders also filed a motion in the Southern District of New York to vacate the award. The Colorado Case was transferred to United States District Court for the Southern District of New York and the proceedings were consolidated²⁶².

As seen carefully drafted of arbitration clauses is essential for identification of parties’ consent. Even if that parties drafted an arbitration clause identifying their consent in the end of the M&A phases; it is possible to be unsatisfied. As studied in the next chapter consolidation like in this example is not the best way in order resolute dispute. All the details of the case are not known, but there is an important question of how to consolidate court proceedings with another in case of existence of an arbitration clause. In this case what would be the effect of “consent award” by an arbitrator.

Since expert determination and arbitration are often combined in a two-step (or parallel) dispute resolution mechanism²⁶³, disputes have been caused by the lack of definition of the scope of assignment at each level²⁶⁴. The following 2002 case from

²⁶² Clarence Frere, et al. v. Orthofix, Inc. Et al., United States District Court for the Southern District of New York, Decision of 6 December 2000, 99 Civ. 4049, 0 Civ. 1968; excerpts in AJ van den Berg (ed.), Yearbook Commercial Arbitration, Vol. XXVI (2001), at pp. 1042-1045, quoted in Ehle, *ibid*, p. 299.

²⁶³ This mechanism is studied in the Chapter IV under the title of different ADR procedures used in M&A transactions and interaction with arbitration proceedings.

²⁶⁴ Klaus Günther, Sie Bedeutung von Schiedsvereinbarungen im M&A Bereich, in Tagungsbeiträge zur DIS –Vortragsveranstaltung “Schiedsgerichtbarkeit bei M&A”, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VII/01, at pp. 20-22; Christian Borris, Streiterledigung beim Unternehmenskauf, in Law of International Business and dispute Settlement in the 21st Century (Liber Amicorum Karl-Heinz Böckstiegel, 2001) at pp. 81-83.

the United States is a good example of the problems that may arise if the dispute resolution clause is not sufficiently clear²⁶⁵.

The parties had entered into a share purchase agreement which provided that the “final share price” for the sale was to be determined by the company’s accountants, and specified that such determination “shall be final and binding on seller and buyer and shall not be subject to any appeal, arbitration, proceeding, adjustment or review of any nature whatsoever”. The agreement provided that all disputes arising under the agreement were to be resolved by arbitration. Following the accountants’ submission of a valuation substantially lower than the seller expected, the seller initiated arbitration seeking to invalidate the accountants’ determination. The buyer, in turn, sought to rescind the agreement and recover money already paid to the seller. The arbitral panel assumed jurisdiction and overturned the accountants’ determination as flawed²⁶⁶.

The buyer brought suit in the United States District Court for the Southern District of New York, seeking approval of the arbitral award in his favour. The court instead vacated the panel’s decision to overturn the accountant’s determination, holding that the parties had committed review of the valuation determination to the accountant under the purchase agreement and that the panel had exceeded its authority in reviewing that determination²⁶⁷.

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

²⁶⁵ Ehle, *supra* note 208, p. 299.

²⁶⁶ *Ibid*, pp. 299-300.

²⁶⁷ *Ibid*, p. 300.

determinations to an independent accountant, ambiguity exists that requires questions of arbitrability to be decided by a court²⁶⁸.

In *FAX (France) v. SL (Netherlands)*, which involved an acquisition of shares with a guaranteed value, an “audit arbitration” was followed by arbitration proceedings. The purchaser requested the ICC arbitral tribunal to hold that the accounts were wrong and to order the seller to pay damages for having breached the guarantee clause. The arbitral tribunal, however, first had to determine its competence in view of the “price adjustment procedure” (audit arbitration) and the arbitration agreement in the share purchase agreement. After interpretation of the provisions, the arbitral tribunal declared itself competent and that it was not bound by the audit arbitration²⁶⁹.

While expert determination and arbitration may usefully interact in complex M&A related disputes, the combining of different alternative dispute resolution (ADR) mechanisms may not always be in the parties’ best interests. A multi-step system may indeed lock the parties up into a fixed program that results in the loss of valuable time and may even be the source of new disputes when the parties disagree on whether or not the “next step” has been reached²⁷⁰.

In the majority of cases, the parties will first try to resolve their dispute through management negotiations, or even resort to mediation, before initiating binding arbitration proceedings. The preliminary mechanisms can always be agreed on ad hoc²⁷¹.

4) Representations and Warranties

The clauses dealing with representations and warranties are the most debated clauses in an M&A transaction. This is so regardless of the applicable law, and regardless of

²⁶⁸ Norman Katz v. Herbert Feinberg, United States Court of Appeals for the Second circuit, Decision of 26 April 2002, 167 F. Supp.2d 556, 565-66 (S.D.N.Y. 2001) affirmed, 290 F. 3d 95 (2d Cir. 2002) quoted also in Ehle, *ibid*, p. 300.

²⁶⁹ *Ibid*, pp. 300-301.

²⁷⁰ Christian Borris, *supra* note 265, pp. 76-77

²⁷¹ Ehle, *supra* note 208, p. 301.

whether the shares of a company are bought (share deal), or transfer directly to the assets of a company (asset deal)²⁷².

Many post M&A arbitrations result from claims of the acquiring company based on contractual representations and warranties, that is, statements of the seller concerning the state of the target at the time of the execution of the acquisition agreement²⁷³. Many of these “snapshot” statements concern the correctness of the company’s financial statements, the absence of liabilities other than those reflected in its latest balance sheet, the seller’s title to the assets part of the sale and compliance with applicable laws²⁷⁴.

According to Tschäni, representations and warranties in M&A contracts have become rather extensive. However, it is fair to say that the scope still varies depending on the governing law. Of the more important jurisdictions, representations and warranties in England and the United States have probably become the most elaborate and detailed. As a result of the considerable influence of the Anglo-American practice, representations and warranties are generally laid out in much detail in M&A contracts. Frequently, the clauses containing representations and warranties are contained in the purchase agreement as such; they are also seldom listed in a specific exhibit of the contract²⁷⁵.

The parties are at liberty to define the representations and warranties in the share purchase Agreement. Conceptually, representations and warranties relate to characteristics of the company and the business being sold. Technically, representations on the one hand and warranties, on the other, have to be distinguished. According to American sources, representations are statements of past or existing facts, while warranties are promises that existing or future facts are or will be true²⁷⁶. However, in practice the difference has proven unimportant. Under Swiss law the term “Representations” would most suitably be translated into “Zusicherungen”; while the term “Warranties” would be equivalent to

²⁷² Tschäni, ASA Conference, supra note 226, p. 67.

²⁷³ Sachs, Schiedsgerichtsverfahren, supra note 103, p. 126.

²⁷⁴ W. Peter, Arb. Int. (2003), supra note 235, pp. 492-493.

²⁷⁵ Tschäni, ASA Conference, supra note 226, p. 67

²⁷⁶ J.C. Freund, Anatomy of a Merger, New York 1975, p. 153; American Bar Association (ABA), Model Asset Purchase Agreement with Commentary, Chicago 2001, p. 69.

“Gewährleistungen” or “Garantien”. “Garantien” would rather amount of indemnities²⁷⁷.

Indeed, representations and warranties must be distinguished from indemnities which are normally agreed upon separately. Indemnities are given in respect of future facts, regarding which the parties agree on the (financial) consequences. Thereof, on the other hand, representations and warranties (Gewährleistungen) relate to facts existing at the time of signing and/or closing. According to the Federal Supreme Court of Switzerland, representations and warranties may also relate to facts at a later time, provided that the seller is contractually obligated and in a position to bring about those facts²⁷⁸. If future facts warranted are beyond the influence of the seller, the representation and warranty must be deemed an indemnity; although indemnities sometimes also relate to present (known or assumed) facts, with the parties agreeing on which party shall bear the (negative) consequences that might arise from these facts. The exact definition will depend on the applicable law, but practically speaking indemnities are used where the parties agree that the consequence of a problem they have identified will be borne by the seller, regardless of the knowledge of the buyer²⁷⁹.

Representations and warranties must further be distinguished from covenants, which define actions to be undertaken, or abstained from, by the parties in the future, i.e. from the time of signing or closing of the share purchase agreement²⁸⁰.

According to Tschäni, the parties in an M&A deal agree that representations and warranties are given as of the time of signing and usually -at least in a qualified form- of closing. This means that the risk of the representations and warranties becoming untrue between signing and closing is borne by the seller²⁸¹.

Representations and warranties are ascribed to have three purposes. First, they constitute the starting point for due diligence. Second, they are the basis for any

²⁷⁷ Tschäni, ASA Conference, supra note 226, p. 68.

²⁷⁸ BGE 122 III 426, 428 et seq.

²⁷⁹ Tschäni, ASA Conference, supra note 226, p. 68.

²⁸⁰ Ibid.

²⁸¹ Ibid, pp. 68-69.

claims the buyer might have after the transaction has been closed because a representation and warranty was not accurate. Third, the buyer might be entitled to refuse to close a transaction should it prove that the representations and warranties are no longer accurate at the time of closing, particularly if the accuracy of the representations and warranties is made a condition precedent to closing²⁸².

The seller is often asked to represent and warrant that the company is not in material breach of any applicable law, governmental permit or order, and has obtained all the material permits and authorizations to carry on its business as presently being conducted²⁸³.

Given the recent tendency of governmental agencies to enforce compliance with laws, particularly in regulated areas, this is a representation and warranty which is becoming increasingly important. In light of this trend, it is becoming more difficult for a seller to refuse to give such a representation and warranty²⁸⁴.

The clause needs to be interpreted as regards the term “material”. The parties sometimes agree that a breach of applicable law must amount to a material adverse change that they define and quantify. Otherwise, it will be up to the arbitrators to rule whether the breach is material. Depending on the case this might prove to be rather difficult. If the parties have agreed on a minimum threshold amount generally, does this mean that the breach has to be material (however defined) and then a claim is solely available if in addition the minimum threshold is met? The answer will depend on the particulars of the case. In some cases, the seller tries to restrict the clause by referring to this knowledge, with the argument that he cannot possibly be aware of breaches of any law. If accepted at all, the buyer will require that the knowledge of the management of the target company be attributed to the seller. Such an agreement will generally be valid²⁸⁵.

One important source of disputes is vaguely, ambiguously or incompletely drafted representations and warranties, as the buyer may then more easily claim that the

²⁸² Ibid, p. 69.

²⁸³ Ibid, p. 72.

²⁸⁴ Ibid.

²⁸⁵ Ibid, p. 73.

seller is liable for breach of contract and/or (negligent) misrepresentation. On the other hand, the seller may ask that certain claims be excluded by making reference to independent assessment made by the purchaser and the knowledge gained in the due diligence process²⁸⁶. Further, representations and warranties are closely linked to the purchase price as they reflect the target's guaranteed qualities. If any warranted qualities of the target turn out to be groundless, such as the existence of certain assets on the balance sheet, the purchaser will often claim an adjustment of the price. The following are two practical examples²⁸⁷.

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 price²⁸⁸.

In another case, ICC arbitration in Switzerland, two companies had sold their entire stock in a company to the purchaser, who negotiated a reservation for a certain price adjustment. The parties agreed to place a part of the purchase price in an escrow deposit to secure certain representations and warranties. Subsequently, the purchaser conveyed parts of the receivables to a third company, which later filed a request for arbitration for price adjustment, based on general representations and warranties. In a partial award, the arbitral tribunal declared itself competent. The sellers challenged this award before the Swiss Federal Tribunal, which denied its jurisdiction, holding that the partial award had not been rendered in an international arbitration in accordance with Articles 176 et seq. of the Swiss Federal Statute on Private International Law, but in a domestic arbitration and, thus, within the scope of application of the Swiss Inter cantonal Concordat Regarding Arbitration of 27 March 1969²⁸⁹.

²⁸⁶ Sachs, Schiedsgerichtsverfahren, supra note 103, p. 126.

²⁸⁷ Ehle, supra note 208, p. 294

²⁸⁸ C. And K. v. S. Compagnie S.A., Geneva Court of Justice, Decision of 15 October 1999, ASA Bulletin 2000, at pp. 793-802 quoted also in Ehle, *ibid*, p. 294. Unfortunately, the outcome of the case is not publicly known, since the published decision of the Geneva court only concerned the purchaser's application for disclosure of information from the seller's Board members²⁸⁸. Everything outside that remained confidential.

²⁸⁹ Swiss Federal Tribunal, 1st Civil Chamber, Decision of 27 October 1995, ASA Bulletin 1996, at pp. 277-283 quoted also in Ehle, *ibid*, pp. 294-295.

4-a) Breaches of representations and warranties

4-a-a) Duty to investigate

Under Swiss law, the buyer has an immediate duty to investigate the business after closing failing which he will have no remedy for breaches that could have been detected in a customary examination. The holding of the Federal Supreme Court has been quite strict on this point, imposing a rather short time period on the buyer to investigate the company after closing. In M&A practice this has been found to be unpractical. Therefore, in a share purchase agreement governed by Swiss law the parties regularly waive the duty to investigate²⁹⁰.

In one arbitration case, the purchase agreement provided that the buyer shall “as soon as reasonably possible” investigate the business. The agreement was subject to German law. The buyer carried out the investigation approximately one month after the closing. Due to a settlement the case did not have to be decided, but the arbitral tribunal was leaning towards assuming that the one month period would have been sufficient to meet the requirement “as soon as reasonably possible”. Ultimately, this is a question of interpretation, taking into account all circumstances²⁹¹.

4-a-b) Duty to Object

If a breach has been discovered, the buyer has the duty to report the breach to the seller. This is an area regulated in the contract in detail. The parties agree that the buyer reports the breach within a certain defined period (30/90 Business days) after detection. Alternatively, they agree that the duty to object is sufficiently fulfilled if the objection occurs within certain time period after the representations and warranties have lapsed, regardless of the time when the breach was detected. Frequently, the parties agree that the claim for a breach of representation is forfeited, if the duty to object has not been fulfilled. Increasingly, however, the parties concur that the claim is not forfeited, but that the buyer must bear the consequences of his

²⁹⁰ Tschäni, ASA Conference, supra note 226, p. 74.

²⁹¹ Ibid.

late notification (such as, for instance, increased costs), which seems in general more appropriate²⁹².

In the case mentioned above the buyer had to meet a 45 days notice period following discovery. Obviously, the day on which the period starts to run is not easy to determine. It would appear that it can only start to run from the time that the buyer has sufficient knowledge of the facts and circumstances to come to the conclusion that there was a breach. Namely, knowledge which would enable him to give an explanation of the facts and circumstances in the notice, as required by the provisions of the purchase contract. A further question arose from the fact that the parties had not spelt out what the consequences were if the duty to give notice had not been complied with. Either, the meaning must have been that any claims are forfeited as a result, or that the buyer could not claim for damage caused by the late notice. In the case at hand the arbitral tribunal would probably have denied forfeiture²⁹³.

To prepare for possible arbitration cases, it is important for the parties to establish what the knowledge has been at the time they entered into the transaction. In one case, the purchase agreement provided that the buyer shall have no remedy if he or any of his advisors, prior to signing date, had accrual knowledge of the breach, because the breach became “obviously and doubtlessly apparent at first sight from the documents provided to the buyer”. This is a relatively rigid standard to meet. In this case, the arbitral tribunal had to review the documents and to come to a conclusion whether the breach had become apparent as contractually stipulated. For instance, is it sufficiently disclosed that the IT system needs a re-haul if the budget lists investments for a new server? The arbitral tribunal tended towards denying the question. The circumstances play a certain role, namely, how voluminous the documents were, how much time was granted to review them, whether the buyer was a commercial party familiar with due diligence, etc²⁹⁴.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid, p. 76.

In another case, the buyer claimed that the seller had breached the representation that the total net inventory value as reflected on the company's financial statements, was not higher than the lower of the cost or market value. The seller had agreed that no investigation by the purchaser shall prevent the purchaser from claiming under the representations and warranties, except for matters which were disclosed in the documents listed on the schedules and exhibits to the share purchase agreement. The buyer objected and asserted that the respective representation and warranty obligated the seller to make up the difference between the accounted value of the inventory and the actual value²⁹⁵.

4-b) Consequences of breaches of Representations and Warranties

It is not surprising that parties address the consequences of a breach of a representation and warranty in the share purchase agreement in detail. The clauses dealing with indemnification in agreements subject to US or English law are more detailed and elaborate as compared to contracts subject to Swiss Law. They usually list the various items for which the seller will be liable; such as, damage, loss, liability and expenses and sometimes diminutions in value, and also reasonable expenses for investigation and attorney's fees and expenses. The indemnification is owed not only to the buyer, but also to the target company and its subsidiary companies. Furthermore, the seller is held liable generally for breaches of covenants or agreements made or to be performed by the seller pursuant to the share purchase agreement, in addition to breaches of representations and warranties. Despite the more detailed indemnification language, the unpredictability of claims in case of breach is equally deplored, as for share purchase agreements, under Swiss Law²⁹⁶.

5) Third- Party Claims

In practically all M&A contracts it is specifically addressed of a third party (including authorities) bringing a claim against the target company after closing date which claim, if successful, is likely to qualify for a claim of the buyer against the

²⁹⁵ Ibid.

²⁹⁶ Ibid, p.78.

seller for breach of representations and warranties. In this case, the buyer has to notify the seller of a third-party claim. The purchaser or the target company has the right to defend the claim, while the seller is consulted and assists in the defence. The parties agree on who may appoint counsel defending the claim. Subject to certain conditions, the seller might be accorded the right to take over the defence of the claim altogether. Furthermore, the parties allocate the costs and agree on the requirements for a settlement with the third party²⁹⁷.

More generally, the issue at stake is who should have control over third-party litigation. Depending on the situation the clause in the share purchase agreement on this point may vary.

Third-party claims might pose difficult questions for the purchaser. To be able to claim from the seller, the buyer might have to bring an action at an early stage in order to meet the term of the representation and warranty which is allegedly breached. In many cases, the third-party claim at that time is not precise enough and also the third-party claim needs to be adjudicated first. In such cases, the buyer may have to apply for a stay of proceedings by the tribunal until the court has ruled on the third party-claim²⁹⁸.

6) Claims for Non-performance or Fundamental Error

The Swiss Federal Supreme Court held that apart from the Gewährleistungsklagen other remedies are available if the respective requirements are met. Those remedies concern claims for non-performance (Erfüllungsklage) and fundamental error (Grundlagenirrtum)²⁹⁹.

In many cases the parties agree that the remedies set forth in the share purchase agreement are to be exclusive. From time to time the parties even explicitly exclude the right of the buyer to rescind the share purchase agreement. For lack of a court precedent, it is not entirely certain whether such exclusion is valid in respect of a

²⁹⁷ Ibid, pp. 78-79.

²⁹⁸ Ibid, p. 79.

²⁹⁹ Ibid.

claim for fundamental error. Against this background, it is not astonishing that in most arbitration under Swiss Law, the buyer will not only claim for a breach of representations and warranties, but he will also base his claim on the theory that there has been a fundamental error. Depending on the particulars of the case, especially when the term of the representations and warranties has lapsed, the remedy for fundamental error might even be the only possible basis on which the buyer may proceed against the seller. The Federal Supreme Court of Switzerland has held that, indeed, the buyer may “partly rescind” share purchases, this effectively results in a reduction of the purchase price³⁰⁰.

The effect of this practice can be illustrated by two cases shortly described below:

In one case, the term for bringing a claim for breach of representations and warranties had lapsed. The buyer, therefore, brought a claim on the theory of fundamental error alleging that, in determining the purchase price, he was relying on financial data, in particular on the EBITDA, and a certain amount of liquidity not needed for operating purposes. According to the buyer, those facts and assumptions proved to be wrong. The buyer, therefore, claimed a reduction of the purchase price using his formula for calculating the purchase price. The seller alleged that the purchase price had been arrived at regardless of the EBITDA and the liquidity. In fact, a representation regarding the income statement of the on-going year and regarding the liquidity had explicitly been refused³⁰¹.

In another case, the transaction was preceded by an auction procedure. In his bid letters, the buyer indicated that he was calculating the purchase price on the basis of the DFC method. For this purpose, he allegedly relied on indications contained in an information memorandum, particularly on the EBITDA and CAPEX forecasts for the running year. Those forecasts ultimately proved to be wrong by some margin. On the other hand, the EBITDA and CAPEX final figures were not represented and warranted in the purchase agreement. The purchase agreement also contained a statement that no further representations and warranties were given and that the seller expressly disclaimed any representation regarding future business

³⁰⁰ BGE 108 II 102; 107 II 419; 81 II 213 quoted in Tschäni, *Ibid*, p. 80.

³⁰¹ Tschäni, *ibid*.

development, profits and business plans of the target company and its subsidiaries. The parties had further agreed that the share purchase agreement shall supersede the information memorandum and the bid letters as well as any other prior agreement³⁰².

By correcting the EBITDA and CAPEX and inserting the corrected figures into his formula the buyer arrived at the amount of CHF 81 million, which was the difference between the actual purchase price paid and the purchase price calculated on the basis of the corrected parameters³⁰³.

Alternatively (in the case that the main claim for CHF 81 million would be dismissed), the buyer claimed some CHF 45 million arguing that a number of representations and warranties had been breached. In other words, the buyer brought the action based on fundamental error because this would have translated into a higher amount as compared to the breaches of the representations and warranties³⁰⁴.

An error is deemed to be fundamental if based on circumstances where the party in error would not have entered into the contract at all, or only on different terms, if that party had known the true facts. The error must relate to a set of facts which the party in error could take as the necessary basis for the contract, pursuant to the principle of good faith in commercial transactions. Not only a subjective but also an objective test is applied to determine whether the requirement is met³⁰⁵.

Particularly in international M&A transactions between sophisticated parties, the non-exclusivity of the contractual remedy has been questioned. When the claim has lapsed because the representations and warranties have expired, it is considered inadequate to give the buyer an additional remedy. It is argued that for breaches of representations and warranties the parties have defined the term, and in most cases have stated that the breach once detected has to be notified within a defined period (30/90 business days). In such cases it is viewed to be inappropriate that the buyer,

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid, p. 81.

³⁰⁵ Ibid.

after having detected a fundamental error, be free to wait for a year before he notifies the seller, and still be able to claim for fundamental error³⁰⁶.

7) Put and Sale Options

Another area that is fertile for post-transaction disputes is put and sales options. It does not appear in chronological phases of M&A transactions in the thesis but disputes generally revolve around the issue of whether or not an option has been triggered. The following three cases underline the practical importance of arbitration in this respect³⁰⁷.

In the first case, the Dutch retailer Ahold had recently announced that it had received a decision from a Swedish arbitration tribunal regarding the premium which was part of the price of a put option exercised by the Norwegian entity Canica AS for Canica's twenty per cent stake in the Scandinavian joint venture ICA AB. According to the shareholders' agreement, between Ahold, Canica and the third joint venture partner, ICA Förbundet Invest AB, Ahold was obliged to buy the shares offered by Canica. The arbitration tribunal rejected the challenges made by Canica concerning the premium rate, and established the rate at 49.56 per cent, which corresponded to the outcome of the valuation made earlier by the valuation expert engaged by the partners in ICA AB³⁰⁸.

In another arbitration between *IPOC International Growth Fund Ltd. (Bermuda)* and *LV Finance Group Ltd. (British Virgin Islands)*, the ICC arbitrators ordered LV Finance Group Ltd. to honour one of two stock option agreements and transfer the promised 25.1 per cent of the shares in the Russian mobile telephone operator, OAO MegaFon, to IPOC International Growth Fund Ltd. The panel in Geneva found that IPOC had "validly exercised sale to another company"³⁰⁹. The Swiss Federal Tribunal

³⁰⁶ Ibid.

³⁰⁷ Ehle, supra note 208, p. 301.

³⁰⁸ "Ahold bekommt Recht – überhöhte Forderung für ICA – Kauf zurückgewiesen", Neue Zürcher Zeitung of 11 October 2004, at p. 23 quoted in Ehle, ibid, p.301.

³⁰⁹ *IPOC International Growth Fund Ltd. (Bermuda) v. LV Finance Group Ltd. (British Virgin Islands)*, ICC Case number 12875/MS, final award of 16 August 2000, Mealey's IAR, Volume 19, Number 9, September 2004, at pp. 6-8, A-1-A-17.

dismissed LV Finance's motion to have the award set aside³¹⁰. A second arbitration has been initiated regarding the second option agreement³¹¹.

In the Canadian arbitration case *Agrifoods International Cooperative Ltd. v. (1) Agropur, Coopérative Agro-Alimentaire and (2) Ultimas Foods Inc. Aliments Ultima Inc.*, the shareholders' agreement contained a share purchase option. The Ontario Superior Court of Justice granted an injunction enjoining a shareholder from exercising the purchase option pending arbitration proceedings on the validity of the sale and the occurrence of a trigger event provided for in the shareholders' agreement. The court enjoined the application of the relevant section of the shareholders' agreement until the fifth day after the decision of the arbitration panel became final³¹².

In a published ICC arbitration case decided in March 1998, the situation was as follows: two parties, both shareholders of the same company, had concluded a shareholders' agreement providing for a buy/sell mechanism as a means of dissolving their relationship, should either of them wish to cease their partnership. The parties interpreted differently statements made in applying this mechanism. The claimant alleged that the defendant had sold all its shares, and the defendant took the position that it had bought the claimant's share. The Defendant further claimed that some of the provisions of the shareholders' agreement were null and void, or had been fraudulently engineered, or performed in bad faith, or violated by the claimant. The tribunal had to decide on a request for interim or conservatory measures³¹³.

As seen in these arbitration cases summarized by Von Segesser, there is no unique way of resolution. The complexity of M&A arbitration is reflected in many different ways depending on the consent of parties. ICC Case pay attention to the interpretation of statement by the parties, however in other cases, arbitral and

³¹⁰ Swiss Federal Tribunal, 1st Civil Chamber, Decision of 14 September 2004, 4P.208/2004, ASA Bulletin 2005, at p. 321 et seq.

³¹¹ *Neue Zürcher Zeitung* of 27/28 November 2004, at p. 25 quoted in Ehle, *supra* note 183, p. 302.

³¹² *Agrifoods International cooperative Ltd. v. (1) Agropur, Coopérative Agro-Alimentaire and (2) Ultimas Foods Inc. Aliments Ultima Inc.*, Ontario Superior Court of Justice, Decision of 23 March 2001, ASA Bulletin 19/2 (2001), pp. 355-366.

³¹³ Segesser, ASA Conference, *supra* note 54, p. 21.

national tribunals pay more attention to the concrete findings. Therefore the author believes that it is necessary to analyse particular aspects of M&A arbitrations.

D) Particular Aspects of M&A Transactions Related Arbitrations

A number of procedural problems have frequently arisen in the context of M&A arbitrations. For instance: validity of an arbitration clause, scope of arbitration clause, applicable law, expedited procedure, interim relief, damages etc.³¹⁴. However, it is especially focused on multi-party and multi-contract M&A arbitrations.

D-1) Multi-party and Multi-Contract Disputes

M&A related arbitrations often arise out of multi-party situations or multi-contract structures, especially on the purchaser's side³¹⁵. This creates problems regarding the constitution of the arbitral tribunal, namely, in view of equal participation, that is, each party's right to appoint its "own" arbitrator.

To take account of the well-known 1992 Dutco decision of the French Cour de Cassation, according to which it was against public policy to force multiple defendants to jointly appoint an arbitrator³¹⁶, the rules of most modern arbitration institutions, such as the ICC³¹⁷ and the LCIA³¹⁸, today provide for adequate solutions to solve this practical problem, consistent with the principle of equal treatment of the parties³¹⁹. In transactions involving several parties and/or multiple contracts, it may, therefore, be sufficient to insert the model clauses of such institutions into agreements.

³¹⁴ For different particular aspects see Segesser, *ibid*, pp. 35-54.

³¹⁵ Bernard Hanotiau, "Complex- Multicontract- Multiparty Arbitrations", *Arb. Int.* Volume 14, No:4, 1998, pp. 369- 394, (hereinafter Hanotiau, *Arb. Int.* , 1998).

³¹⁶ Siemens AG and BML Industrieanlagen GmbH v. Dutco Construction Co., Cour de Cassation, Decision of 7 January 1992, *Revue de l'arbitrage* 1992, pp. 470-472, with note Pierre Bellet, pp. 473-482; *Journal du Droit International*, 1992, pp. 712-713, with the conclusions of Attorney General at pp. 713-726 and note of Charles Jarrosson, pp. 726-736.

³¹⁷ Art. 10 of the ICC Rules.

³¹⁸ Art. 8 of the LCIA Rules.

³¹⁹ Klaus von Schlabrendorff, "Schiedsgerichtsbarkeit bei M&A – Mehrparteisituationen und Inter-Omnies Wirkung" in *Tagungsbeiträge zur DIS- Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) Bd. VIII/01, at p. 35 quoted in Ehle, *supra* note 208, p. 305.

Another important question is whether the parties agree to consolidate parallel proceedings in order to prevent contradictory decisions from being rendered³²⁰.

D-2) Extension of Arbitration Agreements to Third Parties

Lawyers dealing with M&A arbitrations are frequently confronted with the issue of extension of the proceedings to third parties who have not signed the arbitration agreement. This is particularly an issue in situations with group company structures and transactions³²¹. As there is a multitude of possible situations, the rules of national and international arbitration institutions, unlike in the case of multi-party disputes, rarely provide any guidance. On the one hand, an extension to non-signatories may take place by virtue of a number of legal theories, such as legal succession, or through letters of comfort³²². However, as many arbitral tribunals are rather reluctant to extend the arbitration to third parties on these grounds, it is advisable to provide clearly what parties are bound by the arbitration agreement and to let them all sign³²³.

A controversial issue is whether an arbitration agreement can be extended to other companies within the same group³²⁴. According to the “group of companies doctrine”, developed in the famous French case *Dow Chemical firms et al. v. Isover Saint-gobain*, the “corporate veil” can be “pierced” if the other group company³²⁵:

- a) Actively participated in the execution or termination of the agreement;
- b) can be regarded as the “actual” party of the agreement; and
- c) has its own peculiar economic interest in the contract.

³²⁰ Schlabrendorff, p. 34 quoted in Ehle, *ibid*.

³²¹ Jan Michel Ahrens, *Die subjektive Reichweite internationaler Schiedsvereinbarungen und ihre Erstreckung in der Unternehmensgruppe*, Frankfurt, 2001.

³²² Klaus Sachs, *Erstreckung von Schiedsvereinbarungen auf Konzernunternehmen*, in *Tagungsbeiträge zur DIS-Vortragsveranstaltung “Schiedsgerichtsbarkeit bei M&A”*, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at pp. 55-63 (hereinafter Sachs, *Erstreckung*).

³²³ Ehle, *supra* note 208, p. 305.

³²⁴ Otto Sandrock, *The Extension of Arbitration Agreements to non-signatories: An Enigma Still Unresolved*, in *Corporations, Capital Markets and Business in the Law in Liber Amirocum Richard M. Buxbaum*, 2000, p. 465.

³²⁵ *Dow Chemical Firms et al. V. Isover Saint-Gobain*, ICC Case Number 4131, *Y. B. Comm. Arb.*, 1984, pp. 130-134.

In other European countries, however, such as Switzerland and Germany, this doctrine has been rejected by both courts and doctrine for being inconsistent with the parties' intention and the principle of privity of contract³²⁶.

It is certain that the intent of the parties is essential in order to deal in multi-party arbitrations. Therefore, it will be necessary to draft clear, complete arbitration clauses in the context of multiparty M&A disputes. The court-tested model clauses of the more reputable arbitration institutions have proved themselves in the majority of cases, despite the fact that they rarely include a provision for multi-party disputes. Selecting such a clause will make it unnecessary to draft lengthy provisions and provide a degree of security to the parties. The parties and arbitrators can still tailor the procedure to their needs once it is underway³²⁷.

On the other hand, all arbitration clauses, including model clauses, should be drafted with close cooperation between the transaction and the arbitration lawyers to make sure that they "fit" the specific dynamics of specific deals. A particularly important issue is the clear separation of scope between letter of intent and share purchase agreement. In other words, it is possible to generate the question if the arbitration clauses and/or agreements are different in every phase how will the arbitrators deal with this complexity? Is it always possible to invoke parties' intent for a solution in multi contract M&A arbitrations?

E) Conclusion of Chapter II

In further analysis of the phases of M&A transactions and the disputes resulting therefrom, the conclusion can be drawn that arbitration is an effective dispute resolution mechanism in M&A at every stage of a transaction. M&A arbitration benefits from features that make it an attractive alternative to court litigation, despite

³²⁶ Ehle, *supra* note 208, p. 306.

³²⁷ Axel Baum, *Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A*, in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24 and 25 April 2001, (DIS-Materialien Bd., Dresden) VIII/01, at pp. 80-84.

certain procedural particularities and pitfalls to look out for when drafting arbitration clauses.

The initial key to resolving the disputes with arbitration is the careful drafting of an effective arbitration agreement, preferably and necessarily to be done jointly by the transaction and the arbitration lawyers, or to consider the choice of a model clause of a well-known arbitration institution. However, often in practice, a tailored arbitration clause is required in M&A transactions as the complex and intricate nature often demand customised specifications.

The need for well-drafted arbitration clauses is well displayed when one considers the brevity of the subject matter of this chapter. In continuation of the analysis initiated in Chapter One, arbitration can arise in the pre-signing phases of an M&A transaction. Particularly, the phase of the letter of intent, which reinforces the point of the author's proposed guideline, can create binding obligations between the parties.

M&A arbitration must also be concerned with post-signing disputes, such as violation of the covenants, and material adverse changes. Most frequently problems arise concerning representations and warranties, non performance, fundamental error, and especially, price adjustment. Price adjustments, as explained above, often involves appointment of an expert to determine the appropriate price adjustment, which can lead to disputes. The use of such experts being common, it is later discussed in Chapter Four, how such experts interact in M&A arbitration, and the possibilities of multi-step dispute resolution are explored.

The discussion of the various problems grounded at different stages of the transaction in M&A arbitration in this chapter provides the basis for detailed and focused discussion in the forthcoming chapters on the coordination and cooperation of arbitration, parallel proceedings during M&A Transactions and the problem of consent. From examining the interface of arbitration with the M&A transaction, analysis can develop into the risks presented by multiple and parallel proceeding, and beyond to examining methods to overcome these issues.

Furthermore, current discussions by institutions or practitioners lack the quantity and depth needed in order to resolve the complexity of M&A arbitration, especially in terms of “consent”. There are no rules in any national or international institutions regulating consent problems. In discussion of multi-party, multi-contract, and third party issues, it has been deduced that the rules concerning multi-party or multi-contract issues are not sufficient in providing a clear idea of whether M&A arbitration is an example of multi-contract or multi-party arbitration. As outlined above, inserting model clauses is the best way to deal with multi-party or multi-contract arbitrations, however, there are no model clauses of an institution for M&A arbitrations, because there is no standardisation of M&A arbitration.

Thus the working hypothesis’ fourth question is partially answered by the second chapter’s findings, insofar that M&A arbitrations cannot be typical examples of multi-party or multi-contract disputes, given the absence of guidance or standardisation on the matter by arbitration institutions. Subsequent chapters will therefore address how consolidation may be applied to related disputes in M&A arbitration.

To rectify the deficit in guidance or standardisation, the author would not propose law reform given the plethora of existing arbitration laws and rules, but rather respected specific non-binding rules for M&A arbitrations, which are necessary at least for arbitration institutions to inject additional guidelines to M&A arbitrations. The author agrees that careful drafting of arbitration clauses or agreements is very important and particularly recommends the practice. Specific guidelines, however, may also be necessary to standardise the dispute resolution method in order to decrease the complexity of M&A arbitration. While proposing this method, the author is wary of how to standardise. Standardisation should not be applied insofar that provisions appear as institution rules. The flexible and non-binding approach of guidelines for M&A arbitration, rather than codification in the rules of institutions, has been shown to be effective by the IBA Rules concerning the gathering of evidence in Arbitration, which are not mandatory, but persuasive in assisting the parties.

The author finds this the most pragmatic approach, appreciating that it is not easy to standardise M&A arbitration with mandatory rules, because “consent” should not be regulated in a rule. Nonetheless, the author believes that guidelines are necessary for M&A arbitration. Research reveals there has not been any guidance from arbitration institutions on the coordination of arbitration clauses in M&A transactions, or the extension of arbitration clauses to third parties who do not sign the arbitration agreement; thus, the existing rules are not suitable for M&A arbitration. As shown, the M&A process is more complex than the problem of multi-party or multi-contract issues. This will also be discussed further in chapter three.

Simply, M&A arbitrations are different than multi-party and multi-contract arbitrations, in this author’s opinion. Therefore, the current rules and discussions are inadequate for the complexity of M&A arbitration, which necessitates the creation of some guidelines specific to M&A arbitrations.

In introducing and contextualising the subject matter of the thesis, Chapters One and Two have raised significant issues, which by themselves would warrant further study. Benefitting from the necessary background of the examination of the M&A process, disputes arising therefrom and the issues faced by arbitration as a means to resolve those disputes, the thesis accelerates into its second part.

During Part two, the thesis focuses on challenges and practical solutions to M&A arbitrations. To obtain further insight, it is necessary for Chapter Three to overview the cooperation and coordination of arbitral proceedings between different phases of M&A transactions. Chapter Four develops on such problems arising in the cooperation and coordination, or synergy, specifically on how they have been resolved by multi-step processes.

The term “consent” will be the main actor throughout this complex overview M&A arbitrations, not only concerning the consolidation process, but also when examining the successive effects of M&A transactions. Therefore, Chapter Five focuses specifically on the term “consent” and addresses the related issues, before summation of matters in the Conclusion.

PART II : CHALLENGES AND PRACTICAL SOLUTIONS

The second part of the thesis discusses the potential risks of multiple and/or parallel proceedings in different phases of merger and acquisition transactions and the possible solutions which can be provided.

With regard to M&A transactions, two solutions of different aspects of these risks are examined in particular: the first, the consolidation of parallel proceedings and consolidation of arbitration clauses in merger and acquisition transactions (Chapter III); second multi-step processes in M&A transactions (Chapter IV) and Issues of Consent in M&A Arbitration (Chapter V).

CHAPTER III : COOPERATION AND COORDINATION OF ARBITRAL PROCEEDINGS IN M&A TRANSACTIONS

A) Introduction

In this chapter, research will ascertain whether M&A arbitrations consistently form typical examples of multi-contract issues. In multi-contract cases, if there are different arbitration clauses or agreements, it is remarked that national laws and institutional rules provide only for “consolidation” of arbitration proceedings as a solution.

In reviewing institutional rules and given the lack of regulation of M&A arbitration, analysis is confined to rules on multi-contract issues. These regulations require “connection” between the contracts, however, a definition of “connection” is lacking across institutional rules.

In cases where agreements provide for different dispute resolution means such as arbitration and court proceedings in different phases of M&A transactions, it should be taken into consideration whether they are from the same dispute or from related disputes. In both instances, the problems of parallel proceedings may occur, and where parallel proceedings concern the same dispute, mechanisms of *lis pendens* or *res judicata* are often used.

The principle of party autonomy imposes that any consolidation necessarily depends on the agreement of all parties involved. Therefore, it is necessary to focus on the intent of the parties. There are many ways of doing this. For instance, the scope of arbitration clauses is studied in this chapter. In addition, the “group of contracts” doctrine is also examined. However, these methods are not sufficient in order to coordinate parallel proceedings in M&A transaction. On the other hand, it is mandatory to take into consideration the interdependence of agreements, and for interdependence, there should be some binding methods for interrelation between different phases of M&A transaction. In order to implement this, some guidelines

specially tailored for M&A arbitration would be needed, because, existing rules for multi-contract disputes and consolidation rules are not sufficient for M&A arbitration.

The chapter will initially focus on the scope of application of arbitration clauses in order to later determine issues which arise concerning multiple contracts and/or proceedings.

B) The Scope of Arbitration Clauses in M&A Transactions

Once the parties' consent to arbitrate has been established, the arbitration agreement is deemed to cover all disputes between the parties, provided that they are arbitrable and originate from the relationship referred to by the arbitration agreement³²⁸. Most jurisdictions with a substantial arbitration practice assume that parties opting for arbitration wish the arbitral tribunal to have an all-embracing jurisdiction³²⁹.

When interpreting the scope of an arbitration agreement, it will often be necessary to consider the applicable law, including the proper approaches to interpretation. It has long been recognized that under the doctrine of separability, an arbitration agreement may have a different applicable law to the balance of any contract within which it is found³³⁰. Mark Blessing has noted nine possible laws that could apply in such circumstances³³¹. Some scholars suggest that the normal position is to apply the *lex arbitri*. This might be justified on the basis that this is the law expressly referred to in Art. V(1)(a) of the New York Convention, in the context of one of the discretionary bases for refusing enforcement. Another possible justification is that the place most closely connected to an agreement to arbitrate would be the seat of arbitration, where

³²⁸ Segesser, *supra* note 54, p. 36. According to him in M&A disputes, arbitrability is usually not an issue, as these cases involve pecuniary rights that are freely disposable. For instance in Switzerland article 177 (1) PILA.

³²⁹ Segesser, *ibid.* The author gives the example of the decision of Swiss Federal Tribunal 116 Ia 56 for Switzerland; see also Rüede and Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG*, Zurich 1993, § 13 I, 74 (hereinafter Rüede and Hadenfeldt).

³³⁰ Pryles, Waincymer, *supra* note 44, p. 441.

³³¹ Marc Blessing, *The Law Applicable to the Arbitral Clause and Arbitrability*, in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress 1999, p. 168, hereinafter Blessing, *Arbitrability*.

such a closest-connection to conflicts rule is seen as most applicable. Others, such as Lew, Mistelis and Kröll³³², and Redfern and Hunter³³³, suggest that the law governing the subject matter might best apply, an option provided for by Art. 178 (2) of the Swiss Statute on Private International Law³³⁴.

In M&A transactions where conflicts may occur during different phases of the transaction and may consequently relate to different agreements or documents (letter of intent, pre-contract, final agreement), depending on the wording of the clause questions with respect to the scope of arbitration clause may arise. One issue may be whether the arbitration agreement also applies to pre-contractual liabilities, such as damages for culpa in contrahendo³³⁵. Attention must therefore be paid to the careful drafting of the arbitration clause to cover all aspects, from the very first moment the M&A transaction process started through to its completion³³⁶. If several documents contain arbitration clauses, they should be coordinated, or consolidated, so as not to be in conflict with one another. Earlier clauses should be replaced by subsequent ones with an extended scope. Where the M&A agreement contains an “Entire-Agreement Clause”, the arbitration clause must be drafted carefully to compromise all possible disputes relating to the transaction³³⁷.

Moreover, it is not uncommon that the parties’ consent establishes different dispute resolution mechanisms in different phases of M&A transaction. The subject gives rise to significant theoretical and practical questions arising at the stage of commencement of arbitration procedure:

If there are different proceedings concerning the same dispute, which means of dispute resolution will be applied or prevailed?

What are the risks of multiple or parallel proceedings?

³³² Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration*, 2003, p. 121, hereinafter Lew, Mistelis, Kröll.

³³³ Redfern, Hunter, *supra* note 49, paras. 3.09 et seq.

³³⁴ Federal Code on Private International Law of 18 December 1987.

³³⁵ See Rüede and Hadenfeldt, *supra* note 330, § 13 II, 74.

³³⁶ Poudret, Besson, *supra* note 55, paras. 304 et seq. (suggesting the wording “all disputes in connection with the contract” cover, in addition to contractual claims, those based on tort, culpa in contrahendo, etc.), See Segesser, *supra* note 54, p.36, footnote 65.

³³⁷ Segesser, *ibid*, p. 36.

How the doctrine of “consolidation” can be applied depending on the related disputes in M&A Arbitrations?

It is the author’s intention to deal first with the risks of multiple and/or parallel proceedings in different phases (letter of intent, final agreement) of M&A transactions that were clarified in the second chapter.

C) Multiple Proceedings and Parallel Proceedings in M&A Transactions

For more than 30 years, arbitral practice has witnessed the development of complex arbitrations, as well as the specific procedural difficulties inherent thereto. A great source of such problems can be found in the large number of interrelated agreements involved in the performance of major projects, namely in the engineering, construction, raw materials, mining and oil sectors³³⁸. In the ICC Arbitration handbook this list is extended with M&A Arbitrations under the name of shareholder’s agreement³³⁹. These complex contractual relationships may give rise to parallel arbitrations, and to situations in which the unity of the arbitral proceedings may be affected by the multiplicity of issues, agreements, or parties involved in a certain dispute³⁴⁰.

As these situations have become very frequent in today’s business world, various authors have proposed solutions to the difficulties. While some plead for compulsory consolidation or parallel arbitral proceedings by court order, others seek for these procedural questions to be governed by institutional and national rules regarding international arbitration. But there is no general consensus about the best way to handle procedural problems regarding complex arbitrations³⁴¹, and especially in the context of M&A transactions.

³³⁸ In this sense see e.g. Fritz Nicklisch, Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects, J. Int. Arb., 1994, Issue 4, p.57.

³³⁹ Michael W. B’Uhler and Thomas H. Webster, Handbook of ICC Arbitration - Commentart, Precedents, Materials, 2nd Ed., 2008, Sweet&Maxwell, p. 164.

³⁴⁰ Leboulanger, supra note 49, p. 43.

³⁴¹ Ibid.

It is rather astonishing to observe that most of the literature about complex arbitration addresses multi-party arbitration, whereas the situation of parallel proceedings in multi-contract arbitrations involving two parties only a situation much simpler than multi-party arbitration and which has become very frequent seems to have been ignored by doctrine³⁴².

Taking into account the place that authors have dedicated to this hypothesis and the fact that multi-contract situations involving two parties only have been put into the same basket as multi-party arbitrations, one may be tempted to consider that the same conclusion which has been drawn up for multi-party arbitration should be applied to bi-party arbitrations. Actually, some solutions proposed for the former can be applied to the latter, but these solutions are not totally transposable, as two-party arbitrations give rise to very specific problems and present neither the same degree of complexity nor the same difficulties as multi-party arbitrations³⁴³.

As a matter of fact, it appears that joinder of interrelated agreements, is a very useful procedural rule, which could easily be transposed to multi-contract arbitrations involving two parties only³⁴⁴. Although multi-contract situations may involve two or more parties, this chapter deals with multiple and parallel proceedings in M&A transactions involving two parties which require the joinder of parallel arbitral proceedings. However it will be seen that M&A Arbitration involving multiple contracts has many examples with more than two parties. Therefore, examples of multi-party will be given where necessary.

C-1) Terminology

³⁴² Ibid, pp. 43-44. Among the publications which contemplate this last question: for multi-contract situations between, the same parties, see Horacio A. Grigera Naón, (ed.), *Committee on International commercial Arbitration, Complex Arbitrations (Multi-Issue, Multi- Party, Multi-Contract): First Interim Report of the Sixty-Sixth Conference of the International Law Association, Buenos Aires Conference – 1994, The ILA 1994*, pp. 699-704 (hereinafter H.G. Naón, *Interim Report*); and Antoine Kassis, *Réflexions sur le règlement d'arbitrage de la chambre de commerce internationale – Les déviations de l'arbitrage institutionnel*, L.G.D.J. Paris 1988, Nos: 403-405, for multi-contract situations, independent of the problems raised by the number of the parties involved see Hanotiau, *Complex Arbitrations*, again Hanotiau, *Multiple Parties and Multiple Contracts in International Arbitration*, in *Multiple Party Actions in International Arbitration*, Permanent Court of Arbitration (PCA), Oxford University Press 2009, pp. 35-69 (hereinafter Hanotiau, *Multiple Party Actions*).

³⁴³ Lebouanger, *supra* note 49, p.44.

³⁴⁴ Ibid, p. 45.

C-1-1) Multi-Contract and “Group of Contracts” Doctrine in M&A Transactions

In the international business world, a contractual relationship between two or more parties may involve a multi-contract situation. It includes not only group of contracts and (that is, contracts which, although formally independent, are part of a single transaction or operation), but also cases where there are several agreements, having no connection with each other, between the same parties³⁴⁵. Therefore, it seems that the utilisation of the “group of contracts doctrine” seems more appropriate for M&A transactions, because it is considered that each of the phases are related to each other.

According to the classic theory of contract, each individual agreement within a group of contracts is completely independent from the others. If there is no formal link between agreements, each of them is considered to be an extrinsic fact regarding the others. However, this traditional notion does not correspond to current contractual practice³⁴⁶.

Furthermore, Prof. Hanotiau makes a clear distinction between groups of companies and groups of contracts and he mentions that:

“a clear methodological distinction should be, and is not often, made between, on the one hand, the issues arising from the circumstances in which the project at the center of the dispute has been negotiated and performed by one or more companies that belong to a group, some of which are not signatories to the arbitration clause, and on the other hand, the issues arising from the fact that the dispute involves or concerns a variety of problems originating from, or in connection with, two or more agreements entered into by the same and/or different parties and which do not all contain the same (or at least compatible) arbitration clauses. In this second scenario, the fact that the parties to the contracts may belong to a group is a

³⁴⁵ Ibid.

³⁴⁶ See Nagla Nassar, *Sanctity of Contracts Revisited: A study in the theory and practice of Long-Term International Commercial Transactions*, Martinus Nijhoff Publishers, London 1995, p.58.

priori irrelevant, although it may in some cases help clarify to resolve the issues that arise from the existence of a group of contracts³⁴⁷.

According to Prof. Train, a fundamental distinction should be made between contracts that are linked one to other and those that are not. Contracts are linked one to the other when they are united in a relationship of economic or functional dependence. They fall into two categories. The first category includes group of contracts that coexist to attain a common goal: a framework agreement and implementation agreements; a main contract and an accessory agreement for the financing of the main transaction; or a group of contracts of equal importance united by a common cause or goal. The second category covers contracts united in a relationship of substitution or, in other words, group of contracts consisting of two successive agreements between the same parties, where the second one impacts upon the first to amend it or to terminate it: the original agreement and a contract providing for its amicable termination; a novation; or a settlement. Contracts that do not fall in either category are not linked. This is the case, for example, in successive agreements of the same nature between the same parties³⁴⁸.

The issue of groups of contracts is not dealt with as such in the USA. US courts rarely reason their decisions in terms of groups of contracts. Even in the multi-contract situations, they either tend to decide the case (whenever appropriate) in terms of arbitrability (that is according to the American terminology, whether the relevant arbitration clause is wide enough to encompass all the disputes arising from various connected agreements), or in terms of whether non-signatories to one or more connected agreements may be authorized, or must be compelled, to arbitrate with the signatories. In other instances, the issue is approached in terms of consolidation: i.e. whether it is possible to “consolidate” disputes arising from various connected agreements in one arbitral proceeding³⁴⁹?

³⁴⁷ Hanotiau, Multiple Party Actions, *supra* note 343, p. 36. In this sense see e.g. *Société Kis France v. Société Générale*, CA Paris, October 3, 1989, *Rev. Arb.* p. 90, 1992; XVI Y. B. *Comm. Arb.*, p. 145, 1991; Hanotiau, *Complex Arbitrations*, nn. 285-289 and ICC Case No. 8910 (1998), *Partial Award*, in 127 *JDI* p. 1085 (2000), comment Dominique Hascher; Hanotiau, *Complex Arbitrations*, *supra* note 49, N. 304.

³⁴⁸ François Xavier Train, *Les Contrats liés devant l'Arbitre du Commerce International*, Nos. 17-25 (2003), quoted also in Hanotiau, *Complex Arbitrations*, para. 219.

³⁴⁹ Hanotiau, *Multiple Party Actions*, *supra* note 343, p. 64.

By contrast, in continental Europe, the issue of groups of contracts is dealt with under the heading of consolidation by courts and arbitral tribunals. It often arises before arbitral tribunals which are asked to extend their jurisdiction to one or more connected agreements. It sometimes arises before courts, mainly in the context of setting aside proceedings. In continental Europe, national courts and arbitral tribunals are often confronted with the issue of whether it is possible to join and decide together all the disputes arising from inter- related contracts in one single set of proceedings³⁵⁰.

C-1-2) Parallel Proceedings in M&A Arbitration

The same dispute or two closely related disputes may result in parallel proceedings before different arbitral tribunals (or between a national court and an arbitral tribunal), with a resulting risk of conflicting decisions and awards³⁵¹.

C-1-2-1) Parallel Proceeding depending on the same dispute

An international arbitration agreement has two distinct sets of effects: positive and negative effects. The positive effect is the obligation of the parties to participate in the arbitration proceedings. The negative effect of the arbitration agreement prevents national courts from hearing the dispute, unless they find the arbitration agreement to be manifestly null and void³⁵². Different international conventions have recognised the “negative effect” of the arbitration agreement, including the New York Convention and Geneva Convention³⁵³.

The exclusive jurisdiction effect of the arbitration agreement does not always prevent a party from bringing the same dispute (or two closely related disputes) simultaneously before different forums (parallel proceedings). Parallel proceedings may occur between different arbitral tribunals, or between national courts and

³⁵⁰ Ibid, pp. 64- 65.

³⁵¹ Cremades, Madalena, supra note 46, p. 507.

³⁵² In this sense see Julian D M Lew, The Applicable Law to the Form and Substance of the Arbitration Clause, ICCA Congress Series No.9, Paris 1999, p. 125 et seq.

³⁵³ Cremades, Madalena, supra note 46, p. 508.

arbitral tribunals. Parties may start parallel proceedings for different reasons, including seeking the widest legal proceedings³⁵⁴.

According to Prof. Cremades, there is not a unanimous solution to the problems arising from *lis pendens* and *res judicata* in international arbitration, except perhaps the recommendations made by the ILA³⁵⁵. There are, however certain procedural mechanisms to avoid or mitigate the undesirable effects of parallel proceedings. These mechanisms include the well-known doctrines of *lis pendens* and *res judicata*³⁵⁶.

C-1-2-1-1) Mechanism of Lis Pendens in M&A Arbitration

During M&A transactions, one of the parties may start court proceedings arising out of disputes concerning the letter of intent and the other party may start an arbitration procedure. In such case, there will automatically be a problem of *lis pendens*. Therefore, it is essential to pay attention to the principle of “*lis pendens*” in M&A arbitration.

The principle of *lis pendens* refers to pending proceedings. It is a procedural mechanism which serves to avoid conflicting decisions when the same dispute, between the same parties, regarding the same subject matter or relief (*petitum*) and the same legal grounds (*causa petendi*) is brought to another forum³⁵⁷.

James Fawcett, in his authoritative 1994 Report to the International Academy of Comparative Law on Declining Jurisdiction in Private International Law³⁵⁸, describes *lis pendens*³⁵⁹ as a situation in which parallel proceedings, involving the

³⁵⁴ Francisco González de Cossío, *El Arbitraje y la Judicatura*, 2007, pp. 87-88 quoted in Cremades, Madalena, *ibid*, p. 508.

³⁵⁵ ILA, *Res judicata* and Arbitration, in Report of the Seventy-First Conference, Berlin 2004; and, Final Report on *Lis Pendens* and Arbitration, in Report of the Seventy-Second Conference, Toronto 2006

³⁵⁶ Cremades, Madalena, *supra* note 46, p. 508.

³⁵⁷ *Ibid*, p. 509.

³⁵⁸ James Fawcett (ed.), *Declining Jurisdiction in Private International Law*, Report to the XIVth Congress of the International Academy of Comparative Law, Athens 1994, Oxford University Press, Oxford 1995, p. 27.

³⁵⁹ *Lis pendens* literally means a “law suit pending” (and *lis alibi pendens*, which is the phrase more often used in common law jurisdictions, means a “law suit pending elsewhere”). There was a debate within the Committee of ILA whether it would be preferable to use the phrase “parallel proceedings” in the report,

same parties and the same cause of action, continue in two different states at the same time³⁶⁰.

In international procedural law, *lis pendens* operates when two or more disputes are pending, regarding the same claim, but before the courts of different states. In March 2002, the 1968 Brussels Convention was replaced by Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Art. 27 of Regulation 44/2001 (ex article 21 of the Brussels Convention) directs national courts to stay the second proceedings or to decline jurisdiction, if the jurisdiction of the first court is established. Furthermore, Article 28 of the same Regulation (ex-article 22 of the Brussels Convention) refers to the “related actions” and establishes that when such actions “are pending in the courts of the different Member States, any court other than the court first seized may stay its proceedings”. Both provisions recognise the possibility for a national court to stay the proceedings, thus avoiding contradictory judgments³⁶¹.

Most national laws provide specific rules on *lis pendens* between courts. However, the application of the *lis pendens* doctrine varies between the civil law and common law legal systems: a common law court has a discretion whether or not to stay its proceedings on the basis of *forum non conveniens* and the order in which the proceedings were commenced is only one of several factors that the court will take into account; whereas a civil law court will generally apply a first-in-time rule³⁶². The purpose of these rules is to prevent the same dispute from being brought before the courts of two different jurisdictions when the applicable rules confer jurisdiction upon both. Furthermore, there are different mechanisms under international law to

but it is decided that use of Latin was acceptable to describe parallel litigation because the phrase is well recognised and customarily used in that context; nevertheless, the phrase “parallel proceedings” is adopted in the recommendations, taken from Filip DeLy and Audley Sheppard, ILA Final Report on *Lis Pendens* and Arbitration, Arb. Int. 2009 (25), Issue 1, p. 3, footnote 3 (hereinafter De Ly and Sheppard, *Lis Pendens*).

³⁶⁰ *Lis pendens* in some jurisdictions, such as India, has an additional and quite separate meaning relating to real property, namely that any interest in property created pending litigation will be subject to the outcome of that litigation, referred to in s. 52, India Transfer of Property Act 1882.

³⁶¹ Cremades, Madalena, *supra* note 46, p. 510. In this sense see also Lew, Mistelis, Kröll, *supra* note 333, Chapter 19 especially p. 493 et seq.

³⁶² De Ly and Sheppard, *Lis Pendens*, *supra* note 360, p. 4.

prevent duplicate proceedings or contradictory decisions. However, these rules do not automatically apply to arbitration³⁶³.

If court proceedings have been initiated in respect of a dispute submitted to arbitration, national laws do not offer the possibility to raise the defence of *lis pendens*, but a party may object to the jurisdiction of the court that was seized in breach of the arbitration clause³⁶⁴. In considering these questions, the ILA Committee has had to consider whether an arbitral tribunal should apply the rules of the place of arbitration, or whether there is or should be an accepted international arbitration practice. It has been suggested that the question of whether “an arbitral tribunal has legitimate jurisdiction” should be determined by application of the principle of “competence-competence”³⁶⁵. The arbitral tribunal has exclusive jurisdiction to decide all disputes covered by the arbitration clause. Therefore the arbitration agreement serves as the legal basis to challenge the jurisdiction of national courts when court proceedings were started in breach of the parties’ agreement³⁶⁶.

The arbitration agreement prevents national courts from hearing disputes submitted to arbitration, as required by the New York Convention and in the Geneva Convention (articles II.3 and VI.1). Therefore, courts have no jurisdiction when there is a valid arbitration agreement; but the author agrees with Prof. Cremades that this lack of jurisdiction must be raised in proper form and within the applicable time limits. If a party does not challenge the jurisdiction of the court and enters its defence without invoking the courts lack of jurisdiction, it will be presumed that both parties have accepted the jurisdiction of the court to hear the dispute³⁶⁷.

Article II (3) of the New York convention is reflected in Article 8 (1) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and many national laws (e.g. Section 9 of the English Arbitration Act). The underlying reasoning is to prevent one of the parties to an arbitration from resorting to parallel

³⁶³ Cremades, Madalena, *supra* note 46, p. 510.

³⁶⁴ *Ibid.*

³⁶⁵ De Ly and Sheppard, *Lis Pendens*, *supra* note 360, pp. 5-6.

³⁶⁶ Cremades, Madalena, *supra* note 46, p. 510.

³⁶⁷ Cremades, Madalena, *supra* note 46, p. 511.

court litigation as a mere dilatory tactic. Unless the dispute refers to a matter which cannot be submitted to arbitration, or the arbitration agreement is null and void, national courts must refrain from hearing a dispute which has previously been submitted to arbitration³⁶⁸.

It therefore follows that the defence of *lis pendens* is inappropriate, as the proper procedural mechanism is to challenge the jurisdiction of the court in cases where court proceedings are initiated while the same case is being decided in an arbitration. Arbitration proceedings are different in nature from court proceedings, and therefore, according to Prof. Cremades, cannot produce real *lis pendens*. The different national laws reveal that the procedural formula in these cases to be the objection to the jurisdiction of the national court³⁶⁹.

According to French and Swiss approach, Prof. Poudret and Besson ask, when/if *lis pendens* arises between an arbitrator and a judge, before whom the same claim has been brought simultaneously, should the full effect of negative competence-competence be applied, giving absolute priority to the arbitrator as done by article 1458 (1) of the Nouveau Code de Procédure Civile (NCPC), or on the contrary, recognise as the Swiss Federal Tribunal a chronological priority for the one first seized on the matter, even if this is the judge?; or is it preferable not to provide any priority, like the New York Convention and most laws, including the new article 186 (1bis) of the PILS, thereby generating two parallel procedures before the judge and the arbitrator regarding the validity of the arbitration agreement? Even if the first rendered decision would be binding, this last solution leads to a costly duplication of procedures and does not rule out the risk of contradicting decisions. Should the power of examination of the judge first seized be limited to the *prima facie* existence of an arbitration agreement as laid down by Article 1458 (2) of the NCPC or by the Article 7 of the PILS as interpreted by the Federal Tribunal? This solution has rightly been criticised not only because it introduced an additional control, which is limited and worthless, but also because it is difficult to determine when an arbitration clause is “manifestly” invalid. Therefore, Poudret and Besson find another solution and reflect upon the true justification of the arbitrator’s priority to rule on his own

³⁶⁸ Ibid.

³⁶⁹ Ibid.

jurisdiction, whereas the judge could also invoke the principle that every court has the power to determine its own jurisdiction. In their view, the best justification follows from the benefit of attributing the control of the validity of the arbitration agreement, on which depends the jurisdiction of the arbitrator or the judge, to the jurisdiction of the seat applying its own law rather than to a foreign judge. It is important not only to avoid the risk of contradicting decisions, but to favour the jurisdiction in the best position to correctly interpret the applicable law which is the law of the seat. This is why Poudret and Besson suggest, *de lege feranda* to apply a plea of *lis pendens*, leading to the stay of court procedure, when the arbitrator has been seized first and, in the opposite case, to distinguish depending on whether the forum and the seat of arbitration are in the same country. In the affirmative, there is no serious inconvenience to giving priority to the court whose decision will in any case be controlled by the superior court of the seat, as will the award on jurisdiction. In the negative, the priority should be given to the arbitrator and the foreign judge should suspend the pending procedure until a decision is rendered by the arbitrator. Such a solution would however only be coherent and useful if it were contained in an international convention and not only in one or several national legislations³⁷⁰.

The existence of an arbitration agreement between the parties should be alleged in due time and proper form³⁷¹. Failure to do so may result in a tacit submission to the jurisdiction of the national court and may be interpreted as the parties' waiver of the arbitration previously agreed. Each party, by performing certain procedural steps, may tacitly waive the right to arbitration. However, under certain circumstances, the arbitral tribunal might eventually decide to continue with the proceedings, despite the fact that the same dispute is pending before courts. In these cases, parallel proceedings may result in a risk of conflicting decisions. The Buenaventura and Fomento arbitrations illustrate these issues³⁷².

³⁷⁰ Poudret, Besson, *supra* note 55, para. 998.

³⁷¹ Significantly the Model Law regulates that the party requesting the stay of litigation must do so "not later than when submitting his first statement on the substance of the dispute. The English act similarly provides that an application cannot be made after the applicant has taken any step in those proceedings to answer the substantive claim.

³⁷² Cremades, Madalena, *supra* note 46, p. 511.

1) **Buenaventura Case**³⁷³

The *Buenaventura* and *Fomento* cases involved parties in Latin America. The underlying contracts in those cases provided a multi-tiered dispute resolution clause (See Chapter IV), including arbitration in Switzerland, in accordance with the International Chamber of Commerce Rules ('ICC Rules') of Arbitration. When disputes arose, one of the parties started court proceedings notwithstanding the arbitration allegedly agreed. Both parties undertook a number of procedural steps before the national courts, including the filing of different claims. Subsequently, when one party initiated arbitration proceedings in Switzerland regarding the same dispute, the other requested the Swiss courts to stay the arbitration on grounds of *lis alibi pendens*.

In *Compania Minera Condesa SA and Compania de Minas Buenaventura v. BRGM-Peru SAS*, the Peruvian mining company, Buenaventura, and the French state company, Bureau de Recherches Géologiques et Minières (BRGM) entered into negotiations regarding the acquisition by Buenaventura of a stake in Cedimin SA, a subsidiary in Peru of BRGM. A memorandum of understanding providing for mutual call options over the shares in Cedimin was signed by BRGM-Perou, Cedimin and Buenaventura. Cedimin's bylaws would be amended, recognising the terms of the memorandum of understanding. Both the agreement and the amended bylaws included an arbitration clause, whereby any disputes arising between the parties regarding the agreement or bylaws should be submitted to arbitration in Switzerland, in accordance with the ICC Rules. When BRGM sold BRGM-Peru to the Australian Normandy Corporation, Buenaventura brought a lawsuit against BRGM and BRGM-Peru, asserting that they had breached Buenaventura's call option. BRGM-Peru objected to the jurisdiction of the Peruvian courts based upon the arbitration agreement.

Subsequently, BRGM-Peru initiated an arbitration in Zurich against Buenaventura and Condesa, in accordance with the ICC Rules. Buenaventura contended that the

³⁷³ We will follow the summary of Prof. Cremades and Madalena for Buenaventura and Fomento case from his article "Parallel Proceedings", *ibid*.

dispute was already pending in Peru and requested the arbitral tribunal to stay the arbitration pursuant to Article 9 of the PIL Act which provides as follows:

When an action having the same subject matter is already pending between the same parties in a foreign country, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognised in Switzerland.

Later, the Court of Appeal in Lima rejected the respondents' objection that the dispute should be submitted to arbitration, because not all the parties involved in the court proceedings had signed the arbitration agreement. However, the arbitration proceeded in Switzerland. The arbitral tribunal found that it had jurisdiction, notwithstanding the fact that the same dispute between the same parties was being heard before the Peruvian courts. The arbitrators reasoned that the arbitration agreement was valid and covered the subject matter of the claims.

Buenaventura subsequently attempted to annul the award on jurisdiction grounds before the Swiss courts, which was dismissed by the Federal Court. The court recognised as controversial the issue of whether Article 9 of the PIL Act also applied between courts and arbitral tribunals. However, in the present case, the Federal Court considered that no real *lis pendens* existed between the litigation in Peru and the arbitration in Switzerland, as the decision of the Peruvian courts would not in any case be enforceable in Switzerland. The Swiss Federal Court reasoned that the Peruvian courts breached their duty under Article II(3) of the NY Convention, to refer the parties to arbitration.

2) **Fomento Case**³⁷⁴

In the *Fomento case*, three years after *Buenaventura*, another arbitral award was challenged before the Federal Court on the grounds that the arbitral tribunal had failed to stay the arbitration pending court proceedings abroad. The *Fomento*

³⁷⁴ For a commentary of this case see also Matthias Scherer, Editor Note: When Should an Arbitral Tribunal Sitting in Switzerland Confronted with Parallel Litigation Abroad Stay the Arbitration?, ASA Bulletin, 2001, Issue 3, pp. 451- 457.

arbitration arose from the dispute between the Spanish company, Fomento de Construcciones y Contratas SA (FCC) and the Panamanian company, Colon Container Terminal SA (CCT). The parties had entered into a contract whereby CCT commissioned FCC to carry out certain construction works in the Republic of Panama. The contract provided for ICC arbitration in Switzerland. However, FCC brought a lawsuit against CCT before the courts of Panama seeking, *inter alia*, a declaration that the contract and the performance guarantees were null and void. CCT challenged the jurisdiction of the courts based on the arbitration agreement, but the Panamanian Court of First Instance dismissed CCT's arbitration objection as untimely. CCT appealed but also instituted arbitration proceedings in Geneva against FCC.

Subsequently, the Panama Court of Appeal revoked the judgment delivered at first instance and confirmed that CCT's jurisdictional objection had been raised within the legal time limits. FCC appealed before the Supreme Court of Panama as the arbitration proceedings continued in Geneva. On 22 January 2001, the Supreme Court of Panama rendered a judgment confirming the decision of the Court of First Instance, dismissing CCT's objection to the jurisdiction of the Panamanian courts.

Having moved in vain before the arbitral tribunal for a stay of the arbitration until the final decision of the courts in Panama, FCC sought the annulment of the award before the Swiss Federal Supreme Court. The court held that the *lis pendens* rules under Article 9 of the PIL Act also applied between court adjudication and arbitration, and therefore must be observed by arbitral tribunals sitting in Switzerland. Therefore, the arbitrators should have stayed the proceedings because previous court proceedings were pending in Panama as the foreign court proceedings could result in a decision that was enforceable in Switzerland. Accordingly, the Swiss Supreme Court decided to set aside the award³⁷⁵. The court reasoned that the principle of *Kompetenz-Kompetenz* does not give an arbitral tribunal a right to disregard *lis pendens* rules.

³⁷⁵ Fomento Construcciones y Contratas SA v. Colon Container Terminal SA, Swiss Federal Court, judgment of 15 May 2001, ATF 127 III (2001).

The *Fomento* case raised concerns that in an international arbitration sitting in Switzerland, parties could delay the arbitration proceedings by challenging the validity of the arbitration agreement before the Swiss courts. Notwithstanding these concerns, in *Fomento*, it was the parties' tacit submission to the Panamanian courts, by taking relevant procedural steps, which the Federal Supreme Court saw as a decisive criterion in considering whether there was still a valid arbitration agreement between the parties.

It should be pointed out that the basis of the Federal Court's decision was not so much the arbitrator's non-application of the principle of *lis pendens*, as the parties' prior tacit submission to the jurisdiction of the Panamanian courts. The parties initiated proceedings on the merits of the case, conducting sufficiently relevant procedural acts, which the Swiss Federal Court clearly considered as tacit submission to the Courts of the Republic of Panama, waiving the arbitration that they duly agreed in the contract. Whether CCT had lost its right to arbitrate by not invoking it in time before the Panama court was not a matter covered by the NY Convention but for the Panama courts to decide. Consequently, the Swiss arbitral award was set aside for lack of jurisdiction³⁷⁶.

This is the first time that the Federal Tribunal has clearly stated that the *lis pendens* rules of Article 9 PIL Act apply to arbitral tribunals and courts alike. The Federal Court's decision in the *Fomento* case resulted in the Swiss legislator amending Chapter XII of the PIL Act, approving new article 186(1*bis*), which entered into force on 1 March 2007. Article 186(1*bis*) recognises the arbitrators' power to decide on their own jurisdiction, irrespective of whether the same dispute is already pending between the same parties before the courts of a state or another arbitral tribunal, unless there are good grounds to suspend the proceedings³⁷⁷. Therefore, the Swiss legislator has recognised that *Kompetenz-Kompetenz* prevails over *lis pendens*³⁷⁸.

³⁷⁶ Cremades, Madalena, *supra* note 46, p. 513.

³⁷⁷ The original wording of art. 186 (1*bis*) of the Swiss CFDIP establishes the following: “Il statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure”.

³⁷⁸ Emmanuel Gaillard, *Switzerland Says Lis Pendens Not Applicable to Arbitration*, in *New York Law Journal*, 7 August 2006.

The ILA Recommendations on *lis pendens* endorse the principle of *Kompetenz-Kompetenz* as the first criteria in approaching to issue of parallel proceedings. An arbitral tribunal that considers itself to be *prima facie* competent pursuant to the relevant arbitration agreement shall, therefore, continue with the arbitration regardless of any other proceedings pending before a national court or arbitral tribunal, in which the parties and one or more of the issues are the same or substantially the same. But, if duplication in full of the parties, *petitum* and the *causa petendi* are present, the principle of *lis pendens* becomes particularly relevant, allowing the second tribunal to decline jurisdiction or to suspend the arbitration until a relevant determination in the previous proceedings is made³⁷⁹.

Where there are two parallel arbitrations raising the same or substantially the same issues, the Committee concluded that the secondly constituted tribunal should give consideration to case management issues. The Committee concluded that it would be wrong for the second tribunal to proceed with its arbitration, blinkered to the existence of the other arbitration. This recommendation is based on the consideration that, in the case of parallel arbitrations, there is a real *lis pendens* situation because there is parallel jurisdiction, and a policy need for coordination in order to avoid conflicting awards. But the Committee does not recommend that the rigid first-in-time rule applied in many civil law jurisdictions should apply. Instead, the tribunal should have considerable discretion to order a stay on the arbitration on such terms as it sees fit. This might be a stay of only some of the issues. It might be a stay for a limited period, in order to avoid the successful application slowing down the other arbitration unfairly³⁸⁰.

C-1-2-1-2) Mechanism of Res Judicata in M&A Arbitration

The term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent

³⁷⁹ Cremades, Madalena, *supra* note 46, p. 515.

³⁸⁰ De Ly and Sheppard, *Lis Pendens*, *supra* note 360, p. 33, Recommendation 5.

proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called “triple-identity” criteria)³⁸¹.

The principle of *res judicata* has a positive or formal and a negative or material effect. The former refers to the fact that a decision is final between the parties and may not be appealed or challenged. Therefore, a final judgment or award will be binding in subsequent proceedings. The negative effects of *res judicata* prevent the re-litigation of same dispute by the same parties, also referred to as *non bis in idem*³⁸².

For instance a Swiss award held that “it is settled law by now that an arbitral tribunal sitting in an international arbitration in Switzerland must apply the same rules as a Swiss court in matters of *res judicata*”³⁸³.

When the doctrine is described, it is generally stated that the parties must be the same in the two sets of proceedings for the doctrine to apply (or, at least, legally deemed to be the same, which the common law refers to as ‘privies’, *e.g.* trustee and beneficiary). However, the strictness of this requirement varies between legal systems. In addition, this requirement has been relaxed somewhat in the United States, where third parties may rely on the doctrine in some circumstances³⁸⁴.

Res judicata is generally applied defensively, to stop a claimant bringing the same claim or seeking further relief. At least in the United States, it may also be applied offensively to prevent a respondent from denying rulings made against it in earlier proceedings³⁸⁵.

It is generally accepted that the *res judicata* doctrine applies in the context of international arbitration, such that a final award has *res judicata* effect (both positive

³⁸¹ De Ly and Sheppard, ILA Interim Report on Res Judicata and Arbitration, Arb. Int. 2009, Vol. 25, Issue 1, p. 36 (hereinafter De Ly and Sheppard, Res Judicata). For the potential situations where *res judicata* might be argued see Audley Sheppard, Res Judicata and Estoppel, in Bernardo M. Cremades and Julian D. M. Lew (eds.), Parallel State and Arbitral Procedures in International Arbitration, 2005, pp. 220-221 (hereinafter Sheppard, Parallel State).

³⁸² Cremades, Madalena, *supra* note 46, p. 519.

³⁸³ A v. Z. Order No: 5 of 2 May 2002, ASA Bulletin, Vol. 21 No.4, 2003, p. 810.

³⁸⁴ De Ly and Sheppard, Res Judicata, *supra* note 382, p. 37.

³⁸⁵ *Ibid.*

and negative)³⁸⁶. Both in common law countries and in continental civil law systems, the principle of *res judicata* directly applies to arbitration³⁸⁷. Most national laws indeed recognise the *res judicata* effects of arbitral awards, including France (Art. 1476 and 1500 of the previous French New Code of Civil Procedure and Art. 1484 after the modification on 14 January 2011), Belgium (Art. 1703 of the Code of civil Procedure), the Netherlands (Art. 1509 of the Code on Civil Procedure), Austria (Art. 594 of the Code on Civil Procedure), Switzerland (Art. 190 of the Code on Private International Law), Italy (Art. 829.8 of the Code on Civil Procedure), Spain (Art. 43 of the Arbitration Act³⁸⁸). However, the scope of the application of *res judicata* varies for each country. In Switzerland, the Federal Supreme Court has held that: “*Res judicata* only relates to the acts based on knowledge of the decision or the award. It does not cover the reasoning of the decision to know the exact meaning and extent of the *dispositif*”³⁸⁹. In Italy, while the legal doctrine holds that *res judicata* effect is limited to the operative part of the judgment, Italian case law has admitted that the *res judicata* effect may include the entire reasoning and in almost all cases that *res judicata* includes the grounds that constitute the logical and necessary assumptions for the decision itself (the so called “*giudicat implicito*”)³⁹⁰.

It should again be pointed out that, in principle, *res judicata* applies only to the operative part of the award, i.e. the part of the award containing the decision. It does not normally extend to the reasons, which will only be taken into consideration to determine the meaning and the scope of the operative part³⁹¹. It is however, generally considered that *res judicata* extends to the reasons which are necessarily adjunct to the decision; that is to say, the *ratio decidendi* of the award. In other words, the fact that the latter is located in the body of the award rather than in its operative part is irrelevant³⁹².

³⁸⁶ Ibid.

³⁸⁷ See *Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich*, 2002, UKPC 1129.

³⁸⁸ Hanotiau, *Complex Arbitrations*, supra note 49, pp. 246-247.

³⁸⁹ ATF 128 III 191, infra n.97.

³⁹⁰ E.g. Cass. 86/4137, 89/1892, 94/7890 and 95/1460 from De Ly and Sheppard, *Res judicata*, supra note 382, p. 52.

³⁹¹ Hanotiau, *Complex Arbitrations*, supra note 49, p. 251.

³⁹² See the discussion on this issue D. Hascher, *L'autorité de la chose jugée des sentences arbitrales*, address to the French Committee on Private International Law, 7 February 2001, in *Travaux du comité français de droit international privé*, Pedone, 2004, pp. 11-16.

The issue of the scope of *res judicata* has also been addressed in other arbitral awards. For example, in a final award of 31 May 1988 rendered in *ad hoc* proceedings, the arbitral tribunal decided that “*the principle of res judicata prevents the re-opening of necessarily decided points*”³⁹³; it does not prevent the clarification or interpretation of a decision, nor does it prevent a decision from being rendered on points left undecided by an award. In an award of 28 March 1984 in ICC case no. 3267, the arbitral tribunal decided that

*the binding effect of its first award is not limited to the contents of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, i.e., to the ratio decidendi of such award. Irrespective from the academic views that may be entertained on the extent of the principle of res judicata on the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues. By contrast, the arbitral tribunal made clear in other parts of its first award that the views expressed therein on certain other aspects of the case were of a preliminary nature only and without prejudice to its final decision. On such aspects, the arbitral tribunal holds itself entirely free to adopt other views with the benefit of further evidence and investigations*³⁹⁴.

The *res judicata* effect of an earlier decisions raised by a party in subsequent proceedings by pleading: cause of action estoppel, or issue estoppel. If accepted, the plea will have the effect of precluding the other party from contradicting the earlier determination in the later proceedings. The rules of estoppel by *res judicata* are rules of evidence³⁹⁵.

English Law recognises two further pleas of preclusion: merger/former recovery; and abuse of process. Although the fourth, abuse of process, has its own rules, some authors have posited that all four doctrines have as their objective prevention of

³⁹³ Y.B. Comm. Arb., 1990, p. 56. See also annotation to ICC case no. 3383, ICC Awards “The solutions adopted in an arbitral award have *res judicata* effect with respect to another arbitral tribunal until such time as the validity of the award is challenged before the relevant state authority. In particular, it is not up to the second tribunal to check that the award satisfies the conditions that need to be met in order for it to be recognized by the judicial authorities.”

³⁹⁴ Y.B. Comm. Arb., 1987, p. 89.

³⁹⁵ De Ly and Sheppard, *Res Judicata*, supra note 382, p.41.

abuse of the courts' process, and that the term "abuse of process" can be used to describe all four³⁹⁶.

In the US, the Federal Circuit Courts of Appeal have taken somewhat different approaches in determining when res judicata can be asserted as a valid jurisdictional defence against re-litigation in domestic courts. Some circuit courts have focused on the language of the arbitration clause to determine whether res judicata is within the scope of the arbitration clause; others have focused on the finality of the award and applied a traditional transactional analysis to the claims being raised; and others have pursued a hybrid approach between the two³⁹⁷.

Many scenarios may arise for res judicata³⁹⁸. One of these scenario is that res judicata may arise because the parties institute arbitration based on different agreements to arbitrate arising under the same legal relationship. The battle of forms is a typical example of such situation. A similar situation exists between identical parties in relation to related legal relationships (such as different format of group of contracts). If disputes are brought before different arbitral tribunals, res judicata issues may arise³⁹⁹.

The application of res judicata in M&A Arbitration does not have many examples. However some cases in international commercial arbitration mention the

³⁹⁶ See e.g. Lord Keith in *Arnold v. National Westminster Bank plc*, 1991, 2 AC 93 at 111 (HL).

³⁹⁷ Compare, e.g. *Chiron Corp. V. Ortho Diagnostic Sys*, 207 F. 3d 1126,1130-1131 (9th Cir. 2000), *John Hancock Mutual Life Insurance Co. v. Thomas W. Olick*, 151 F. 3d 132, 136-137 (3rd Cir. 1998); *Apparel Art International, Inc. v. Amertex Enterprises Ltd.*, 48 F. 3d 576, 583 (1st Cir. 1995); and *Hugo Marom Aviation Consultants Ltd. v. Recon/optical Inc.*, 1991 US Dist LEXIS 6877 (7th cir. 1991). See also Born, *International Commercial Arbitration in the United States*, 2nd Ed., Kluwer, The Hague 2001, p.683 (hereinafter Born, United States).

³⁹⁸ For the situations where res judicata might arise see De Ly and Sheppard, *Res Judicata*, supra note 382, p. 37 et seq. and Cremades, Madalena, supra note 46, p. 520 et seq. See also Bernard Hanotiau, *Problems Raised by Complex Arbitrations involving Multiple Contracts-Parties-Issues – An Analysis*, 2001, 18 *J. Int. Arb.* 251 at 356 (hereinafter Hanotiau, Analysis) and also "Quelques réflexions à propos de l'autorité de chose jugée des sentences arbitrales" in *Liber Amicorum Lucien Simont*, Brussels: Bruylant, 2002, p. 301; Hanotiau, *The Res Judicata Effect of Arbitral Awards*, in ICC International Court of Arbitration Bulletin. *Complex Arbitrations: Perspectives on their Procedural Implications*, 2003, p. 43, (hereinafter Hanotiau, ICC Bulletin 2003); Audley Sheppard, *The Scope and Res Judicata Effect of Arbitral Awards in Arbitral Procedure at the Dawn of The New Millennium*, Brussels: CEPANI, Bruylant, 2005, p. 263, (hereinafter Sheppard, Millenium); Christer Söderlund, Lis Pendens, Res Judicata and The Issue of Parallel Judicial Proceedings, 22 *J. Int. Arb.*, 301, No. 4, 2005; V.V. Veeder, *Issue Estoppel, Reasons for Awards and Transnational Arbitration*, in ICC Bulletin 2003, p. 73, (hereinafter Veeder, ICC Bulletin 2003).

³⁹⁹ See Train, supra note 349, pp. 458-460 and 470.

requirements for *res judicata*. For instance the final award of ICC Case No: 6363 confirmed that the application of the doctrine of *res judicata* requires “identity as regards subject matter of the dispute, petitum and causa petendi, between a prior judgment and a new claim”⁴⁰⁰.

Parallel proceedings involve a clear risk of different claims in different forums, between different parties, but in relation to the same facts or legal relationship. The issue, therefore, remains as to whether and to what extent an arbitral tribunal may be bound by an award rendered in another connected arbitration, which is not *res judicata*⁴⁰¹. In the ICC Case No: 6363 the arbitral tribunal held that a previous decision was not *res judicata*, however, it decided that the first decision could not be ignored⁴⁰².

In the context of investor-state arbitration, previous arbitral awards are not considered binding precedent, although they may have persuasive effects on subsequent proceedings. However, arbitral tribunals have no obligation to rule in accordance with precedent and must decide the dispute only on the basis of the applicable law⁴⁰³.

In contractual disputes, the governing law will be established in the contract itself and the applicable mandatory rules. When the applicable law is a common law jurisdiction, the binding precedent and the doctrine of *stare decisis* play a more important role. However, when the dispute is governed by a civil law system,

⁴⁰⁰ Hanotiau, *Complex Arbitrations*, supra note 49, p. 248.

⁴⁰¹ Cremades, Madalena, supra note 46, p. 522.

⁴⁰² Award of 1991 in ICC case no. 6363, 17 *Y.B. Comm. Arb.*, 1992, p. 201. This approach was not followed by an arbitral tribunal in ICSID proceedings initiated by a company against Egypt after an award rendered by an ICC arbitral tribunal between the same parties and in relation to the same dispute had been set aside by the Paris Court of Appeal, whose decision was subsequently upheld by the French *Cour de cassation* (*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (the *Pyramid* case), decision on jurisdiction of 14 April 1988, (1991) 26 *Y.B. Comm. Arb.* 16 at 39 (2001) quoted also in Hanotiau, *Complex Arbitrations*, supra note 49, pp. 253-254.

⁴⁰³ *Enron Corp. Ponderosa Assets, LP v. Republic of Argentina*, ICSID Case no.01/3, decision on jurisdiction, 2 August 2004, para. 25, the arbitral tribunal agreed with the opinion of the respondent that previous ICSID awards did not constitute binding precedent and each case should be examined on its own merits, but might follow the same line of reasoning of previous awards when the issues raised by the parties were substantially similar, Cremades and Madalena, supra note 46, p. 523.

national legislation becomes much more relevant. In both systems, however, previous awards are not formally binding⁴⁰⁴.

C-1-2-2) Parallel Proceedings depending on related disputes

When full identity does not exist between the parties, the *petitum* and the *causa petendi* between two or more arbitrations, there may nevertheless be certain elements in common, such as the underlying legal relationship, resulting in the award rendered in one case having certain effects on the other⁴⁰⁵.

In M&A transactions, contractual relationships usually involve long-term economic operations comprising a large number of distinct, but interrelated contracts. In many cases, the different kinds of agreements seem to give rise to an indivisible transaction, an economical and operational unit “hidden” behind a multi-contract façade that actually amounts to one fundamental single relationship. The notion of interrelated agreements takes into account this reality and defines agreements in relation to the business context in which they operate and to the purposes they are meant to serve⁴⁰⁶.

As Prof. Dely and Mr. Sheppard mention, in the situation of related claims between the same parties, the issue may not be one of *lis pendens* but of case management⁴⁰⁷. There are many examples of case management in M&A arbitration depending on related disputes, because disputes sometimes arise where the parties have entered into a number of different agreements, either simultaneously or consecutively, each with (or sometimes without) a separate dispute resolution mechanism. This can create procedural difficulties, with the potential for parallel or overlapping arbitrations and litigation under different dispute resolution clauses. It also gives rise to questions of whether an arbitration clause in one contract applies to disputes under

⁴⁰⁴ Sheppard, *Parallel State*, supra note 382, p. 222.

⁴⁰⁵ Cremades, Madalena, supra note 49, p. 515.

⁴⁰⁶ Leboulanger, supra note 49, p. 46.

⁴⁰⁷ De Ly and Sheppard, *Lis Pendens*, supra note 360, p.30, para 4.49.

the provisions of another contract⁴⁰⁸. In M&A arbitrations this is particularly an issue in situations with group company structures and transactions⁴⁰⁹.

In such situation, it is advised by the doctrine that those drafting international agreements should ordinarily ensure that a single, unitary dispute resolution mechanism governs all of the parties' various relations⁴¹⁰.

This is a question of the parties' intent, but, in largely fact-specific decisions, courts have endeavoured to construe the parties' contracts in a commercially-sensible manner that, insofar as possible, permits a single, centralized dispute resolution mechanism. So long as the parties to the relevant contracts are the same, and the contracts all relate to a single project, or course of dealing, U.S.⁴¹¹, French⁴¹², English⁴¹³, Swiss⁴¹⁴, German⁴¹⁵ and other courts have generally been willing to hold that an arbitration clause in one agreement extends to related agreements (provided that the other agreements do not contain inconsistent arbitration or forum selection

⁴⁰⁸ Born, *Int. Comm. Arb.*, supra note 52, p. 1110.

⁴⁰⁹ Ehle, supra note 208, p. 305. In this sense see the recent ICC case published in XXXIV Y.B. Comm. Arb. 2009, pp. 130-211. See Chapter V of the thesis for a detailed examination of this case.

⁴¹⁰ See footnote 51 for literature view.

⁴¹¹ See, e.g., *Int. Ambassador Programs, Inc. v. Archexpo*, 68 F.3d 337, 340 (9th Cir. 1995) (arbitration clause in one of two related contracts applies to disputes under other contract; if agreements are unrelated, then opposite conclusion); *J.A. Jones, Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 1999 U.S. Dist. LEXIS 5284 (E.D.N.C. 1999) ("when a subsidiary contract without an arbitration provision is read in conjunction with a primary contract with an arbitration provision, a dispute arising under the secondary contract may be arbitrated"); *Mississippi Phosphates Corp. v. Unitramp Ltd.*, 11(12) Mealey's IAR. E-1 (S.D. Miss. 1996) (1996); *G.D. Searle & Co. v. Metric Constr., Inc.*, 572 F.Supp. 836 (N.D. Ga. 1983) (invoking FAA's "pro-arbitration" policy to hold that parties' subsequent agreement to submit two specific disputes to arbitration did not supersede prior, broad agreement to arbitrate). *Compare Riley Mfg Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1998) (merger clause in settlement agreement excludes application of arbitration clause in earlier contract to disputes under settlement agreement) quoted in Born, *Int. Comm. Arb.*, p. 1111.

⁴¹² See, e.g., *Judgment of 23 November 1999, Société Glencore Grain Rotterdam v. Société Afric*, 2000 Rev. arb. 501 (Paris Cour d'appel) (arbitration clause in sales contract held to apply to disputes under related, back-to-back sales contract); *Judgment of 14 May 1996, Société Sigma Corp v. Société Techni-Ciné-Phot*, 1997 Rev. arb. 535 (French Cour de cassation civ. 1e); *Judgment of 5 March 1991, Pepratr v. Fichou*, 1992 Rev. arb. 66 (French Cour de cassation comm.); *Judgment of 29 March 1990*, 1992 Rev. arb. 66 (Bobigny Tribunal de commerce).

⁴¹³ See, e.g., *Al-Naimi v. Islamic Press Agency Inc.* [2000] 1 Lloyd's Rep. 522, 524 (English Court of Appeal);

⁴¹⁴ See *Judgment of 28 July 1988*, 7 ASA Bull. 304 (Bülach District Court of Zurich) (1989); Swiss International Arbitration Rules, Art. 4(1).

⁴¹⁵ See e.g. *Judgment of 28 November 1963*, 1964 NJW 591, 592 (settlement agreement amending a contract remains subject to the arbitration clause included in the earlier contract) (German Bundesgerichtshof); *Judgment of 5 December 1994*, 13 ASA Bull. 247 (Oberlandesgericht Dresden) (1995) (arbitration clause extends to contract amendments).

clauses). One commentator has described the decisions of national courts in this context as follows:

“the courts have uniformly concluded that if two agreements between the same parties are closely connected and one finds its origin in the other, or is the complement or the implementation of the other, the absence of an arbitration clause in one of the contracts does not prevent disputes arising from the two agreements from being submitted to an arbitral tribunal and decided together⁴¹⁶.”

A more likely scenario is two arbitrations between the same parties raising different claims, albeit closely related. The existence of separate arbitration provisions in related agreements has generally been held to be strong evidence that disputes under the various agreements were meant to be arbitrated under different dispute resolution provisions – not those of some other contract⁴¹⁷. This is particularly true where different contracts contain different arbitration clauses⁴¹⁸. Even where an identical arbitration clause (e.g., a model clause from a leading institution) is simply repeated verbatim in multiple contracts, it is sometimes said not to be the “same” clause, giving rise to the possibility of separate arbitrations (and arbitral tribunals) under each separate substantive contract, with each arbitration limited to a single, specific agreement. Arbitral tribunals have generally sought to avoid this latter result⁴¹⁹, at least where different contracts involve the same parties⁴²⁰. According to Mr. Pryles and Prof. Waincymer it is reasonable to start with the view that identical clauses can

⁴¹⁶ Hanotiau, *Complex Arbitrations*, supra note 49, para. 281. See also Lew, Mistelis, Kröll, supra note 333, paras. 7-44 and 7-45.

⁴¹⁷ See e.g., award in Zurich Chamber of Commerce, Case No. 273/95, 31 May 1996, XXIII Y.B. Comm. Arb. 128, 135 (1998), *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 345 (8th Cir. 1990); *Netherlands Curacao Co., NV v. Kenton Corp.*, 366 F.Supp. 744 (S.D.N.Y. 1973).

⁴¹⁸ See, e.g., *Award in ICC Case No. 4392*, 110 J.D.I. (Clunet) 907 (1983); *Final Award in ICC Case No. 6829*, XIX Y.B. Comm. Arb. 167 (1994); *Judgment of 11 April 2002, SA JDA Software France et autres v. SA Kiabi*, 2003 Rev. arb. 1252 (Paris Cour d'appel) (slightly different arbitration clauses in two related contracts held to apply, respectively, to disputes under each of the two contracts).

⁴¹⁹ See, e.g., *Interim Award in ICC Case No. 3879*, XI Y.B. Comm. Arb. 127, 132-33 (1986) (award set aside by the Swiss Federal Tribunal: “[T]he series of documents concluded constitutes an indivisible whole and the four States thus truly demonstrated their desire to act together, by joining together under one name. The similarity of the clauses used in the various contracts can only serve to bear out this interpretation. It follows that the Tribunal is not merely competent as regards each of these States, AOI and ABH, but is justified in adjudicating upon their cases in one and the same award.”); *Final Award in ICC Case No. 5989*, XV Y.B. Comm. Arb. 74 (1990); *Final Award in ICC Case No. 7184*, 8(2) ICC Ct. Bull. 63 (1997); *Judgment of 31 October 1989, Kis France SA and KIS Photo Indus. SA v. Société Générale*, XVI Y.B. Comm. Arb. 145, 147 (Paris Cour d'appel) (1991). But see *Interim Award in ICC Case No. 7893*, XXVII Y.B. Comm. Arb. 139 (1997) (ICC arbitration clauses in two contracts held to be separate).

⁴²⁰ *Final Award in ICC Case No. 5989*, XV Y.B. Comm. Arb. 1990.

lead to multiple claims being brought together and differences in clauses constitutes evidence to the contrary. Nevertheless, they observe that, as to the first, some cases may raise legitimate procedural justice concerns as to composition even where clauses are identical. Where there are different clauses, being a matter of construction of both in context, it is at least arguable that such clauses may say nothing more than that *isolated* claims must go to different places. They may give no clear indication of what was intended for *concurrent* reverse claims. In these circumstances, tribunals should analyse all of the factors in construing intent⁴²¹.

Similar issues arise when one or more of a related group of contracts contain(s) a forum selection clause⁴²², and other contract(s) contain(s) an arbitration clause. In these cases, and absent contrary indication, some courts have sought to give broad effect to arbitration clauses, refusing to conclude that the forum selection clause overrides or qualifies them⁴²³.

It is debatable whether the court's minimization of the significance of a forum selection clause is universally applicable: in many cases, the contractual choice of particular national courts has substantial commercial and legal importance, and should not necessarily be subjugated to a parallel arbitration agreement⁴²⁴. Thus, many arbitral tribunals appear to have concluded that the inclusion of a forum selection clause in one agreement, and an arbitration clause in a related agreement, will ordinarily signify the parties' expectation for separate dispute resolution

⁴²¹ Pryles, Waincymmer, *supra* note 44, p. 498.

⁴²² For the detailed analysis of the forum selection clauses see Born, *Drafting and Enforcing*, *supra* note 49.

⁴²³ *Judgment of 11 April 2002, SA JDA Software France et autres v. SA Kiabi*, 2003 Rev. arb. 1252 (Paris Cour d'appel) (on multicontract context, existence of forum selection clause does not "ruin" arbitration agreements); *Judgment of 18 April 1989*, 1990 Rev. arb. 915 (Paris Cour d'appel); *Judgment of 1 December 1995, Ministère de l'Agriculture d'Irak v. Hochtief*, 1996 Rev. arb. 456 (Paris Cour d'appel); *Judgment of 11 January 1995*, 1997 Rev. arb. 471 (Paris Cour d'appel); *Walkinshaw v. Diniz* [2000] 2 All E.R. (Comm.) 237 (Q.B.); *Sonatrach Petroleum Corp. (BVI) v. Ferrell Int. Ltd* [2002] 1 All E.R. (Comm.) 627 (Q.B.).

⁴²⁴ Born, *Int. Comm. Arb.*, *supra* note 52, p. 1115. Compare the similar reservations in Hanotiau, *Complex Arbitrations*, *supra* note 49, para. 299. See also *Judgment of 9 December 1987, G.I.E. Acadi v. Thomson-Answare*, 1988 Rev. Arb. 573 (Paris Cour d'appel) (treating subsequent forum selection clause as "waiver" of earlier arbitration agreement). In similar circumstances, the Swiss Federal Tribunal held that a forum selection clause contained in a settlement agreement replaced an arbitration clause contained in an earlier agreement to the contrary (absent evidence of an intention). *Judgment of 20 December 1995*, DFT 121 III 495 (Swiss Federal Tribunal).

mechanisms⁴²⁵. Similarly, indications that two contracts were intended to be treated separately (for example, in their merger or integration provisions) have sometimes been relied upon in holding that the arbitration clause in one agreement does not cover disputes under the other contract⁴²⁶.

D) Solutions Proposed by Doctrine and Case Law in Different Jurisdictions for Joinder of Parallel Proceedings

Various solutions have been put into practice, including the possibility for national courts to appoint the same arbitrator to hear disputes, or the consideration of an “umbrella clause” by the parties⁴²⁷. In addition, the consolidation of proceedings is an effective mechanism to avoid contradictory awards, but without the parties’ consent, the possibility to consolidate different proceedings will depend on the provisions of the applicable arbitration rules and national legislation⁴²⁸.

Moreover, if the potential problem of parallel or multiple proceedings is raised before arbitrators, it is proposed that the arbitrators explore the possibilities of the parties reaching an agreement on consolidation, or proposing a “coordination conference” with all parties and the arbitrators, which would meet to identify common issues and the manner of their determination. Such conference might increase the possibilities of the parties reaching an agreement on a total or partial consolidation, or some less far-reaching form of coordination by highlighting potential risks associated with a continuation of the different proceedings without any such coordination. Also the psychological pressure usually generated by such a conference as opposed to traditional correspondence with the parties might make it

⁴²⁵ Born, *ibid.* See e.g. *Award in ICC Case No. 2272*, in S. Jarvin & Y. Derains (eds.), *Collection of ICC Arbitral Awards 1974-1985* 11 (1990); *Award in ICC Case No. 4392*, 110 J.D.I. (Clunet) 907 (1983) (interpreting arbitration clause restrictively and concluding that it did not extend to disputes under agreement with forum selection clause).

⁴²⁶ *Clarence Holdings Ltd v. Prendos Ltd*, [2000] D.C.R. 404 (Auckland District Court).

⁴²⁷ See Richard Bamforth, Katerina Maidment, All join in or not? How well does international arbitration cater for disputes involving multiple parties or related claims?, *ASA Bulletin* 2009, Issue 1, p. 20.

⁴²⁸ Lew, Mistelis, Kröll, *supra* note 333, p. 389.

harder for a party, who is refusing any form of coordination, to persist in such refusal⁴²⁹.

A stay of the proceedings could be an efficient way of coordinating parallel or multiple proceedings, in particular, in the examples of vertical disputes such as the employer-contractor-subcontractor example and the ship-owner – time-charterer - voyage charterer example. In these cases, the subsequent proceedings between the contractor and subcontractor, or the time charterer and voyage charterer, would simply disappear, were the claim of the employer, or the ship owner, in the primary proceedings to be denied⁴³⁰.

However, no matter how efficient such a stay of the proceedings might be, it is important not to overlook that one of the duties of the arbitrators in relation to the parties is to adjudicate the dispute in a speedy manner, and of course within any award period that may have been agreed. Since the resolution of the parallel disputes could take considerable time, a stay ordered by the tribunal against the will of one of the parties could be seen as depriving such party of its right to have its case heard in a speedy manner, which in turn could lead to the setting aside of the award⁴³¹.

Another possible means to deal with parallel or multiple proceedings is to coordinate the resolution of such proceedings without consolidation and joinder. This can be done, for instance, by appointing the same arbitrators for all the related disputes, or appointing the same chairman for all the related disputes. The appointment of a joint tribunal is usually suggested by the parties before an arbitral tribunal has been appointed in any of the proceedings. However, should a related dispute arise subsequent to the formation of the first tribunal, the parties to the parallel dispute must involve the arbitrators in determining whether it would be appropriate that the subsequent tribunal consist of the same members⁴³².

⁴²⁹ See Kaj Hobér, *Parallel Arbitration Proceedings – Duties of the arbitrators*, in *Parallel State and Arbitral Procedures in International Arbitration*, ICC Publishing 2005, p. 255.

⁴³⁰ *Ibid*, p. 256.

⁴³¹ *Ibid*, pp. 256-257.

⁴³² *Ibid*, pp. 257-258.

The most efficient method of avoiding these difficulties is, of course, the consolidation of the contract and subcontract disputes into one arbitration. This arbitration would nevertheless still face the same questions of choice of rules, arbitral institution, and procedure normally faced by the arbitration of disputes arising from purely bilateral international commercial contracts⁴³³.

Neither the UNCITRAL Model Law nor the UNCITRAL Arbitration Rules contain provisions on the consolidation of arbitration proceedings⁴³⁴. However, the risk of parallel proceedings is a problem which the different international arbitration institutions are carefully considering. Article 4(6) of the ICC Rules provides that when a party submits a request for arbitration in connection with a legal relationship in respect of which an ICC arbitration is already pending between the same parties, any of the parties may request the court to include the claims contained in the request for arbitration in the pending proceedings, provided that the terms of reference have not been signed or approved by the court. If the terms of reference have been signed, additional claims may only be included if authorised by the arbitral tribunal⁴³⁵.

In international arbitration, there are at least three situations in which consolidation has been considered: (i) two arbitration proceedings between the same parties under the same contract and arbitration agreement; (ii) two arbitration proceedings between

⁴³³ Isaak I. Dore, *Theory and Practice of Multiparty Arbitration Under the UNCITRAL Framework*, Graham & Trotman/M. Nijhoff, 1990, p. 48.

⁴³⁴ The UNCITRAL Working Group II on International Arbitration and Conciliation considered a provision that would stipulate a single determination of related claims arising under separate contractual instruments. During the thirty-ninth session (New York, 19 June-7 July 2006), the United Nations Commission on International Trade Law (UNCITRAL) agreed that, in respect of future work of the Working Group, priority shall be given to a revision of the UNCITRAL Arbitration Rules (1976) (the UNCITRAL Arbitration Rules or the Rules). At its forty-fifth session (Vienna, 11-15 September 2006), Working Group II undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful. In this respect, a provision on consolidation of cases was added to Art. 15, which provided that “the arbitral tribunal may, on the application of any party, assume jurisdiction over any claim involving the same parties and arising out of the same legal relationship, provided that such claims are subject to arbitration under these Rules and that the arbitration proceedings in relation to those claims have not yet commenced”. According to Prof. Nayla Comair-Obeid it may be recalled that the Working Group considered that it might not be necessary to provide for consolidation under the Rules (“Report of Working Group on Arbitration on the work of its forty-sixth session” (New York, 5-9 February 2007) UNCITRAL, 40th Sess., UN Doc. A/CN.9/619 (25 June-12 July 2007), para. 120), “Consolidation and Joinder in Arbitration: The Arab Middle Eastern Approach” in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14*, Kluwer Law International 2009, p. 500, footnote 1. Maybe this is the reason that the UNCITRAL Arbitration Rules (revised 2010) as well do not contain any provision concerning consolidation.

⁴³⁵ Cremades, Madalena, *supra* note 46, pp.518-519.

the same parties under different arbitration contracts and arbitration agreements; and (iii) two arbitration proceedings between different parties and based on different contracts and arbitration agreements⁴³⁶.

A valid arbitration agreement is sufficient to confer jurisdiction, enhancing the risks of parallel proceedings. Issues relating to consolidation thus arise more often in relation to different arbitral tribunals, rather than between courts and arbitral tribunals⁴³⁷. When the same dispute is brought before two different arbitration proceedings, arbitrators will decide on their own jurisdiction pursuant to the principle of *Kompetenz-Kompetenz*⁴³⁸.

Most arbitration rules fail to address the consolidation of claims where common questions of fact or law affect multiple parties, but the 1998 ICC Rules now deal with the joinder or consolidation of arbitral proceedings. Article 4(6) of the Rules proposes a solution allowing the parties to agree on joinder or consolidation⁴³⁹. Otherwise, the general rule in arbitration is that consent of all parties is necessary, even though the current trend is that consent may be either expressed or implied⁴⁴⁰.

CEPANI cases No. 2176 and 2189⁴⁴¹ provide an illustration of such a request for consolidation by two related multiparty-multicontract proceedings. A number of companies and one individual, who was the majority shareholder of the group (respondents), had sold their interests in the assets of various companies of the said group, involved in the textile business, to a number of companies controlled by X

⁴³⁶ Ibid, p. 532 from Ignacio Suárez Anzorena, 'La acumulación de arbitrajes: acumulación de problemas?' in Fernando Mantilla Serrano (ed.), *Arbitraje Internacional: Tensiones Actuales*, 2007, p. 342 *et seq.*

⁴³⁷ Antonio Crivellaro, Consolidation of Arbitral Procedures in Investment Disputes in Bernardo M. Cremades and Julian D.M. Lew (eds.), *Parallel State and Arbitral Procedures in International Arbitration*, ICC Publishing 2005, p. 80.

⁴³⁸ Cremades, Madalena, *supra* 46, p. 519.

⁴³⁹ For multiple proceedings in ICC see Anne Marie Whitesell and Eduardo Silva Romero, Multiparty and Multicontract Arbitration: Recent ICC Experience, in ICC International Court of Arbitration Bull. Special Supplement 2003, pp. 7-18.

⁴⁴⁰ Gabrielle Kauffmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin and Makane Moïse Mbengue, Consolidation of Proceedings in Investment Arbitration: How can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently? in (2006) 21(1) *ICSID Rev. – Foreign Investment Law Journal* no. 1, p. 59. See also Jamie Shookman, Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis, *J. Int. Arb.*, 2010, pp. 361-378.

⁴⁴¹ These cases are unpublished and quoted in Hanotiau, *Complex Arbitrations*, *supra* note 49, pp. 184-185.

International SA (claimants). The sale purchase agreement provided for the application of Belgian law and for ICC arbitration in Luxembourg in case of dispute. Together with the sale purchase agreement, various ancillary and related agreements were entered into by claimants and respondents, or some of them, together, for part of the agreements, with other companies. These agreements included a shareholders agreement concluded between some of the sellers who were already shareholders and would remain shareholders of group companies, on the one hand, and on the other hand, new shareholders, X International SA and a Swiss bank referred to as bank Y. The shareholders agreement was governed by Luxembourg law and also provided for ICC arbitration. A request for arbitration was filed by the purchasers against the sellers on the basis of a breach of the representations and warranties. An arbitral tribunal was appointed under the CEPANI Rules. At the time the arbitral tribunal was discussing the terms of reference, the respondents decided to file a counterclaim against the claimants, and also against bank Y, which was not a party to the arbitration. The claimants objected. There was, therefore, no other possibility for the respondents than to start a separate arbitration procedure against bank Y and ask for the consolidation of both arbitrations, which they did. In the second arbitration, the parties did not appoint the same arbitrators as in the first one. The claimants objected to consolidation, considering in the first place that the two disputes were not closely related – the first one concerned the breach of the warranties under the sale purchase agreement, and the second, a breach of the shareholders agreement by bank Y, which was not a party to the first contract – and that there was therefore no risk of contradictory awards. They also pointed out that the issues were different, that the applicable law was not the same and that consolidation would normally lead to a tribunal composed of five arbitrators (two from Luxemburg and three from Belgium), which was not optimal. The respondents challenged all these objections and added that according to Article 11 of the Rules, the arbitral tribunal could be appointed by CEPANI, which could therefore decide to appoint for the consolidated arbitration the three arbitrators appointed in the first case. After the parties submitted briefs of their arguments in favour or against consolidation, a meeting was organised by the Appointments Committee of CEPANI, where the parties were invited to present their submissions orally. After this meeting, the Appointments Committee decided not to join the arbitrations, without disclosing its reasons. This decision

clearly illustrates the challenges that consolidation under CEPANI Rules may involve on the grounds of the equality and due process principles.

However, it is not clear to see the reasons for denying the consolidation between two separate but parallel arbitration proceedings. According to the summary of Prof. Hanotiau, it can be seen that the Appointments Committee of CEPANI did not accept that there is a relation between the sale purchase agreement and the shareholders agreement. This can be another reason why M&A transactions are not a typical example of multi-contract arbitration or related agreements arbitration. Furthermore if two different arbitration tribunals produce contradictory decisions, which one will be applied? In any case awards of the first arbitration court concerning the sale purchase agreement will have effects on the shareholding agreement. Therefore the author believes that some guidelines should be drafted.

Moreover, in this case, the consolidation problem arises with the counterclaim against the claimants together with a party which is not a party to the arbitration agreement. This is the main reason for the second arbitration and for the consolidation of both arbitration proceedings. However, if there were some M&A arbitration guidelines in CEPANI, it may be possible to allege that the dispute arose from the breach of representations and warranties, therefore only the first arbitration agreement will be applied and any effect of this arbitration award will be limited only with representations and warranties, nothing more.

In the decision of the Appointment Committee of CEPANI, one cannot clearly observe the evidence in order to precise the “consent” of parties. The Committee does not focus on the consent of parties in order to resolve the problem of consolidation. Again, with M&A arbitration guidelines it may be possible to focus more on the consent of parties from different arbitration agreements.

E) Advantages and Disadvantages of Consolidation in M&A Arbitration

The most compelling factor in favour of consolidating related proceedings is the risk of inconsistent or even contradictory decisions in separately held proceedings, with

respect to both the facts involved and the application of the governing law⁴⁴². This concern is even more important in international arbitration than it is in litigation, given that the review of arbitral awards by national courts, be it in the context of an action to set aside an award or to enforce the award, will normally not look into the correct handling of the facts or the law by arbitral tribunal⁴⁴³.

Nevertheless, the consolidation of related proceedings is by no means always the ideal answer to the difficulties arising in complex international disputes. Especially in M&A arbitrations the consolidation of related proceedings is likely to raise the problem that confidential information, such as trade secrets, cost margins, or general financial information, is exposed to risk of being disclosed to parties from which this information was normally to be kept secret⁴⁴⁴. However, such intrusion upon the right to privacy and confidentiality should remain limited, given that such information produced for or generated by an arbitration cannot be disclosed for purposes unrelated to the arbitration⁴⁴⁵.

The use of documents generated in, or obtained during, the arbitration for use outside the arbitration, is not permissible even when required for use in other related proceedings. The English Privy Council clarified in *Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Company of Zurich*⁴⁴⁶ that the restriction on use of documents obtained in an arbitration should not be extended to the award made, as the award itself may be required for purposes of accounting, or of enforcing a right which the award confers⁴⁴⁷.

⁴⁴² Emmanuel Gaillard, The Consolidation of Arbitral Proceedings and Court Proceedings in Complex Arbitrations, in ICC International Court of Arbitration Bull. Special Supplement 2003, p. 36 (hereinafter Gaillard, ICC Bulletin 2003). See e.g. F. Nicklish, Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects, J. Int. Arb., 1994, Issue 4, p.64, Leboulanger, supra note 49, p.54. For critical views, see M. Platte, When Should an Arbitrator Join Cases?, Arb. Int. 2002, Issue 1, p. 67 et seq.; V.V. Veeder, Multi-Party Disputes: Consolidation under English Law –The Viemira – a Sad Forensic Fable, Arb. Int. 1986, Issue 2, p. 310. For a detailed analysis of the advantages and disadvantages of consolidation generally, see J. C. Chiu, Consolidation of Arbitral Proceedings and International Commercial Arbitration, J. Int. Arb., 1990, Issue 2, p. 53 et seq.

⁴⁴³ J. C. Chiu, ibid, p. 78, Leboulanger, ibid, p. 63.

⁴⁴⁴ See Chapter Two of the thesis for confidentiality agreement.

⁴⁴⁵ Gaillard, ICC Bulletin 2003, supra note 443, p. 37. For a more detailed discussion of issues of privacy and confidentiality in consolidated proceedings see e.g. M. Collins, Privacy and Confidentiality in Arbitration Proceedings, Arb. Int., 1995, Issue 3, p. 321.

⁴⁴⁶ See Ly and Sheppard, Res Judicata, supra note 382, p. 38, footnote 9.

⁴⁴⁷ It has been suggested by one commentator (see LIM, The Confidentiality of Arbitration Proceedings, Singapore Law Gazette (Sep. 2003)) that this decision is a retreat from the position taken in *Ali Shipping*

In England, confidentiality in arbitration is recognized as an essential corollary to privacy in arbitration⁴⁴⁸, and is a term the law will necessarily import into the agreement. This appears to be the position in Singapore⁴⁴⁹. As Prof. Boo classifies the English rule of confidentiality is subject to certain exceptions, such as⁴⁵⁰:

- 1) where the parties consented to disclosure; or
- 2) disclosure is made pursuant to an order of court; or
- 3) if disclosure is reasonably necessary for the protection of the legitimate interests of a party vis-à-vis a claim by a third party⁴⁵¹
- 4) where the interest of justice requires disclosure⁴⁵²

The Singapore position is consistent with, and has specific statutory provisions enacted to preserve confidentiality of arbitral proceedings and awards made. Confidentiality also extends to proceedings in court arising out of any matter related to arbitration or the agreement⁴⁵³.

In one situation, there were parallel ICSID and ICC arbitrations. The respondent in both cases was the same, but the claimants differed. The claimant in the ICSID case was a shareholder of the claimant in the ICC case. The two tribunals were different and there was no common member. The tribunal in the ICSID case ordered the respondent to produce all the documentation in the ICC case. The ICC tribunal

Corp v. Shipyard Trogir. A closer reading however will show that the PC did nothing more than clarify the situation in which an award could be legitimately disclosed to protect or assert a legal right.

⁴⁴⁸ *Liverpool City Council v. Irwin* [1977] AC 239, [1976] 2 All ER 39, HL; *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL.

⁴⁴⁹ See *Myanma Yaung Chi Oo Ltd v. Win Win Nu* [2003] 2 SLR 547.

⁴⁵⁰ Lawrence G. S. Boo, Commentary on Issues Involving Confidentiality in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Volume 12, Kluwer Law International 2005, p. 525.

⁴⁵¹ *Hassneh Insurance Co of Israel v. Mew*, *op. cit.*, fn. 5; *Insurance Co v. Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.

⁴⁵² *London and Leeds Estates Ltd v. Paribas Ltd (No 2)* [1995] 02 EG 134, where the court held that if an expert witness in a previous arbitration had expressed views which might contradict those in court proceedings, he might be subpoenaed in the interest of justice to give proof of his evidence in the earlier arbitration. In *Ali Shipping Corp v. Shipyard Trogir*, *op. cit.*, fn. 5, Potter LJ added that he would have done so even if the witness was a witness of fact.

⁴⁵³ See SAA Sect. 57 (Cap 10, 2002 Ed); International Arbitration Act (Cap 143A, 2002 Ed) Sect. 23.

issued a corresponding order requiring the respondent to produce all the documentation in the ICSID case⁴⁵⁴.

The exchange of documentation in parallel arbitrations may raise questions of confidentiality, particularly where the parties in the two arbitrations are not identical. Even where the parties are the same, but the tribunals differ and contain a common member, an interesting question may arise. Can the common arbitrator refer to or otherwise have regard to a document produced in arbitration A in arbitration B? If the arbitrator discloses it, is it a breach of a duty of confidentiality? As confidentiality belongs to the parties, and as the parties are the same in both proceedings, it might be thought that no breach occurs. But disclosure is being made to the other members of the tribunal⁴⁵⁵. Bernard Hanotiau says that the principle of neutrality, independence, and impartiality of the arbitrator is of paramount concern, and the duty of confidentiality will lead the arbitrator in some cases to reach the conclusion that it is no longer possible to fulfil the arbitrator's duties in total independence or impartiality and that he may have to resign. However in other cases the arbitrator may simply make a full disclosure of the problem to the co-arbitrators and the parties⁴⁵⁶.

According to Prof. Boo, a strict application of the rule of confidentiality would mean that a tribunal's finding or what had transpired in one arbitration may not be referred to in another even if the parties and subject matters involved are closely related. Apart from the obvious waste of time and resources, this could also lead to inconsistent findings by a different tribunal. In back-to-back contracts, a party who had lost in an earlier arbitration may be in an unenviable position if the party against whom he is seeking an indemnity insists on a replay of the evidence adduced before the earlier tribunal with no certainty that the second tribunal would come to the same or consistent finding or holding⁴⁵⁷.

The consolidation may also raise difficulties for the effective administration of the case, when two proceedings have been filed under different mechanisms. According

⁴⁵⁴ Pryles, Waincymer, *supra* note 44, p. 493.

⁴⁵⁵ *Ibid*, pp. 493-494.

⁴⁵⁶ Hanotiau, *Analysis*, *supra* note 399, p. 350.

⁴⁵⁷ Boo, *supra* note 451, p. 527.

to Prof. Cremades, the ultimate decision as to whether or not to order consolidation will lie within the discretionary powers of the arbitral tribunal. However, several non-exhaustive cumulative conditions are usually regarded in the balancing test for consolidation, including (a) that there is high degree of connection between the proceedings, so that the decision reached in one of them will have direct effects on the other; (b) that the consolidation is in the interests of both parties and of a fair and effective resolution of the claims; (c) that all the parties have granted their consent, if the applicable law or arbitration rules so require; and (d) that the consolidation is possible within the framework of the different applicable dispute resolution mechanisms⁴⁵⁸.

First, consolidation requires a high degree of connection between the different claims with a risk of conflicting decisions or awards. It is not necessary that both proceedings refer to identical claims, but rather that there is close link of interdependence between them. The required degree of connection between the different claims may vary depending on the applicable arbitration rules. Some of them require that the triple-identity test (between parties, *petitum* and *causa petendi*) is fully met, but there is no uniform criteria. Article 4(6) of the ICC Rules seems, for example, to require that all claims refer to the same legal relationship, which is stricter than the criteria adopted by the LCIA Arbitration Rules⁴⁵⁹.

Secondly, the main purpose of consolidation is the effective resolution of the disputes, avoiding inconsistent solutions, optimising resources, and contributing to appropriate administration of justice⁴⁶⁰.

A third element, and the main issue to be discussed in any analysis of the consolidation of related proceedings, is the question of who can decide upon such consolidation. Recent arbitration practice shows that consent may be understood in broad terms, including both expressed and implied consent⁴⁶¹.

⁴⁵⁸ Cremades, Madalena, *supra* note 46, p. 534.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ See Chapter VI for the concept of “consent” in M&A arbitration.

The fourth element in the test for consolidation requires that all claims are being pursued under the same dispute resolution mechanisms. The greater the differences between the two mechanisms involved, the greater difficulties in the consolidation, especially when the law governing the merits of the case or the procedural rules are different⁴⁶².

Although most national arbitration laws and the UNCITRAL Model Law on International Commercial Arbitration do not contain provisions on the consolidation of arbitral proceedings, such provisions are found in a limited number of laws⁴⁶³. Some legislators have simply enacted a solution which prevails in the absence of any agreement by the parties to the contrary, and which provides for consolidation of related arbitral proceedings ordered by the national courts, but subjects this power to the consent of all parties concerned⁴⁶⁴. This guards against mandatory consolidation based on the local court's power, without the agreement of the parties involved. Other national laws, on the other hand, such as in the Netherlands⁴⁶⁵, for a while in

⁴⁶² Cremades, Madalena, *supra* note 46, p. 537.

⁴⁶³ Gaillard, ICC Bulletin 2003, *supra* note 443, p. 38. On the consolidation of related arbitration proceedings in comparative law, see . F. Bourque, *Le règlement des litiges multipartites dans l'arbitrage commercial international*, Thesis University of Poitiers, France, 1989 at 508 ff; I.I. Dore, footnote 584; P. Level, *Joinder of Proceedings Intervention of Third Parties, and Additional Claims and Counterclaims*, ICC Int. Comm. Arb. Bull. 36 (1996) 7:2; M. F. Guarin, *International Approaches to Court-Ordered Consolidation of Arbitral Proceedings*, *The American Review of International Arbitration*, 1993 (4), p. 519 and 520; P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, *Arb. Int.*, 1995, Issue 1, p. 29; Edwin Tong Chun Fai, *Nakul Dewan, Drafting Arbitration Agreements with "Consolidation" in Mind?*, *Asian Int. Arb. Journal*, 2009, Issue 1, p. 70 et seq.

⁴⁶⁴ See e.g. the international commercial arbitration statutes of some of the common law provinces and territories of Canada, such as Ontario and British Columbia; S. Jarvin, *Canada's Determined Move Towards International Commercial Arbitration*, *J. Int. Arb.*, 1986, Issue 3, p. 111; M. F. Guarin, *ibid*, p. 532 ff.; Le Boulanger, *supra* note 49, p. 58. Similarly, the state laws of those US states that have adopted the UNCITRAL Model Law have typically included a provision on consolidation of arbitral proceedings by the courts "on terms the court considers just and necessary", where all parties involved agree to such an application to the courts. See also s. 35 of the 1996 English Arbitration Act which allows the consolidation of arbitral proceedings only with the explicit agreement of the parties. See Redfern, Hunter, *supra* note 49, p. 181; M. F. Guarin, *ibid*, p. 526. For a court's criticism of the absence of any statutory power in England to order the consolidation of separate arbitral proceedings, see *The Viemira*, *Aiden Shipping Co. Ltd. V. Interbulk Ltd.*, *Lloyd's Rep.* 1984/2, p. 66. See also s.s 24-26 of the Australian International Arbitration Act. This position is adopted in the Arab legislation and jurisprudence. Especially the Lebanese and Syrian state courts reiterated their positions on the non-admissibility of the request for joinder of a third party to an arbitral proceeding, and considered that such request shall be dismissed unless all the parties to the arbitral proceeding and third party agreed to the joinder, see Prof. Obeid, *supra* note 435, p. 505.

⁴⁶⁵ See Article 1046 of the Dutch Code of Civil Procedure. For consolidation in Netherlands see Jan Willem Bitter, *Consolidation of Arbitral Proceedings in the Netherlands: The Practice and Perspective of the NAI*, in *Multiple-Party Actions in International Arbitration*, PCA, 2010, p. 221 et seq. For a discussion of the article 1046 see J.J. van Haersolte van Hof, *Consolidation under English Arbitration Act 1996: A View from the Netherlands*, *Arb. Int.* 1997, Issue 4, p. 427; K. P. Berger, *International Economic Arbitration in Germany: A New Era*, *Arb. Int.* 1992, (hereinafter Berger, *Arbitration in*

Hong Kong⁴⁶⁶, and the USA⁴⁶⁷, permit genuine court ordered consolidation of arbitral proceedings, even without the agreement of all the parties concerned. However, these provisions do not apply to the consolidation of arbitral proceedings and court proceedings⁴⁶⁸.

In France, previously, the primacy of the will of the parties placed limits on any kind of judicial intervention regarding consolidation. Ex-Article 1444 of the New Code allowed French Courts to rule on difficulties regarding the constitution of the arbitral tribunal, but it did not empower judges to decide against what was stipulated in the arbitration agreement⁴⁶⁹. It seems that with the new arbitration rules adopted on 14 January 2011 this rule is not changed, the limits of the intervention seems greater with the use of the official title of support judge (*juge d'appui*) of the President of the

Germany) p.111; M. F. Guarin, *ibid*, p. 533; G. Herrmann: "Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture, *Arb. Int.* 1999, Issue 3, p. 211 who points out that Article 1046 has been applied exclusively in domestic cases.

⁴⁶⁶ S. 6B(1) of the 1982 Hong Kong Arbitration Ordinance which after adoption of UNCITRAL Model Law for international arbitration, now applies only to domestic arbitration, recognizes the court-ordered consolidation of related arbitrations. In Hong Kong, by virtue of the Arbitration Ordinance of 1982, courts can order not only consolidation of proceedings but also that two arbitrations be "heard together", which means that the case should be heard by the arbitrators at the same time. In this case there are separate awards and not one award affecting all parties. Under s. 6B, the court also has the power to order that one arbitration be heard immediately after another or to order that one or more arbitrations be stayed until after the determination of one or more other arbitrations, see H.S. Miller, Consolidation in Hong Kong: the Shui On Case, *Arb. Int.* 1987, Issue 1, p. 87; V.V. Veeder: "Consolidation: More News from the Front-Line: The Second Shui On Case, *Arb. Int.* 1987, Issue 3, pp. 262-266.

⁴⁶⁷ In the US case-law has a major role for the development of the consolidation of parallel arbitrations. Until 1993, US Federal Courts were favourable to consolidating interrelated arbitral proceedings. The Southern District Court of New York and the Second Circuit Court of Appeal played leading roles in the development of case-law regarding consolidation in arbitration by ordering consolidation even if the arbitration agreements of the parties did not provide for consolidated proceedings (in this sense see William M. Barron, Court-Ordered Consolidation of Arbitration Proceedings in the United States, *J. Int. Arb.* 1987, Issue 1, p. 81 et seq., Chiu, *supra* note 593, p. 62; David J. Branson and Richard E. Wallace Jr., Court-Ordered Consolidated Arbitrations in the United States: Recent Authority Assures Parties the Choice, *J. Int. Arb.*, 1988, Issue 1, p. 89 et seq. However in 1993 with the case *Compania Espanole de Petroleos S.A. v. Nereus Shipping S.A.* 527 F. The Second Circuit rules that consolidation of arbitral proceedings cannot be ordered, unless there is express or implied agreement among all the parties involved. See D. T. Hascher, Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?, *J. Int. Arb.* 1984, Issue 2, p. 133 et seq.; see the recent case of 3rd Circuit *Century Indemnity v. Certain Underwriters at Lloyd's* 2009 WL 3297322 (2009); See also *United Kingdom v. Boeing Co.* 998 F. 2d 68 (2d. Circuit 1993), Mealey's IAR. C-1; *North River Ins. Co. v. Philadelphia Reinsurance Corp.* 856 F. Supp. 850 (S.D.N.Y. 1994). For commentaries see R.E. Wallace Jr., *ibid*, W. M. Barron, *ibid*, Don Wallace, Consolidated Arbitration in the United States- Recent Authority Requires consent of the Parties, *J. Int. Arb.*, 1993, Issue 4, p. 5 et seq; H. M. Mc Cormack, Recent U.S. Legal Decisions on Arbitration Law, *J. Int. Arb.*, 1994, Issue 4, p.73; C. Stippl, International Multi-Party Arbitration: The Role of Party Autonomy, *The American Review of International Arbitration*, 1996, p. 47; Hanotiau, Analysis, *supra* note 399, p. 333 reprinted in *Complex Arbitration*, *supra* note 49, p. 185.

⁴⁶⁸ Gaillard, ICC Bulletin 2003, *supra* note 443, p. 39.

⁴⁶⁹ See P. Bellet, Note, TGI de Paris (Ordonnance de référé), 13 Janvier 1986, *Revue de l'arbitrage* 1987, p. 69, Leboulanger, *supra* note 47, p. 61.

Paris Court of First Instance within Article 1459. This term has been previously used in the doctrine and case law, but the president now officially has the sole jurisdiction to “support” international arbitration proceedings in case of related procedural disputes. This centralisation of power by the Paris Court has been commented on as a designation to ensure consistency in decisions⁴⁷⁰.

Despite these rare provisions allowing for court-ordered consolidation of arbitration proceedings seated in a country whose law permits such consolidation, no law other than the Colombian decree allows related court proceedings and arbitral proceedings to be consolidated without the consent of all parties⁴⁷¹.

The consent of parties may result in two types of consolidation: The parties may agree to waive their arbitration agreement, and consolidate in a single court action⁴⁷² or in a single arbitration. With regard to the topic the author will focus on the consolidation in a single arbitration.

F) Consolidation in a Single Arbitration

Discussions concerning related or parallel proceedings in the context of international arbitration very rarely turn on the possible consolidation of court proceedings and arbitral proceedings. Rather, the topics that are normally discussed are the

⁴⁷⁰ See the commentary of Christophe von Krause in Kluwer Arbitration Blog, New French Arbitration Law Clarifies Role of National Courts and Reinforces Recognition and Enforcement of Arbitration Awards, 25 February 2011. Consistent with the previous law, this “support judge” has jurisdiction when the place of arbitration is France, or the parties have chosen to apply French procedural law. In addition, the “support judge” now also has jurisdiction if the parties have expressly agreed to refer their procedural disputes to French Courts or where one of the parties is exposed to a risk of denial of justice (Article 1505), which is a noteworthy innovation.

⁴⁷¹ Gaillard, ICC Bulletin 2003, *supra* note 443, p. 39. Under the 1989 Colombian Decree on arbitration, arbitration agreements between two parties are invalid where the dispute may have effects on a third party that is not party to the arbitration agreement, and where that third party does not agree to be joined in the arbitration. In such a case, according to the Article 30 of the decree, the arbitral tribunal shall invite the third party or parties to adhere to the arbitration agreement, failing which the arbitration agreement will be invalid. Consequently, the arbitration proceedings are effectively consolidated with any related court proceedings, despite the absence of an agreement of all parties in this respect. According to Prof. Gaillard this provision is aimed at resolved problems arising from the fact that it is impossible to bring related disputes before the same judicial authority where the arbitration agreement has not been accepted by all the parties involved, see Gaillard, *ibid* p. 38.

⁴⁷² For consolidation in a single court action see Gaillard, *ibid*, pp. 39-40 and footnotes 25-36.

consolidation of different arbitral proceedings. Unsurprisingly, the consolidation of such proceedings depends entirely on the agreement of all parties involved and it thus remains true the parties' agreement constitutes both the foundation and, in the case of multi-party situations, sometimes the inconvenience of international arbitration⁴⁷³.

The parties' agreement to consolidate the related proceedings in a single arbitration, is the precondition for such consolidation. In the absence of such agreement, any award that is made on the basis of the arbitration agreement in one of the contracts at issue but extends to disputes arising out of another contract could be challenged on the ground that the arbitral tribunal decided- at least in part- in the absence of an arbitration agreement⁴⁷⁴.

The parties' agreement that their disputes should be solved through arbitration is not the only condition for consolidating related proceedings. In addition all the parties involved must agree to consolidate their arbitral proceedings with the related arbitration. Such agreement can obviously be made expressly⁴⁷⁵. The arbitral tribunal in the Sofidif arbitration, for instance, suggested to the parties that they expressly agree to extend the arbitration agreement in question to the cross-claim to be decided⁴⁷⁶.

In any event, admissibility of counterclaims in multi-contract situations would still need to be linked back to an agreement to arbitrate found within one contract that,

⁴⁷³ Gaillard, *ibid*, p. 35.

⁴⁷⁴ *Ibid*, p. 41. See Cass. Civ. 1re, 8 March 1988, *Sofidif v. O.I.A.E.T.I.* Bull. Civ. 1988.I, No:64, Rev. Arb. 1989, p. 481, reversing Paris 19 December 1986, *O.I.A.E.T.I. v. Sofidif ou les difficultés de l'arbitrage multi-partite* (à propos de l'arrêt rendu par la Cour d'appel de Paris le 19 Décembre 1986, Rev. Arb. 1987, p.275; W. L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd Ed., Oceana Publications /ICC Publishing, 2000, p. 181(hereinafter Craig, Park, Paulsson).

⁴⁷⁵ See the 1991 partial award in ICC Case 6719, J.D.I.1994.1071. On this issue, see also the 1992 final award in ICC Cases 7385 and 7402, Y.B. Comm. Arb. XVIII, 1993, p. 68.

⁴⁷⁶ E. Gaillard, ICC Bulletin 2003, *supra* note 443, p. 42. As it happened, the parties did not follow this suggestion. See also K. P. Berger: "Set-Off in International Economic Arbitration", *Arb. Int.*, 1999, p. 53 et seq.(hereinafter, Berger, Set-Off). In the footnote 88 of that article it is cited the second interim award in ICC case 5124 (unpublished): Adjudicating the set-off in the present arbitration depends on whether the parties are prepared to simplify proceedings and to enter into an agreement to (extend the scope of the arbitration agreement to the cross claim). The tribunal can only express its willingness to cooperate if this would be the case quoted in E. Gaillard, *ibid*, footnote 42.

because of the integrated nature of the various contracts, is held to be broad enough to encompass claims under distinct contracts⁴⁷⁷.

In the absence of an express agreement to consolidate, the arbitral tribunal will have to examine whether the parties implicitly agreed to have the related arbitral proceedings consolidated. In the M&A arbitrations it will be difficult to interpret the parties' true intent, particularly in cases where several contracts are connected. According to Ms. Chiu, the consolidation of proceedings is necessarily in line with the parties' agreement, since the parties' "fundamental goal" must be "a speedy and fair resolution of their disputes"⁴⁷⁸. However, alongside Prof. Gaillard, the author does not share this view. The concept of consolidation should be determined carefully on a case-by-case basis as to whether the parties implicitly agreed that disputes arising out of the related contracts could, and should, be heard together in a single arbitration⁴⁷⁹.

G) Conclusion of Chapter III

Following from the author's examination of different proceedings in the different phases of M&A transactions and their relation to arbitration, this chapter further exposes the risks of multiple and parallel proceedings. Consistent with the working hypothesis, the author examined how consolidation may be applied to related disputes in M&A arbitrations while noting the deficit in existing arbitration rules. Possible guidelines for M&A arbitration will also be proposed.

It is accepted that in each phase of M&A transactions there is a link between the agreements which demonstrates that there is a necessary interdependence between them. Following this view, one should typically mention that, during M&A transactions, there is a situation of multi-contract arbitration, which is regulated in the majority of institution rules and national legislations. However, as seen in this chapter, it is not convenient to apply directly multi-contract or consolidation rules to

⁴⁷⁷ Pryles, Waincymer, *supra* note 44, p. 499.

⁴⁷⁸ Chiu, *supra* note 443.

⁴⁷⁹ On this issue Fouchard, Gaillard, Goldman, *supra* note 49, §§518-523; Hanotiau, *Analysis*, *supra* note 399, p.299 reprinted in *Complex Arbitrations*, *supra* note 49, p. 101 et seq.; Leboulanger, *supra* note 49, p.46; M. Platte, *supra* note 443, Berger, *Set-Off*, *supra* note 477, pp. 66-67.

M&A arbitration, because of the nature of M&A arbitrations distinct from typical multi-party or multi-contract arbitration i.e. M&A arbitrations are not typical examples of multi-contract arbitration. There are many reasons for this:

Firstly, for multi-contract issues, institution rules focus on the condition of “connection” between contracts. However, the meaning and the extent of “connection” fails to appear in any rules or legislation. For instance, in a recent revision by an institution on multiple contracts, the ICC Arbitration Rules 2012 state that:

“claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules”.

However, the lack of meaning or definition of the term “connection” creates problems. For instance in the CEPANI cases studied above, the Appointment Committee decided that there is no relation between the sale purchase agreement and shareholding agreements because of the problem of representations and warranties without stating any reason. This limit the analysis of the tribunals finding however, it is noted that in their consideration the following was considered: a) The parties b) the applicable law c) the number of arbitrators i.e. was consolidation the optimal solution. These considerations are not consistent with the provisions of arbitration institutions. Therefore, the absence of definition of “connection” or “related agreements”, the tribunal in this instance developed its own criteria. However, in the author’s opinion it is not possible to generalise that where there is a dispute of representations and warranties there is no “connection” between the purchase agreement and shareholders agreement. The arbitral tribunal determination in this case can be considered specific to these disputes and offers little practical application for practitioners in future disputes. This is a recurring problem in M&A arbitrations which could be suitably cured by practical guidelines.

Research has shown that it is not possible to mention that M&A arbitration is a typical example of multi-contract arbitration. In the first chapter it is mentioned that there is a relation between different phases of M&A transactions. However these

relations do not amount to “connection” in every case. Therefore it cannot be presumed that M&A arbitrations are always multi-contract arbitrations.

Furthermore, if one of the parties to an arbitration is strategically applying to a national court or another arbitration, which occurs very often in M&A transactions, parallel proceedings between arbitration and court proceedings are not regulated in any institution rules.

Depending on the different phases of M&A transaction, the same or related disputes may arise in parallel proceedings before different arbitral tribunals, as seen in CEPANI cases No. 2176 and No. 2189 analysed above, or between courts and arbitral tribunals. While there is no unanimous solution, discussions rarely turn on the possible consolidation of arbitral proceedings. Consolidation which offers solution to parallel proceedings is inhibited by the lack of guidelines or definition of connection. However, the consolidation of related court proceedings and arbitral proceedings raises important obstacles both on the conceptual and procedural level. Institution rules impose conditions for consolidation on parties’ agreement. However, the problem arises as to how the interpretation of parties’ agreement will be done. The principle of party autonomy imposes that any consolidation necessarily depends on the agreement of all the parties involved. Nonetheless, arbitration institutions such as the ICC, LCIA etc. stipulate that all claims seeking consolidation must not be contrary to the parties’ agreement and should be made under the same arbitration agreement, or same agreements where the parties are the same. However, as seen above in M&A arbitration depending on different phases, arbitration or court proceedings are determined in different agreements which cause the problem of parallel proceedings.

In cases of parallel proceedings, the question arises about whether the parallel proceedings concern the same or related disputes. Where the same dispute is concerned, two doctrines can appear to assist: “lis pendens” and “res judicata”. It is possible to use these doctrines in M&A arbitrations. If an application for lis pendens and res judicata is filed, it is necessary that both actions concern the same dispute and the same legal ground. However, in the author’s opinion, in M&A arbitration the “same legal ground” criterion can be problematic. It is necessary to clarify this

notion of the same legal grounds within the context of M&A arbitration, because, it is possible to consider all disputes arising from an M&A transaction as falling within the same legal ground. A guideline can be recommended to define the limits of this notion to assist practitioners and insure consistency in the area.

On the other hand, while applying the doctrines of *lis pendens* and *res judicata*, earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings. However, it is difficult to apply this rule directly to M&A arbitration. In M&A arbitration, very often where an award is issued in initial stages such as negotiations and/or letter of intent, the parties alter their terms applicable to the next steps, and in these cases the subsequent changes may be more favourable to the parties of M&A. Given that the parties wish to adhere to their altered terms, what should be done with the earlier award based on the previous terms? In different arbitration cases noted, it is also indicated that the parties can still progress to different phases of M&A in spite of the existence of problems in previous phases. Therefore, in the author's opinion, there should be some restrictions on the application of *lis pendens* and *res judicata* in M&A arbitration, and the best way of doing this is to draw up guidelines for M&A arbitration. For instance, guidelines could recommend individual evaluation of each phase with an arbitration agreement contained in itself, and "connection" should only be taken into consideration for material elements (such as price, information about the target company etc.), not for arbitration agreements. This is also more suitable for autonomy of arbitration clauses particular to their respective phases.

A third reason why the potential disadvantages of consolidation render its application convenient for M&A arbitration is confidentiality. From the beginning of negotiations, confidentiality is the main point that parties pay attention to during the process. The uses of a confidentiality agreement or data room within the organisation of the target company are common methods employed in order to protect confidential information. While consolidating two or more proceedings, confidential information about the target companies may be exposed to parties to the consolidated proceedings. On the other hand, similarly for *res judicata* and *lis pendens*, subsequent proceedings become privy to earlier determinations which may contain information parties' would rather remain confidential. Therefore, neither consolidation clauses

proposed by arbitration institutions or national legislatures or the doctrines of *res judicata* and *lis pendens* are convenient for M&A arbitrations.

As a solution to the problems mentioned above, in practice alternative dispute resolution has been used as a substitute or incoordination with traditional dispute resolution methods offered by courts and arbitral tribunals in M&A transactions. The following chapter will examine the emergence of ADR used in M&A transactions and the relation with arbitration. ADR has proved effective in providing flexible means to address the complexities involved in M&A transactions owing to the different phases. However, it will be shown that ADR and its interface with arbitration can pose procedural complexities in the forthcoming chapter.

CHAPTER IV: MULTI-STEP PROCESSES IN M&A TRANSACTIONS

A) Introduction

In order to avoid multiple and parallel proceedings and problems arising from convergent decisions, which were examined in Chapter Three, parties in M&A transactions, as a second option, may also choose different alternative dispute resolution (ADR) proceedings⁴⁸⁰. The number of the potential conflicts detailed in Chapter Three proves there is considerable scope for disputes arising during any M&A transactions prior to a deal's consummation. Therefore, it is important to choose an appropriate dispute resolution mechanism that is tailored for possible incidents and the particular circumstances of the transaction.

The promise of a negotiated solution with time and cost savings, combined with the finality of a determinative process like arbitration, is proving increasingly attractive. Arbitration also meets the needs of the business community which judicial litigation cannot, such as the confidentiality of disputes and the use of expertise in their settlement. Such expertise in the analysis of the merits of the case is a clear and settled advantage of ADR methods. Confidentiality – especially in arbitration – has also become crucial and disputed factor which the parties to arbitration expect to be effective. This contrasts sharply with the public nature of litigation. Consequently, it is perceived to be particularly advantageous where both parties to a dispute are anxious to protect and control their priceless confidential material.

The valued tailoring of these methods to such intricate transactions, however, demands a great deal of negotiation between contract drafters to avoid those problems most likely to arise. Draftsmen in merger transactions frequently include mixed or multi-step dispute resolution clauses where any disputes relating to particular matters such as post-closing balance sheet adjustments, will be resolved by a neutral expert, whereas all other dispute(s) will fall under a more general

⁴⁸⁰ For different ADR Processes see Doug Jones, *supra* note 53.

arbitration provision, i.e. a combination of binding and non-binding ADR mechanisms⁴⁸¹.

Given the large number of ADR mechanisms available, it is not the author's intention to deal with every ADR method for solving disputes. Focus will concentrate more on the binding and non-binding effects of ADR in M&A transactions and their relation with arbitration. Therefore, after discussing the terms conciliation and mediation, expert determination which is most used in M&A transactions is specifically addressing the question whether a hybrid staged process involving ADR with arbitration can serve as a practical mechanism in M&A arbitration.

B) Background

The survey of corporate attitudes to international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London, and PricewaterhouseCoopers in 2006 found that, of the 73% of respondents who preferred international arbitration as their dispute resolution mechanism of choice, approximately two-thirds preferred to use arbitration "in combination with ADR mechanisms" in a "multi-tiered, or escalating, dispute resolution process"⁴⁸². These mechanisms are referred to as "escalation clauses"⁴⁸³, "multi-tier clauses"⁴⁸⁴, "multi-step alternative dispute resolution clauses"⁴⁸⁵, "ADR-first clauses", or "Integrated Dispute Resolution Clauses"⁴⁸⁶.

⁴⁸¹ Cremades, *Interactive Arbitration*, supra note 259, p. 163, footnote 9.

⁴⁸² *International Arbitration: Corporate Attitudes and Practices 2006*, available at <www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf>. The question does not appear to have been repeated in the Queen Mary/PwC survey, completed in 2008 and most recent in 2010 sponsored by White and Case.

⁴⁸³ See e.g. Klaus Peter Berger, *Law and Practice of Escalation Clauses*, *Arb. Int.* 2006, Issue 1, pp.1-17 (hereinafter Berger, *Escalation Clauses*)

⁴⁸⁴ See e.g. Alexander Jolles, *Consequences of Multi-tier Arbitration Clauses*, *Arbitration* 2006, 72/4, pp. 329-338 (hereinafter Jolles, *Multi-tier*)

⁴⁸⁵ D. Jason File, *United States: Multistep Dispute Resolution Clauses*, 3 *Mediation Committee Newsletter* 1, IBA Legal Practice Division, July 2007, p. 36.

⁴⁸⁶ James H. Carter in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Volume 12, Kluwer Law International 2005 (hereinafter Carter, *ICCA Congress*), p. 446 et seq.

As a matter of fact, companies which enter into transnational merger transactions show the desire to avoid, both the escalation of antagonism that the adversarial system has come to represent, and the severe financial consequences of corporate litigation. Thus, contrary to the former longstanding attitude of seeking justice through judicial channels, nowadays many companies seek to settle their conflicts through consensus, where practicable. Mechanisms available include binding and non-binding procedures. These devices are not always mutually exclusive, but rather complementary, especially when applied in M&A transactions⁴⁸⁷.

According to Von Segesser, dispute resolution clauses are often discussed and negotiated at the very end of lengthy M&A negotiations, and their drafting does not always get the degree of attention it should. Considering what may be at stake, not only with respect to the time and costs involved, but also the fact that a divergence of opinions may jeopardise the entire transaction, it should be the duty of the negotiators or their advisors to provide the appropriate dispute resolution mechanism(s)⁴⁸⁸.

Where many dispute resolution methods are anticipated, it is important to draw a clear line between the task and competence of the expert, on the one hand, and the scope of the jurisdiction of the arbitral tribunal, on the other. However, each dispute resolution mechanism has its own characteristics. When integrated in a tiered ADR clause, those differences must be anticipated in the drafting. Failure to do so can have serious consequences⁴⁸⁹.

⁴⁸⁷ Cremades, *Interactive Arbitration*, supra note 259, footnote 9.

⁴⁸⁸ Segesser, supra note 54, p. 30.

⁴⁸⁹ According to J. H. Carter the combination of negotiation and conciliation steps tends to work against the enforceability of the conciliation procedure if it is described in the same type of loose language that parties often use to specify negotiations. The courts of many nations still consider negotiation clauses to be unenforceable⁴⁸⁹, and some clauses are so loosely drafted that they could not be described otherwise. Joining negotiation clauses of indeterminate character with conciliation provisions that are intended to be enforceable requires careful drafting of the sort that is not always observed. Institutions also should address this problem. Some now do so by suggesting only two-tiered rather than three-tiered clauses, omitting and implicitly discouraging formal negotiation agreements. Alternatively, arbitral institutions could offer examples that clearly delineate enforceable and non-enforceable remedies from one another. They also could specify penalties for breach of those obligations in “Part I: Issues Arising from Integrated Dispute Resolution Clauses” in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Volume 12, Kluwer Law International 2005, p. 447(hereinafter Carter, Part I).

One set of issues involves the drafting of integrated clauses. Should the negotiation and conciliation phases be mandatory or optional? If mandatory, should there be a mechanism by which a party may withdraw and proceed to a binding phase of the process where the other party is delaying or obstructing dispute resolution? Should clauses or statutes provide that conciliation settlements may be enforced as arbitral awards, or only as contracts? What provisions in clauses can strengthen the enforcement of settlement agreements⁴⁹⁰?

Depending on the text, the multi-step dispute resolution clause can be considered as: (a) a condition precedent to the commencement of arbitration, (b) a procedural requirement for arbitration, or (c) a procedural step that ought to be followed for a party's own benefit (“*carga procesal*”)⁴⁹¹.

On one side of the debate believes the clause bars recourse to arbitration until the negotiation process has been complied with, and is therefore a type of condition precedent. This position is popular among U.S. courts, when the parties clearly desire to establish an obligation as such. The clause has similarly been considered to be a “*pactum de non petendo*”, a temporary waiver of the right to commence arbitration until negotiation has ended⁴⁹². Except for a U.S. court decision which held that the arbitral tribunal lacked jurisdiction because a condition precedent had not been met⁴⁹³, the consensus is that this issue should be decided by the arbitration tribunal⁴⁹⁴.

C) Different ADR Procedures used in M&A Transactions and Interaction with Arbitration Proceedings

⁴⁹⁰ Carter, *ibid*, p. 446.

⁴⁹¹ Álvaro López de Argumedo Piñeiro, Multi-Step Dispute Resolution Clauses in M. Á. Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010), p. 734.

⁴⁹² See Berger, *Escalation Clauses*, *supra* note 484, p. 5; for the examples of American court cases see also Piñeiro, *ibid*.

⁴⁹³ The majority believes the opposite: «issues concerning the procedure for triggering arbitration ... are matters for arbitration, not initial judicial determination.» *SBC Interactive Inc. v. Corp. Media Partners*, 714 A.2d 758, 759 (Del. 1998). See also *Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons*, 408 A.2d 963 (Del. Ch. 1979) (The proper method of initiating arbitration under the contract is a matter for the decision of the arbitrator)

⁴⁹⁴ Born, *Int. Comm., Arb.*, *supra* note 52, p. 842.

C-1) Conciliation

There are many statutes regulating conciliation in various countries. Indeed, they were described recently by one author as a “hodgepodge,” a “rag bag” and a “confusing quilt of laws that create different rules for all the different areas in which mediation or conciliation is supposed to take place”⁴⁹⁵. Much of this legislation is permissive or provides default provisions for situations in which parties do not adopt conciliation rules or draft full conciliation agreements⁴⁹⁶.

According to Martin Hunter, in modern times, the terms “mediation” and “conciliation” have come to be used interchangeably. In Asia and in the civil law countries of Europe the term “conciliation” is commonly used. In the United States, the term “mediation” is more usual. In the models used here, the UNCITRAL Conciliation Rules are used merely as an example⁴⁹⁷.

Many M&A agreements provide for a conciliation mechanism to resolve potential conflicts either alone, or in combination with other dispute resolution instruments⁴⁹⁸. Often, such clauses provide that parties may only file a request for arbitration or initiate court proceedings after they have undergone conciliation or mediation. Such conciliation efforts may be conducted in a variety of ways, such as with a neutral conciliator, a dispute resolution board⁴⁹⁹, or by turning to a higher management level within both parties⁵⁰⁰.

⁴⁹⁵ Eric Van GINKEL, The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal, J. Int. Arb., 2004, Issue 1, pp.2-3.

⁴⁹⁶ James H. Carter: “Part II - Issues Involving Confidentiality” in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series, 2004 Beijing Volume 12 (Kluwer Law International 2005) pp. 487 (hereinafter Carter, Part II)

⁴⁹⁷ J. Martin Hunter, Commentary on Integrated Dispute Resolution Clauses, in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series, 2004 Beijing Volume 12, Kluwer Law International 2005, p. 476, footnote 9 (hereinafter Hunter, Integrated Disputes)

⁴⁹⁸ Borris, supra note 265 quoted in Segesser, supra note 54, p. 30, footnote 33.

⁴⁹⁹ For a description of various dispute resolution boards see Bernardo M. Cremades, Multi-Tiered Dispute Resolution Clauses, *available at* <www1.fidic.org/resources/contracts/cremades_2004.pdf> and also published in CPR Institute European Committee, Better Solutions for Business: Commercial Mediation in the EU, The Hague 2004, p. 7 (hereinafter Cremades, Multi-Tiered)

⁵⁰⁰ For a description of the various ADR procedures see e.g. Marc Blessing, ADR (Alternative Dispute Resolution) in: Stephen Berti (ed.), International Arbitration in Switzerland, 2000, N 962 et seq.

Conciliation procedures are particularly useful in long-term construction projects where they are used to settle conflicts speedily and efficiently without jeopardising the completion of a project. In the M&A context, and especially with regard to disputes before closing, the same benefits can apply. However, conciliation should not be misused and the initiation of arbitration or court proceedings should not be delayed where successful conciliation appears to be unrealistic⁵⁰¹.

If a share purchase agreement or a preliminary document (letter of intent or others) provides for conciliation prior to adjudication, the question arises as to whether an arbitral tribunal is bound by such a clause should a party initiate arbitral proceedings without having undergone conciliation (or some other ADR procedure). Where there is a clear obligation for the parties to attempt to settle their disputes first through conciliation, the arbitral tribunal will have to decline jurisdiction⁵⁰², or to suspend arbitral proceedings for a defined period of time to allow the conciliation to take place⁵⁰³. This is the English Law perspective. As Mr. Naughton states, an arbitral tribunal applying English law will decline jurisdiction where a contractual provision expressly states that determinate procedures are a condition precedent to arbitration, until they have been followed. But non-determinative procedures, e.g. negotiation or mediation, would be considered unenforceable and not constituting a condition precedent to the tribunal assuming jurisdiction⁵⁰⁴.

In Germany, the Federal Supreme Court in a decision where the parties had agreed in the context of a purchase agreement, that in case of dispute, the parties would first present their controversy to their local professional organisation for conciliation, prior to commencing litigation. The claimant failed to do so, and argued that in the circumstances conciliation was a futile exercise, given that the respondent had shown no willingness to settle the matter in earlier negotiations. The court held that such pre-litigation conciliation clauses are valid and must be respected by the parties and the courts. Thus, as long as a party invoking the pre-trial conciliation clause had a legitimate interest in conciliation, the courts had to treat an action filed prior to the

⁵⁰¹ Borris, *supra* note 265, pp. 76-77.

⁵⁰² See cases reported by Cremades, *Multi-tiered*, *supra* note 500, p. 7

⁵⁰³ Segesser, *supra* note 54, p. 31.

⁵⁰⁴ Philip Naughton Q.C., *Country Report for England in Enforcement of Multi-tiered Dispute Resolution Clauses*, IBA Newsletter of Committee D (Arbitration and ADR), Vol: 6, No:2, October 2001.

agreed conciliation as inadmissible (without prejudice) (*unzulässig*), but not as unfounded (with prejudice) (*unbegründet*)⁵⁰⁵.

Like the German Federal Supreme Court, the French Cour de Cassation⁵⁰⁶, the English Commercial Court⁵⁰⁷, the Supreme Court of New South Wales⁵⁰⁸, and the Irish High Court⁵⁰⁹, also assume a comparable procedural effect for a preliminary mediation or other ADR clause. The US courts, whose jurisprudence is characterised by a positive basic attitude to ADR proceedings, have also advocated the enforceability of such clauses⁵¹⁰. The US Uniform Mediation Act similarly provides for the enforceability of ADR agreements⁵¹¹. Article 13 of the UNCITRAL Model Law on International Commercial Conciliation also provides that an undertaking to conciliate shall be given effect by a court or arbitral tribunal, provided that the parties have ‘expressly undertaken not to initiate, during a specified period of time or until a specified event has occurred, arbitral or judicial proceedings with respect to an existing or future dispute’⁵¹².

In contrast, the Zurich Court of Cassation (Kassationsgericht) qualified the *pactum de non petendo* contained in a mediation agreement as an element of substantive law,

⁵⁰⁵ Decision BGH, reported in NJW, Heft 12, 1984, pp. 669-670 quoted in Jolles, Multi-Tiered, supra note 485, p. 332.

⁵⁰⁶ *Peyrin and others v. Société Polyclinique des Fleurs* (2001) Rev. Arb. 749 (however, the court assumes a procedural requirement to be observed ex officio); cf. also the note by Charles Jarosson, La sanction du non-respect d'une clause instituant un préliminaire obligatoire de conciliation ou de médiation: Note - Cour de cassation (2e Ch. civ.) 6 juillet 2000; Cour de cassation (1re Ch. civ.) 23 janvier et 6 février 2001 ibid. p. 752 et seq.

⁵⁰⁷ *Cable & Wireless Plc (C&W) v. IBM United Kingdom Ltd (IBM)* [2002] 2 All E.R. (Comm) 1041 at 1054; cf. in this regard Veeder in *Revue de l'Arbitrage*, 2003, p. 537.

⁵⁰⁸ *Hooper Bailie Associated Ltd v. Natcon Group PTY Ltd* [1992] 28 NSWLR 194 at 211; cf. also (restrictive) *Aiton Australia Pty Ltd v. Transfield Pty Ltd* [1999] 153 FLR 236 at 250; *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* [1995] 36 NSWLR 709; *Hugh Morrow and others v. Chinadotcom Corp. and others* [2001] NSWSC 209.

⁵⁰⁹ *Euro Petroleum Trading Ltd v. Transpetroleum International Ltd*, decision of 31 January 2002, cf. the case report by Klaus Reichert in Ireland: Appointment of arbitrators by the courts under the arbitration (International Commercial) Act 1998, *Int. ALR*, 2002, *Issue* 1, N-1.

⁵¹⁰ *AMF Incorporated v. Brunswick Corp.* [1985] 621 F.Supp. 456, 461: ‘Whether or not the agreement be deemed one to arbitrate, it is an enforceable contract to utilize a confidential advisory process in a matter of serious concern to the parties. The agreement may be enforced in equity’; *CB Richard Ellis, Inc. v. American Environmental Waste* 1998 WL 903495 (EDNY); *Cecala and others v. Moore and others* 982 F. Supp. 609; cf. also *Design Benefit Plans v. Enright* 940 F. Supp. 200 (ND.Ill. 1996); Scanlon and Spiewak, Enforcement of Contract Clauses Providing for Mediation, in (2001) 19 *Alternatives to the High Costs of Litigation* (May) 1.

⁵¹¹ The Uniform Mediation Act has been adopted by Illinois and Nebraska. For the current status of Uniform Laws refer to the National Conference of Commissioners on Uniform State Laws at www.nccusl.org

⁵¹² UN Doc. A/57/17, Annex 1, pp. 54, 58.

and therefore, denied it the quality of a procedural requirement. In consequence, the action before the arbitral tribunal was not dismissed as inadmissible, despite the failure to comply with the escalation levels⁵¹³.

In a recent decision, the Swiss Supreme Court examined whether contractual provisions contemplating certain procedural steps before initiating arbitration proceedings impacted the jurisdiction of the arbitral tribunal⁵¹⁴. The Supreme Court confirmed that a party believing that a mandatory pre-arbitral procedure had not been followed could rely on Art. 190(2)(b) PIL Act (lack of jurisdiction). According to the Court the more specific and binding the contractual language used to describe the pre-arbitral mechanism, the more likely arbitral tribunals and the Court will sanction the absence of its implementation, and vice versa. Although not clearly stated, parties must undertake the required steps antecedent to arbitration in good faith. However, bad faith cannot be presumed merely if a party insists on its position.

According to Prof. Berger, if a party brings an action before an arbitral tribunal bypassing the contractually agreed escalation levels, the respondent's reaction is determined by the principles applicable to objections to jurisdiction of the arbitration law at the seat of the arbitration (*lex loci arbitri*)⁵¹⁵.

In several ICC arbitrations over the last decade, tribunals have dealt with the issue of multi-tier arbitration clauses⁵¹⁶. In ICC cases, when faced with an objection from a respondent alleging that the claimant has submitted the request for arbitration prematurely, without having completed the necessary steps prior to arbitration, the arbitration tribunals tend to adopt a two-pronged approach. First, considering whether the parties were obligated to attempt amicable dispute resolution before arbitration. If the answer is yes, they then look at the facts to determine whether or not this obligation has been fulfilled⁵¹⁷. Accordingly, the Arbitral Tribunal is not bound by

⁵¹³ Kassationsgericht Zürich, decision of 15 March 1999, (2002) *ASA Bull.* 373 at p. 374; on the substantive law qualification under Swiss law see also Eiholzer, *Die Streitbeilegungsabrede* (1998), p. 181 *et seq.* quoted in the article Berger, Escalation Clauses, *supra* note 657, p. 7, footnote 31.

⁵¹⁴ Case no. 4A_46/2011 of 16 May 2011 in www.kluwerarbitration.com.

⁵¹⁵ Berger, Escalation Clauses, *supra* note 484, p.6.

⁵¹⁶ See the report in ICC International Court of Arbitration Bulletin 14, 2003, No:1.

⁵¹⁷ Dyalá Jiménez Figueres, Multi-tiered Dispute Resolution Clauses in ICC Arbitration in ICC International Court of Arbitration Bulletin, Vol. 14, No:1, Spring 2003, pp. 71-72.

the Court's decision that an arbitration agreement exists, and may render a final decision as to its jurisdiction in an interim or final award⁵¹⁸.

The issue of whether a multi-tiered dispute resolution clause raises a valid condition precedent to arbitration is a question of jurisdiction. Under the *Kompetenz-Kompetenz* principle, it is question to be ascertained by the arbitral tribunal itself; but the effectiveness of the clause will depend on whether there is doubt about the parties' intention to resolve the dispute by arbitration should ADR fail⁵¹⁹.

In addition, there are always certain exceptions that allow the parties to resort directly to arbitration without following all the tiers addressed in an escalating dispute resolution clause. This would be the case "...where interim relief of some sort is required"⁵²⁰.

Accordingly, it is advisable that the parties provide in the dispute resolution clause that they "...retain the right to seek interim relief from an appropriate court or arbitration tribunal."⁵²¹

C-2) Mediation

Mediation is a dispute resolution method which may, in specific situations, lead to an acceptable outcome within a short time frame. In contrast to arbitration, in which the tribunal adjudicates over conflicting interests, mediation is aimed at establishing the parties' common interests in order to find a solution based thereon. In M&A transactions in particular, it might be helpful and efficient to initiate mediation, with a mediator who has expert knowledge in the area of the disputed issue, which might add another dimension to the discussion in which the two negotiator are mired⁵²².

⁵¹⁸ Craig, Park, Paulsson, supra note 475, p. 155.

⁵¹⁹ Cremades, Multi-Tiered, supra note 500, pp. 9-10.

⁵²⁰ Lew, Mistelis, Kröll, supra note 333, p. 184.

⁵²¹ Cremades, Multi-Tiered, supra note 500, p. 10.

⁵²² Segesser, supra note 54, p. 31.

Research in the area of international arbitration indicates that European jurisdictions may be more comfortable with the notion of arbitrators making settlement and meditative interventions than their Anglo-American counterparts⁵²³.

To understand the differences between mediation and consolidation one can refer to the Discussion Paper by the Lord Chancellor's Department on Alternative Dispute Resolution where while defining "Mediation" and "Conciliation", it is stated that "Mediation" is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Mediation can be "evaluative" or "facilitative". "Conciliation" is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement⁵²⁴. These discussions show that the mediator is a facilitator and does not have a pro-active role⁵²⁵.

In an article from the US, a number of conciliators treat "conciliation" as less formal and "mediation" as pro-active where there is an agenda and there are ground rules. In the US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a "conciliator". In the US the word "mediator" reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. The position in the US, in terms of definitions, is therefore merely a restatement in alternative wording than the UNCITRAL Conciliation Rules or English Arbitration and Conciliation Act 1996 where the conciliator has a greater role, along the same lines as the mediator in the US⁵²⁶.

⁵²³ Nadja Alexander, *International and Comparative Mediation – Legal Perspectives*, Kluwer Law International, 2009, p. 119; See C Bühring-Uhle, L Kirchhoff and G Sherer: *Arbitration and Mediation in International Business: Procedures for Effective Conflict Management*, Alphen aan den Rijn: Kluwer Law International, 2006 and the draft report of the CEDR Commission on Settlement in International Arbitration, 2009, p. 3 available at www.cedr.com. In France see the med-arb simultaneous procedure developed by CMAP, which involves parallel mediation and arbitration processes with different disputes resolution practitioners, www.cmap.fr.

⁵²⁴ <http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm>

⁵²⁵ "Concepts of Conciliation and Mediation and Their Differences, Justice M. Jagannadha Rao, in http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf

⁵²⁶ For the article see <http://www.colorado.edu/conflict/civil-rights/topics/1950.html> quoted in the article of Justice Rao, *ibid*.

C-3) Med-Arb or Arb-Med

Med-Arb defines when an attempt is first made to resolve a dispute by mutual agreement through mediation and if it fails, then directly proceeding to a binding arbitration. Med-arb is sometimes said to be superior to pure mediation on the grounds that a binding resolution is assured⁵²⁷.

It offers advantages: first, that the process will, in one way or another, produce a resolution; second, that parties may perhaps try harder to be reasonable and to resolve the matter during the mediation phase; and third, that if an adjudication is required, there will be no loss of time or cost in having to re-acquaint a new neutral party with the facts of the case and the issues between the parties⁵²⁸.

It may also have negative consequences in comparison with mediation. If the parties in med-arb feel that a settlement has been imposed upon them – rather than voluntarily agreed to – they may be less willing to comply with the same. Additionally, if the parties focus primarily on persuading the mediator that they are right, rather than seeking an accommodation with the other party, they will not improve their ability to resolve disputes without resort to an outside decision-maker⁵²⁹.

Traditionally, it was an agreed doctrine within the world of arbitration that an arbitrator's duty should not be mixed with any mediating activity or intent to reconcile. Several arbitral institutions have begun to recognize the options available, and this has been reflected in their arbitration/conciliation rules. Where the UNCITRAL Model Law on International Commercial Conciliation 2002 governs a dispute, it allows a conciliator to act as an arbitrator in the same case subject only to the consent of the parties⁵³⁰. This shows a limited acceptance of Med-Arb, which is reflected in the rules of several institutions. For example, the ICC has Rules of Optional Conciliation, which do not allow for a conciliator to subsequently become

⁵²⁷ Cremades, *Interactive Arbitration*, supra note 259, p.162, footnote 6.

⁵²⁸ Ibid.

⁵²⁹ Ibid; see Ury, Brett and Goldberg, *Getting Disputes Resolved—Designing Systems to Cut the Costs of Conflict*, San Francisco, Jossey-Bass 1988.

⁵³⁰ See Article 12.

an arbitrator, unless the parties agree⁵³¹. This provision, however, is rather limited in that Art. 11 provides that parties “agree not to introduce in any arbitration proceeding any proposals put forward by the conciliator”. Institutions are gradually incorporating Med-Arb in some form into their accepted procedures. For example, since 1 April 1999, the Mediation Institute of the Stockholm Chamber of Commerce's Rules provide for Med-Arb⁵³².

This was one of the greatest dangers widely highlighted in arbitration seminars, as it was stated clearly that an arbitrator who initiated conciliation or mediation was exposed to the risk of an eventual challenge⁵³³.

Again, the participation in international commercial arbitration of jurists with such different origins has, in practice, caused such inflexible positions to be questioned⁵³⁴. Even in continental Europe, procedural laws in countries of Germanic origin have included an obligation for the judge to facilitate conciliation between opposing parties throughout proceedings. Likewise, in Far East countries, conciliation is something natural and closer to the mentality of its jurists than litigation or arbitration. The excessive ‘judicialization’ of international commercial arbitration has in fact led to the search for alternative dispute resolution techniques distinct from both litigation and arbitration⁵³⁵.

The first question which arises is knowing whether a person who has acted as mediator or conciliator may later intervene as an arbitrator in the same conflict and among the same parties; because, according to Prof. Lew, a mediator or conciliator should be able to put legal and factual issues out of his mind in order to assist in

⁵³¹ See Article 10.

⁵³² See Article 12.

⁵³³ Cremades, *Interactive Arbitration*, supra note 259, p. 162.

⁵³⁴ There seems to be a definite diversity in the opinions and the approaches as to how active an arbitral tribunal should be in promoting settlement and as to the manner in which exploration of settlement possibilities should be handled. One school of thought sees no difficulty in the transformation of an arbitrator into a mediator and, if necessary, being reincarnated as an arbitrator in the same dispute. Another school of thought has difficulty with this role-changing and feels that settlement negotiations in the nature of a mediation ought to be facilitated by a person different from the arbitrator, so that the arbitrator retains complete independence from the private considerations of each party as to settlement possibilities. Still another school sees no difficulty in the arbitrator becoming a mediator, but feels that, once the mediator role has been assumed, it is not possible for the same person to be born again as an arbitrator required to make an adjudication of the dispute, see Cremades, *Interactive Arbitration*, *ibid*, footnote 8.

⁵³⁵ *Ibid*.

settlement. This assistance may involve revising a contract for future execution, narrowing the issues and problems at stake, identifying the strengths and weaknesses of the respective parties' cases, and helping the parties to understand one another and to look towards making a deal at this early stage. He should have the courage to put pressure on and cajole the parties where necessary⁵³⁶.

The general rejection which this proposition enjoyed some years ago is today questioned even by the most reticent. It primarily depends on the will of the parties in conflict, and the ethical beliefs of the person whose services are solicited. The parties may even prefer someone who has knowledge of a conflict in conciliation to be the person in charge of deciding as arbitrator after the conciliation or mediation attempt has failed. The limits of his performance as arbitrator will have to be established by himself in accordance with his own conscience: in his decision, it seems quite impossible that he may mentally disregard everything which he may have discovered during the conciliation or mediation phase; however, the influence and use during his arbitral decision-making process of all that he has discovered, is something which only he can determine within the limits of the parties' desires and the applicable arbitration rules and legislation⁵³⁷.

Another question rests in knowing whether, during arbitration proceedings, the parties may consent to the arbitral tribunal undertaking the functions of a conciliator or mediator⁵³⁸. Until very recently, rejection of this arbitration doctrine was general.

⁵³⁶ Julian D. M. Lew, Multi-Institutionals Conciliation and the Reconciliation of Different Legal Cultures, in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Volume 12, Kluwer Law International 2005, p. 425 (hereinafter Lew, Conciliation)

⁵³⁷ Cremades, *Interactive Arbitration*, supra note 259, p. 163.

⁵³⁸ In fact, the admissibility and appropriateness for an arbitrator to act as conciliator is among the most controversial issues in arbitration. The differences in the views on this issue clearly have their origin in different legal cultures. Traditionally, a judge in the common law countries is not permitted to be actively involved in settlement facilitation. However, this traditional hostile attitude to conciliating efforts by the judge and arbitrator is changing (*see, e.g.*, Canada, where the new favourable approach finds a clear expression in the 1991 Alberta Arbitration Act; Australia, in the 1990 NSWCA Act; the 1990 Hong Kong Ordinance; the 1994 Singapore International Arbitration Act (SAA); the 1993 Bermuda International Arbitration and Conciliation Act or the 1996 English Arbitration Act). In civil law countries, the position varies. In France (although it is expressly mentioned as one of the functions of the judge or the arbitrator) French arbitration practitioners resort to a combination. In Germany, the judge may facilitate at any stage of the proceedings an amicable settlement of the dispute on any of the contentious issues. A similar provision applies in Austria. In Turkey such a combination of functions is allowed neither for the judge nor for the arbitrator. Article 1043 of the 1986 Netherlands Arbitration Act expressly allows settlement efforts by the arbitrators, *see Cremades, ibid*, p. 164, footnote 10.

Today, this question depends on the will of the parties. Having chosen arbitration, the parties' expectations of an adjudication are basically assured. This does not preclude a tribunal from actively suggesting exploration of settlement, but any such exploration must be voluntarily accepted by, rather than imposed on, the parties, who must also have the power to choose how any settlement explorations are to be conducted. If the arbitrator is vested with a meditative function (*amiable compositeur*), and if it is envisaged that the same person may return to the arbitral function, this should be voluntarily and explicitly agreed. Provided that such transparency is respected, party expectations will not be disappointed and arbitration as an institution will be broad enough to accommodate the diversity of psychology that prevails throughout the world in respect of dispute resolution. For instance, in the 'Machinery Joint Venture'⁵³⁹ case, Med-Arb was successfully employed to produce an agreement between the parties, without the need for a formal settlement agreement or an award⁵⁴⁰.

The arbitral tribunal with the parties must establish the terms of the conciliation or mediation period and suspend arbitral activity during such a phase. In the event that the mediation or conciliation is successful, then the parties by mutual agreement must decide how this positive result should be formalized: either separately from the arbitration proceedings or as an agreed award by the tribunal⁵⁴¹. Likewise, they must

⁵³⁹ Unreported reference from Toshio Sawada, *Hybrid Arb-Med: Will West and East Never Meet?*, 14 ICC International Court of Arbitration Bulletin, 2003 (2), p. 33 quoted in Lew, *Conciliation*, supra note 537, p. 427.

⁵⁴⁰ The case surrounded a letter of intent produced by two companies to buy machinery produced by each other. The dispute arose due to the uncertainty surrounding which of its provisions created binding obligations and which did not. An arbitrator met with the parties separately to mediate and resumed work as an arbitrator after each meeting. This eventually enabled the parties to draw up Heads of Agreement to create a joint venture in a spirit of mutual cooperation.

⁵⁴¹ According to Prof. Cremades settlement does not always surprise an arbitrator. Often, the nature of the dispute or certain elements of it, immediately suggest settlement possibilities. The arbitrator may then recommend conciliation to the parties, a practice which is common in the courts of a number of countries. Thus, in France, courts practise so-called judicial mediation by means of which the court itself appoints a mediator who discusses the case with the parties outside the court. The mediator later on reports on the result without revealing information relative to the content of the mediation nor to the parties' position. This practice can be applied in arbitration. Clause 10 of the AAA Commercial Arbitration Rules provides for the possibility of mediation during an arbitration procedure. This 'mediation window' or 'intermezzo' seems to be rarely used in international arbitration. This may be due to the fact that arbitration practitioners are reluctant to make such a suggestion when they are sitting as arbitrators as the parties might not appreciate this from them. The parties engaged in an arbitration logically expect the arbitral tribunal to settle their dispute, Cremades, *Interactive Arbitration*, supra note 259, p. 164, footnote 12.

set the terms under which the arbitration proceedings shall continue if the conciliation or mediation between the parties does not prove possible, establishing these conditions in the clearest possible fashion to prevent challenge of the arbitrator or an eventual appeal of the arbitration award. In any event, the arbitral tribunal will decide the ethical limits within which it may use the information which has been obtained during the conciliation or mediation attempt, in the arbitration phase. The important question may arise as to whether the arbitrator becomes bound in his arbitration decision to any proposal he made during the mediation phase. For example, if under mediation terms he proposes the payment of a specific compensation to one of the parties, may he disregard his mediation proposal or even modify it later in making his arbitration decision after his mediation formula has been rejected⁵⁴².

Prof. Hunter responds to this question with arbitration-first clauses. He believes that there is no reason to expect that the results of an integrated “arbitration-first” system would be less effective than the results of such processes⁵⁴³.

Indeed, support for this proposition can be found in the ICC and the American Arbitration Association’s published materials. The foreword to the ICC’s ADR Rules refers to the possibility of the parties solving the dispute amicably after the arbitration has been commenced. Further, in earlier versions of its guide on drafting ADR clauses, the AAA offered a model “Arb-Med” clause, which envisaged sealing the arbitration award for a certain number of days to give the parties an opportunity to negotiate a settlement while the award was “hanging over their heads” like a sword of Damocles. This guide also rightly emphasized the cost advantages of starting mediation procedures at a much earlier stage of arbitration proceedings. However, the current version of the AAA’s Guide has dropped this feature⁵⁴⁴, and the ICC has never offered model clauses or procedures for “arbitration-first” schemes⁵⁴⁵.

⁵⁴² Ibid, p. 164.

⁵⁴³ Hunter, *Integrated Disputes*, supra note 498, p. 472.

⁵⁴⁴ AAA *Drafting Dispute Resolution Clauses – A Practical Guide* (January 2004). Also available online at <www.adr.org>.

⁵⁴⁵ Hunter, *Integrated Disputes*, supra note 498, pp. 472-473.

Under the 2011 Hong-Kong Arbitration Ordinance, a member of an arbitral tribunal is permitted to serve as a mediator after arbitration proceedings have begun, provided that all parties give their written consent. The Ordinance provides that, in these circumstances, the proceedings are to be stayed to afford the mediation the maximum chance of success – although if the mediation fails, the arbitrator-mediator is required to disclose to all parties any confidential information obtained during the mediation which he considers to be “material to the arbitral proceedings”⁵⁴⁶.

The arbitrator's interactive approach as a formula to overcome the possible clash of legal cultures shows that the initial dogmatic rejection of the combination of arbitration with an eventual mediation or conciliation is not correct, especially parties express this by mutual agreement⁵⁴⁷. Commentators on arbitration in Germany argue that there is no need for a new system of mediation, but just a recognition that mediation is one of the functions of the arbitrator. In their view, “arbitration and mediation form a synthesis not an antithesis”⁵⁴⁸.

In order to decrease this clash of legal cultures, Prof. Lew proposes that inspiration to re-evaluate the arbitrator's role can be taken from Singapore Sect. 17(3) of the Singapore International Arbitration Act 2002. He proposes that with the written consent of both parties to the mediator acting as arbitrator should be obtained at the outset, perhaps at the preparatory conference. As a precautionary measure, such consent should be recorded in the minutes of the hearing or as standardized wording in a separate procedural protocol, to the effect that the mediation should not give reason to challenge the tribunal on the grounds of lack of impartiality⁵⁴⁹.

C-4) Expert Determination

⁵⁴⁶ See the comments of Justin D’Agostino, Simon Chapman and Ula Cartwright-Finch, in www.kluwerarbitration.com

⁵⁴⁷ Cremades, *Interactive Arbitration*, supra note 259, p. 165.

⁵⁴⁸ Klaus Peter Berger: “Integration of Mediation Elements into Arbitration, “Hybrid Procedures and “Intuitive” Mediation by International Arbitrators”, *Arb. Int.* 2003, Issue 3, pp. 387-403 (Hereinafter Berger, *Mediation*).

⁵⁴⁹ Lew, *Conciliation*, supra note 512, p. 428. The effect of such a waiver under English law is uncertain, though, particularly given the mandatory effect of Sects. 24 and 33 of the Arbitration Act 1996.

Expert determination can be a very efficient and time effective way to solve a conflict about a factual issue, such as valuation, the examination of financial statements whether a material adverse change has occurred, and, in general, on issues where a state court or an arbitral tribunal would also have to rely on an expert⁵⁵⁰.

In many M&A transactions, the appointed experts are chartered accountants or professionals with a technical, environmental, financial, or construction background. Among the said non-binding alternatives, the retention of a neutral expert (an established 'big six' accounting firm) is widely practised in cross-border merger transactions⁵⁵¹. The issues typically subject to expert determination relate to valuation matters, such as determining the net equity of the target company as a basis for calculating the purchase price, or the company's future earnings in the context of EBIT or EBITDA guarantees or earn out clauses⁵⁵².

Unless otherwise agreed by the parties, experts have the power to make binding determinations regarding a particular fact⁵⁵³. However, as a rule, expert determinations do not result in an enforceable decision, in contrast to the situation with an arbitration award⁵⁵⁴.

Expert determination is intended to be a mechanism independent and distinct from the general arbitration mechanism. This is reflected in M&A contracts in practice, where as a rule expert determination clauses are embedded in the price adjustment provisions. By contrast, arbitration clauses are typically found at the end of the contract. It is interesting, and even surprising, to note that M&A contracts rarely provide any specific language as to the demarcation of the two proceedings from each other. In most cases, they simply stand parallel. However, arbitral practice

⁵⁵⁰ See Anke Sessler – Corina Leimert, *The Role of Expert Determination in Mergers and Acquisitions under German Law*, *Arb. Int.*, 2004, Issue 2, p. 151.

⁵⁵¹ See the ICC Case No: 5418.

⁵⁵² Klaus Sachs, *The Interaction Between Expert Determination and Arbitration*, in *ASA Special Series No. 24*, 2005, p. 235 (hereinafter Sachs, *ASA Special Series No. 24*, 2005).

⁵⁵³ Segesser, *supra* note 54, p. 32. This is in contrast to determinations made by experts appointed by a tribunal or a court which are not binding.

⁵⁵⁴ For Swiss law see decision of the Swiss Federal Tribunal 117 Ia 365 quoted in Segesser *ibid*, p. 32 and Poudret, Besson, *supra* note 55, para. 15.

shows both that the demarcation of the two mechanisms from each other, and the interaction between them, is not always easy⁵⁵⁵.

Nevertheless, as a starting point, it is generally held both in civil and common law jurisdictions that an arbitral tribunal or state court lacks jurisdiction to the extent that a matter has been contractually referred to expert determination⁵⁵⁶. Under German and Swiss law, this effect is referred to as “Ausschlusswirkung”, and this effect of exclusion of competence is reciprocal between the two mechanisms. Hence, if a party were to start arbitration proceedings, introducing a claim the factual basis of which, pursuant to the contract, is subject to the expert determination, (for example, by claiming a reduction from the purchase price on the ground of an alleged shortfall in the target company’s net equity), such request for arbitration would have to be dismissed as premature⁵⁵⁷.

The author believes that the parallelism between different ADR, including the expert determination and arbitration is a question of binding or non-binding effect of these ADR mechanisms. In that case, drafting in such clauses is a key issue in order to precise the demarcation between ADR and arbitration. Quite often such clauses are relatively short and simply state that if the parties fail to agree on, for instance, a valuation issue, then this matter shall be referred for determination by a neutral expert whose decision shall be final and binding on the parties. As a rule, expert determination clauses further state the required qualifications of the expert, e.g. neutrality, specific know-how, and provide - similar to arbitration clauses - that failing an agreement between the parties on the neutral expert to be appointed, such expert shall be nominated by an appointing authority, so that one party cannot prevent the proceedings from taking place. However, many clauses are more elaborate defining the powers of the expert and the proceedings to be followed in detail⁵⁵⁸.

⁵⁵⁵ Sachs, *Asa Special Series* No. 24, 2005, *supra* note 553, p. 236.

⁵⁵⁶ Borowsky, *Das Schiedsgutachten im Common Law*, 1998, p. 191 quoted in Sachs, *ibid*, p. 236, footnote 6.

⁵⁵⁷ Sachs, *ibid.*, p.236.

⁵⁵⁸ *Ibid*, pp. 236-237.

On the other hand, there are cases in which it is questionable whether a clause providing for expert determination must in reality be interpreted as an arbitration clause. Thus, in *Boulderstone Hornibrook Engineering Pty Ltd v. Kayah Holdings Pty Ltd*, despite the clear wording that the so-called referee shall act as an expert and not as an arbitrator, the Supreme Court of Western Australia found that because the referee was entrusted to decide any dispute arising out of the contract, the clause operated “to oust the jurisdiction” and should therefore not be recognized⁵⁵⁹. Certainly, this is a rather extreme case which probably rarely occurs in the context of M&A contracts where the scope of the expert determination, as a rule, does not encompass any disputes between the parties, but is limited to specific valuation issues. Nevertheless, even in M&A contracts, the question sometimes arises whether the parties agreed on an expert determination or on arbitral proceeding. In most jurisdictions, the terminology used by the parties is not ultimately decisive. Rather, one has to examine the true intention of the parties: Did they want the expert, or the referee, to decide on a specific question of fact; or did they intend that such third party be authorized to decide any disputes between them as a whole⁵⁶⁰?

C-4-1) Problems Involving Expert Determination

In arbitration practice, parallelism between the expert determination or other ADR mechanisms and the arbitration mechanism often creates problems. Mr. Sachs gives examples from practice for expert determination which are undoubtedly valid for other ADR mechanisms as well⁵⁶¹.

⁵⁵⁹ See R.H.B. Pringle, *Agreements to Submit Disputes in the Construction Industry for Expert Determination*, *The Int. Const. Law Rev.*, 1999, p. 620. The clause in the contract between the parties was as follows: “*If any dispute arises out of this Agreement, the Parties shall in the first instance attempt to resolve such dispute by mutual consultation between the Chief Executive Officers of the Parties, and any party may at any time serve a notice on the other Party requesting such consultation and stating the nature of the dispute.The Referee who has been agreed upon or appointed shall act as an expert and not as an arbitrator*”.

⁵⁶⁰ Sachs, *ASA Special Series No.24*, 2005, *supra* note 553, p. 238. For German Law see German Federal Supreme Court BGHZ 6, p. 338; regarding Italian Law see Hartl, *Das Schiedsgutachten im italienischen Recht*, 1993, p. 92 et seq. Borowsky, *supra* note 532, p. 73 regarding English Law and p. 139 et seq. regarding US law; for Swiss law see Blessing in: Honsell/ Vogt/Schnyder: “*Internationales Privatrecht*”, 1st Ed., 1996, *Einleitung zum Zwölften Kapitel*, no. 275 quoted in Sachs, *ASA Special Series No.24*, 2005, *supra* note 553, p. 238, footnote 9.

⁵⁶¹ Sachs, *ibid*.

In the first example the parties agreed an EBITDA guarantee⁵⁶² which provided for terms as to how to evaluate the EBITDA. A dispute arose as to proper meaning of an accounting term used. The question came up whether an expert was empowered to decide on the correct interpretation of the contract term and was this a task which the expert was empowered to fulfil in the context of his evaluation of the EBITDA, or was this a legal matter to be decided by the arbitral tribunal? If this was a legal matter, how would the two proceedings interact?⁵⁶³

In another example, a dispute on the correct Net Equity of the sold company resulted in expert determination proceedings. It lasted for one year and half, and at the end the buyer commenced arbitration to challenge the result of the expert determination on the ground that it had not been heard sufficiently and that the result was materially wrong. What rules of procedure apply to an expert determination proceeding? Is an expert determination result final and binding even though it is materially wrong? Can it be challenged on the ground that procedural rights have been violated? What happens if the challenge is successful?⁵⁶⁴

In the last example, it was agreed the Buyer of the Company was to prepare and submit to the Seller the Closing Date Accounts within 180 days after the closing. For various reasons this did not happen in time. Therefore, the Seller, who still had access to the sold Company, arranged for the Closing Date Accounts to be prepared and claimed them to be the ones foreseen in the expert determination clause. The Buyer rejected those Accounts on the ground that he had not prepared them and prepared and submitted his own Accounts, but long after the lapse of the 180 day period. There was a disagreement between the parties as to the correct Net Equity value. Neither of the two Accounts fulfilled the formal prerequisites for the expert determination proceedings – the Seller’s Accounts having not been submitted by the Buyer, and the Buyer’s Accounts having not been submitted in a timely manner. What must happen in such a situation? Can the Seller’s Accounts be considered as replacing the Accounts required under the contract? Can the expert determination

⁵⁶² This provision 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, see Part I, Chapter 3, p. 98 et seq.

⁵⁶³ Sachs, ASA Special Series No. 24, 2005, *supra* note 553, p. 238.

⁵⁶⁴ *Ibid*, pp. 238-239.

clause work on this basis? Or, shall the case be submitted first to the arbitral tribunal in order to decide which Accounts are relevant and if neither of them are relevant, to decide the correct Net Equity itself, with the help of a tribunal-appointed expert?⁵⁶⁵

Following this, confusion can arise when separate documents in a single transaction make reference to both expert determinations and arbitration without clarifying their relationship. Such a situation can occur, for example, in a transaction implemented by more than one agreement, in which the parties provide for one type of dispute resolution mechanism (such as appraisal or ruling by accountants on balance sheet adjustments) in one agreement, and for a different type (typically arbitration) in another related document. If a dispute arises, one party may claim that it is a balance sheet adjustment to be determined by an accountant, while the other may say that the dispute arises out of or is related to a transaction document containing an arbitration clause. Is that for arbitrators to determine? For a court⁵⁶⁶? If the parties address both is it possible to declare “lis pendens”?

C-4-2) Solutions proposed

Referring to the previous chapter, applying to the consent of the parties is recommended. When analysing the issues raised by these case examples, it is important to understand that the concept of expert determination and the scope of these ADR mechanisms are contractual. Most jurisdictions concur that arbitration laws do not apply to expert determination proceedings. This has important consequences: there are no binding procedural rules; there is no court support available regarding procedural incidences, e.g., making a challenge against an expert; and most importantly, the result of the expert determination cannot be enforced⁵⁶⁷.

Therefore it is essential to focus to the intent of the parties in stead of applying for court intervention. In so doing, it is important to focus first on the draft of the clause and discuss the scope of it. But the issue arises as to whether the expert may interpret

⁵⁶⁵ Ibid, p. 239.

⁵⁶⁶ Carter, Part I, supra note 490, p. 455.

⁵⁶⁷ Sachs, ASA Special Series No. 24, 2005, supra note 553, p. 239.

the contract, or whether this is the exclusive task of the arbitral tribunal of the court. Under French law, such expert interpretation is not permissible due to the particular concept of the “mandataire commun”. Under the traditional view of French law, the correct interpretation of an accounting term in question, for example, could not be left to an expert, but would have to be deliberated on by a judge or arbitrator. However, the Paris Court of Appeal, in a decision, rejected a challenge based on the ground that the powers of the expert included the possibility to “apprécier” the meaning of those contract provisions that relate to his task, thus he can fulfil the same. The interpretation related to a technical issue and was therefore still within the competence of the expert⁵⁶⁸.

Under German⁵⁶⁹ and English Law⁵⁷⁰, the expert may be authorised to decide preliminary questions of law and to interpret the contract where necessary, but it is held, at least under German law that, such authority must be granted expressly⁵⁷¹. By contrast, under the laws of most US states, the interpretation of the contract is a question of law exclusively reserved for the court or the arbitral tribunal⁵⁷².

Whether or not the expert should be given the authority for contractual interpretation can only be answered with due regard to the circumstances of the case. In the case mentioned above where a specific accounting term was in dispute, the economic impact of the correct meaning amounted to more than 200 million Euro. For that reason, the parties both preferred to submit this interpretation issue to the tribunal first, before calling the expert to proceed with the value determination. But, there may be other cases where it would be in the interest of all the parties to give the expert such authority, for example to decide on the interpretation of issues relating to technical terms falling in the specific field of the expert’s professional knowledge⁵⁷³.

⁵⁶⁸ Cour d’Appel de Paris, 25ème Chambre, s. B, arrêt du 17 Septembre 2004 quoted in Sachs, *ibid*, p. 244.

⁵⁶⁹ German Federal Supreme Court BGHZ 48, 25 (30 et seq.); Heinrichs in Palandt, BGB, 63rd Ed., 2004, §317 no.6 with further references.

⁵⁷⁰ Borowsky, *supra* note 557, p. 189.

⁵⁷¹ Raeschke-Kessler, Die deutsche Rechtsprechung zur Schiedsgerichtsbarkeit von 1989 und die neuere Rechtsprechung zu Schiedsgutachten, in: Jahrbuch für die Praxis der Schiedsgerichtsbarkeit, Vol. 3, 1989, p. 213 quoted in Sachs, ASA Special Series No. 24, 2005, *supra* note 528, p. 244, footnote 42.

⁵⁷² Borowsky, *supra* note 557, p. 189.

⁵⁷³ Sachs, ASA Special Series No. 24, 2005, *supra* note 553, p. 244.

D) The problem of Confidentiality in Multi-Tiered Dispute Resolution Processes

Among the main disadvantages of multi-step proceedings is confidentiality. As Prof. Boo mentions, in a multi-tiered dispute resolution process, confidentiality issues become even more complex with a seamless flow-through from a mediator's non-adjudicatory role to that of an arbitrator. While in mediation mode, the concern is often centred on the parties' possible use or misuse of information obtained in the mediation for other purposes. In a multi-tiered process, the additional concern could well be the state-of-mind which one, in particular the mediator-turned-arbitrator (permissible in some jurisdictions, such as Singapore and China), may have in the metamorphosis from a non-adjudicatory role to an adjudicatory one. The idea of erasing things from one's mind, what was said, offered, or even simply suggested, is indeed an artificial one. Unlike a computer, one could not simply press a “delete” key or “empty trash can”. For this reason, the Singapore legislation has the following provision⁵⁷⁴:

Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during conciliation proceedings, and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall before resuming the arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings.

Parties can disclose sensitive business information or say things that might constitute an admission in a litigation context only if they believe that those statements cannot be repeated. This is a fundamental advantage of many alternative dispute resolution processes, including conciliation⁵⁷⁵. As Professor Peter Robinson puts it, strict confidentiality has the effect of transforming a mediated settlement agreement into a “super contract”, because, once executed, it becomes impossible to challenge and is

⁵⁷⁴ Boo, supra note 451, p. 528.

⁵⁷⁵ Carter, Part II, supra note 497, p. 484.

open to abuse⁵⁷⁶. Abusive negotiation tactics, such as fraud or coercion, could be masked by a right of confidentiality⁵⁷⁷.

On the other hand, the new Hong Kong Ordinance expressly prohibits parties from disclosing any information relating to the arbitral proceedings or the award, subject to the usual exceptions regarding disclosure to professional advisors or disclosure required by law. In addition, and marking another significant change from the previous regime, the default position under the new Ordinance is that court proceedings relating to arbitration are to be conducted in closed court. Parties with arbitrations seated in Hong Kong can therefore assume that duties of confidentiality will bind their proceedings without the need for any additional drafting in this regard⁵⁷⁸.

In the United States, mediation confidentiality is protected on principles derived from evidentiary privileges, such as the privilege for communications between client and attorney and the privilege protecting settlement negotiations from disclosure in litigation⁵⁷⁹. This approach to confidentiality was not accepted in the UNCITRAL Model Law on International Commercial Conciliation. Instead, the drafters sought to establish a unique regime designed specifically for conciliation, including a list of matters as to which parties may not refer in subsequent proceedings, and exceptions to the confidentiality principle for “requirements of law” and “for the purposes of implementation or enforcement of a settlement agreement”⁵⁸⁰.

Among the arbitration institutions, some (e.g., ICC, LCIA) recognize expressly that confidentiality has vague but ill-defined outer limits, noting exceptions as “required by law.” Others (e.g., AAA, UNCITRAL) say nothing about exceptions. Exceptions thus are entirely a matter of national law and presumably would include, for

⁵⁷⁶ Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened*, *J. Disp. Res.*, 2003, p. 135 at p. 164.

⁵⁷⁷ Carter, Part II, *supra* note 497, p. 485.

⁵⁷⁸ For the description of the new ordinance see www.kluwerarbitration.com

⁵⁷⁹ See National Conference of Commissioners on Uniform State Laws, “Uniform Mediation Act with Prefatory Note and Comments” (hereinafter, *UMA Report*), available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm>; Eric van GINKEL, see *supra* note 496.

⁵⁸⁰ Carter, Part II, *supra* note 497, p.486.

example, any requirements that publicly traded corporations make public filings of certain types disclosing financially significant developments⁵⁸¹.

This author agrees with Mr. Carter that with respect to confidentiality, drafters must consider the extent to which they will seek to address this separately in clauses or agreements, as opposed to invoking standard conciliation rules and/or relying on statutory protections. States should decide whether and in what form to enact legislation⁵⁸².

E) Conclusion of Chapter IV

Review of the major Alternative Dispute Resolution mechanisms most commonly employed in M&A transactions has shown that the methods offer qualities of flexibility and dynamism that can result in quick and cost effective results, which have proved popular in commercial practice. Variation in practice also exists concerning conciliation, mediation, med-arb and expert determination across different jurisdictions, but core elements of these procedures prove somewhat consistent.

It has also been observed that the solution of multi-step dispute resolution proceedings have many problems like enforceability, binding or non-binding effect, and confidentiality. Analysis focused on multi-step processes where two or more ADR mechanisms are in place with arbitration, but the limitation of each mechanism has not been established.

To counteract the problem where the scope of application of the different methods is not defined, there are many solutions proposed. One author has proposed that multi-tiered ADR clauses should be sufficiently standardized by arbitration institutions⁵⁸³.

⁵⁸¹ Ibid, p. 493.

⁵⁸² Ibid, p. 496.

⁵⁸³ Carter, Part I, supra note 490, p. 447. The author gives many examples of ADR models among arbitration institutions but finds not sufficiently standardized. In the same sense Mr. Sachs proposes that to develop harmonized transnational rules for expert arbitration. The ICC Rules of Expertise in force as from 1 January 2003 and the ICC rules for a Pre-arbitral Referee Procedure in force as from 1 January

Court intervention, during the “consolidation” process is also proposed where suitable and convenient. However, in any case, the main issue warranting attention will be, and must be, the intent of the parties.

One should bear in mind that, unlike in the field of arbitration, there are no harmonized rules regarding the proceedings, the power of the expert, and the challenge of the expert determination proceedings in ADR mechanisms. Therefore, multi-step dispute resolution clauses should be carefully drafted, by clearly demarcating ADR mechanisms and arbitration from each other, determining the interaction between the two proceedings, and defining the precise task and the powers of ADR mechanisms, the standards to be applied and the rules of due process which shall govern the proceedings. It is important that a multi-tiered clause precisely and clearly states the parties’ intention to resolve future disputes by arbitration, should the previous ADR procedure addressed in the clause fail.

Where a clear multi-tiered clause is not provided, as should also be the case for consolidation, the intervention by the courts or arbitration institutions should be limited. The author believes that the “consent” of the parties will be the main indicator in clarifying the limits of each ADR mechanism and their escalation to arbitration.

In proposing guidelines for multi-tiered ADR disputes resolution clauses in M&A transactions, it must be emphasised that again any guidelines must respect the consent of the parties. Therefore, where a precise clause is drafted, demarcating the operation and interaction of the different ADR methods will function and how the process will escalate to arbitration, guidelines will not be needed to offer assistance to the parties. Yet, such guidelines would determine where it would be appropriate for parallel ADR mechanisms to operate concurrently to best serve the continuation of the transaction. However, another issue is that an ADR mechanism’s results where non-binding can be challenged by an aggrieved party. Thus, guidelines must best serve the intention of the parties’ adherence to non-binding resolutions. Any guidelines proposed for ADR mechanisms must be wary not to standardise their

1990, constitute rules which could serve as examples for that purpose. However the author does not forget to mention that this purposes have to be adapted to the special needs of M&A transactions.

practice to the extent that ADR mechanisms' flexible nature is negated and because of the varying practices seen across different jurisdictions which should be respected.

In the last and largest chapter of the thesis, focus is drawn further on the notion of "consent" and it will be shown how "consent" can prevent the intervention of the courts.

CHAPTER V: ISSUES OF CONSENT IN M&A ARBITRATION

A) Introduction

Consent is the foundation of arbitration, and in general a court or an arbitral tribunal will refuse to treat a person or entity as a party to the contract, or at least to the arbitration clause if it has not expressly or implicitly consented to it⁵⁸⁴. Consent in most – but not all – cases will be expressed by the signature or by conduct of the person or entity concerned on a contractual document. But, on the other hand, as will be seen below, it is possible to become party to a contract without having signed the *instrumentum* and, on the contrary, the fact that a party has affixed its signature on the contract does not necessarily mean that it has consented to become a party to the agreement⁵⁸⁵.

It is not always proper to equate the right and duty to arbitrate with the notion of consent to arbitration. Although a party's participation in arbitral proceedings will often be based on (at least presumed) consent, it is not always the case.

Consent does not usually raise any difficulty where in each other's presence two parties agree in writing to arbitrate their disputes and where, when a dispute arises, the procedure is initiated by one party against the other. Excluding the case where arbitration is imposed by law⁵⁸⁶ or where consent is adhesive⁵⁸⁷, the question whether one or several parties to the arbitration have consented to the arbitral process comes

⁵⁸⁴ For an example of a very strict approach to consent by an arbitral tribunal (sitting in Geneva) which had to decide whether it had jurisdiction over three non-signatories respondents (two presidents of the joint venture company set up by claimant and the first respondent and an individual who had bought shares of this company), see ICC award in case no. 5281 of 1989, 7 *ASA Bull.* 313 (1989) quoted in Hanotiau, *Complex Arbitrations*, supra note 49, p. 32, footnote 90.

⁵⁸⁵ *Ibid*, pp. 32-33.

⁵⁸⁶ The law may impose arbitration for a category of disputes. For instance the Finnish Companies Act imposes arbitration with respect to redemption of shares in mergers and takeovers resulting in a shareholding exceeding 90% of shares and votes quoted in Hanotiau, *Freshfields Lecture*, supra note 195, p. 539, footnote 2.

⁵⁸⁷ In some cases, the arbitration agreement is excluded from negotiations. For example, from the moment you adhere to the New York Stock Exchange, you agree to arbitration, whether you like it or not, for the resolution of all disputes that you may later have with other members of the Stock-Exchange, *ibid*, footnote 3.

to the forefront each time objections are raised over the jurisdiction of the arbitral tribunal with respect to one or several of the parties to the arbitral process⁵⁸⁸.

The party defending these objections, especially in M&A arbitration, tries to justify its position by invoking mechanisms of assignment and succession. Therefore, after analysing the identification of consent in M&A arbitrations, these mechanisms also will be analysed in this chapter.

Further to the working hypothesis, this chapter addresses the question of how the transitory definition of consent significantly effects the M&A arbitration. Analysis will broach the other questions addressed in previous chapters within the context of consent. In addition to commenting on the state of existing rules, guidelines would be suggested to fulfil shortcomings. Therefore it is necessary to focus on the identification of consent from the chapter's outset.

B) Identifying Consent in M&A Arbitration

Consent in international commercial transactions is usually evidenced by written instruments, typically with the execution of a formal contract by a corporate officer's signature⁵⁸⁹. Recurrent issues relating to the parties' consent include: the factual proof of consent, issues of implied or tacit consent, the treatment of competing forms or proposals exchanged by the parties, the consequences of poorly-drafted arbitration provisions (such as internally-inconsistent, indefinite or vague arbitration clauses, "optional" arbitration clauses, clauses with incorrect designations of arbitral institutions or rules), duress, and the effects of lack of notice⁵⁹⁰.

It is also important to distinguish between the "written" form requirements applicable to arbitration agreements under many international conventions and national arbitration statutes, and the question whether a party has consented to an arbitration agreement. It is possible for applicable "written" form requirements to be satisfied (*e.g.*, there is an exchange of letters or telegrams, signed by the parties), but for the

⁵⁸⁸ Hanotiau, Freshfields Lecture, *supra* note 195, p.540.

⁵⁸⁹ Born, *Int. Comm. Arb.*, *supra* note 52, p. 640.

⁵⁹⁰ *Ibid*, p. 641.

extant documents to fail substantively to establish the existence of an arbitration agreement as a substantive matter (*e.g.*, there is no arbitration clause contained in the writing(s), the putative arbitration clause is defective, or the parties have not in fact consented to the proposed clause)⁵⁹¹. Conversely, it is also entirely possible for parties to have undeniably consented to arbitration (*e.g.*, as evidenced by an unequivocal, undisputed oral agreement), but for their agreement to fail to satisfy applicable form requirements. In order to establish a valid arbitration agreement, both applicable form requirements and substantive consent requirements must be satisfied⁵⁹².

However, while it may be incorrect to argue that consent to arbitrate can only be proved by signature or an agreement in writing, it is equally incorrect to suggest that consent to arbitration agreements can be presumed or ascertained more easily than consent to any other procedural or substantive agreement; a suggestion occasionally adopted by tribunals and national courts⁵⁹³. Therefore, the assertion of implied consent requires the application of specific principles and techniques of interpretation which must reveal the “intention to arbitrate” with a degree of certainty, rather than probability⁵⁹⁴.

Nonetheless, putting aside form requirements, it is settled that a party's consent to an arbitration agreement or a written instrument containing an arbitration clause can be expressed as a substantive matter by means other than a signature. Numerous arbitral awards and national court decisions have expressly declared this⁵⁹⁵.

⁵⁹¹ *Bothell v. Hitachi Zosen Corp.*, 97 F.Supp.2d 1048, 1051-53 (W.D. Wash. 2000) (“in a series of documents, where the words used to refer to a proposed arbitration agreement are so vague as to be meaningless and no further explanation is provided, either by attachment, discussion, or otherwise, the totality of the documents exchanged between the parties does not constitute a valid ‘arbitration agreement.’”). See also A. van den Berg, *The New York Convention* 177 (1981) (“the form of the arbitration agreement does not concern questions concerning its *formation*”) quoted in Born, *ibid.*, p. 644 footnote 433.

⁵⁹² *Ibid.* p. 644.

⁵⁹³ Brekoulakis, *supra* note, 56, para. 1.73. The author gives the example of the case *Fluehmann v Associates Financial Services* 2002 WL 500564 (D Mass). (footnote 39). “In the instant case, the subject arbitration provision is ostensibly broad, covering any dispute that may “arise under” or “relate to” the Loan Agreement. When confronted with such broad language, courts presume the validity of the agreement to arbitrate (...) and generally find that similarly broad arbitration clauses governing “all disputes” arising under the agreement apply even to a non-signatory. The baseline assumption here, therefore, is that the Arbitration Agreement casts a wide net” (emphasis added).

⁵⁹⁴ *Ibid.*

⁵⁹⁵ Born, *Int. Comm. Arb.*, *supra* note 52, p. 664. See *Fisser v. Int. Bank*, 282 F.2d 231, 233 (2d Cir. 1960); *Interocean Shipping Co. v. Nat'l Shipping and Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975)

When determining whether or not the parties actually agreed to submit their disputes to arbitration, arbitrators and the courts apply various principles of interpretation. In the light of these principles, they establish the degree of certainty required for the parties' consent to be effective as well as the scope of that consent⁵⁹⁶.

In order to determine the existence of the parties' consent, arbitrators will make recourse to the general principles of contractual interpretation⁵⁹⁷. (e.g. the principle of interpretation in good faith, and the principle of effective interpretation prove most valuable with respect to pathological clauses, i.e. incomplete, defective or contradictory clauses⁵⁹⁸. In the exercise of contract interpretation, the principle of *favorem validitatis* cannot apply⁵⁹⁹.

In the author's opinion, interpretation of the arbitration clauses and/or arbitration agreements in M&A transactions should be related to the nature of the transaction. During the M&A transactions there are many different issues which should be considered. Chapter Three analysed the problem of parallel proceedings and the problem of consolidation. During this analysis it has been remarked that the consent should not be seen only as a condition for arbitration or courts, but also interpreted from the view of what is covered by the parties' consent to arbitration. Therefore, the

("[T]he mere fact that a party did not sign an arbitration agreement does not mean that it cannot be held bound by it. Ordinary contract principles determine who is bound."); *In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006); *Walkinshaw v. Diniz* [2000] 2 All E.R. (Comm.) 237 (Q.B.) (arbitration clause for Contracts Resolution Board established by Formula One Racing was binding even though not signed by all members); *Jayaar Impex Ltd v. Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437 (Q.B.). See also *Baker v. Yorkshire Ins. Co.* [1892] 1 Q.B. 144 (Divisional Court) (citing principle that an agreement in writing is binding whether or not the parties have signed it, so long as an "intention to be bound" can be established from the surrounding circumstances); *Judgment of 29 September 2000*, 2001 Zeitschrift für Sport und Recht 247 (Hanseatisches Oberlandesgericht Hamburg) (arbitration clause contained in the charter of an association need not to be signed by members) quoted in Born, *ibid*.

⁵⁹⁶ Fouchard, Gaillard, Goldman, *supra* note 49, para. 472.

⁵⁹⁷ Abdulla Z., *The Arbitration Agreement* in Kaufmann-Kohler G., Stucki B., *International Arbitration in Switzerland, A Handbook for Practitioners*, 2004, The Hague, Kluwer Law International, p. 18.

⁵⁹⁸ *Ibid*, p. 19 quoted also in the unpublished PhD thesis of A. M. Steingruber: "Notion, Nature and Extent of Consent in International Arbitration", Queen Mary University of London, 2009, p. 108.

⁵⁹⁹ See Fouchard, Gaillard, Goldman, *supra* note 515, para 477 et seq, referring to "the principle of interpretation in good faith", which seeks to establish the actual intention of the parties, "the principle of effective interpretation", favouring the interpretation which enables the clause to be effective over the interpretation preventing the clause from being effective, and "the principle of interpretation contra proferentem" establishing the presumption that an agreement should be interpreted against the party that drafted the clause in dispute quoted in Brekoulakis *supra* note 56, p. 16, footnote 41.

author believes that the “effective interpretation” of arbitration clauses in M&A transactions will be accomplished only when the interpretation has been done not only with the “express consent” but also with “implied consent” together with the common intention of the parties in conformity with the facts of the M&A transaction.

B-1) Incorporation by Reference

International contracts frequently seek to incorporate arbitration agreements or rules from other instruments. In some cases, an agreement will incorporate an arbitration clause from another contract. In other, an arbitration agreement may be incorporated from trade association rules, general terms and conditions, or other non-contractual sources. Provisions incorporating arbitration clauses from other instruments give rise to issues of both formal and substantive validity⁶⁰⁰. For the most part, the incorporation of an arbitration agreement should present few difficulties with regard to formal validity⁶⁰¹, and the real issues will concern consent and substantive validity⁶⁰².

On the other hand, when contracts are concluded by reference to general conditions, the arbitration clause may not have been the object of specific attention by the parties, since the general conditions or any other document containing the arbitration clause may not be attached to the contract itself⁶⁰³. Furthermore, the parties may also conclude a contract without reference to an arbitration clause, but in a series of contracts which include an arbitration agreement⁶⁰⁴. Moreover, when a contract containing the arbitration clause is signed by only one party, it is widely accepted

⁶⁰⁰ A. Samuel, *Jurisdictional Problems in International Commercial Arbitration* : A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law, Publications of the Swiss Institute of Comparative Law, 1989, p. 87 (incorporation raises issues of both form and consent).

⁶⁰¹ UNCITRAL Model Law, Art. 7(2); A. Samuel, *ibid* p. 88 (“if, as a matter of the applicable law, the arbitral clause is deemed to be included in the contract, then it is ‘juridically’ if not ‘physically’ ‘in the contract’ and that is sufficient” to satisfy Article II(2)); *Tuca v. Ocean Freighters, Ltd*, 2006 U.S. Dist. LEXIS 16174 (E.D. La. 2006) (“agreements that incorporate agreements with arbitration clauses can satisfy the agreement in writing requirement”); *Stony Brook Marine Transp. Corp. v. Wilton*, 1996 WL 913180 (E.D.N.Y. 1996).

⁶⁰² Born, *Int. Comm. Arb.*, *supra* note 52, p. 695,

⁶⁰³ Lew, Mistelis, Kröll, *supra* note 333, para. 7-35.

⁶⁰⁴ *Ibid*.

that the written consent of the other party contained in a different document does not have to be signed⁶⁰⁵.

In substance, incorporation by reference concerns the issue of whether an arbitration clause contained in general or standard conditions or in a document or contract (between the same parties or not) other than the main contract concluded between the original parties binds the latter or third parties or permits bringing all the parties to these agreements to the same arbitral proceeding⁶⁰⁶.

Such incorporation by reference seems to be generally admitted by statute or case law in Western European countries. The requirement that an arbitration clause be in writing, whether by effect of a local statute or by application of Article II.2 of the New York Convention has been recently interpreted by most courts, including in Switzerland, in a more relaxed fashion. The issue has become rather whether the party against whom the clause is invoked was aware of the incorporation of the related conditions or documents containing the clause in the original agreement and had a real opportunity to know of their contents⁶⁰⁷. When deciding the issue, the courts take into consideration various elements, such as, whether the parties are both professionals, whether the contract is an isolated one, or whether there was an on-going relationship between the parties, and whether the clause accords or not with trade usages⁶⁰⁸.

⁶⁰⁵ Ibid. 7-28.

⁶⁰⁶ Hanotiau, *Complex Arbitrations*, supra note 49, para. 57, Fouchard, Gaillard, Goldman, supra note 49, para. 491. On this issue, generally, see also Bruno Oppetit, *La clause arbitrale par référence*, 1990 Rev. Arb., pp. 551, 557; Claude Reymond, *La clause arbitrale par référence*, in *Recueil des Travaux Suisses sur l'arbitrage international*, 1984, p. 85; Jean-François Poudret, *La clause arbitrale par référence selon la Convention de New York et l'art. 6 du Concordat sur l'arbitrage*, in *Recueil des Travaux Offerts à M. Guy Flattet*, 1985, p. 523; Lucius Huber, *Arbitration Clause "by Reference,"* in *ASA Special Series No. 8, The Arbitration Agreement – Its Multifold Critical Aspects*, 1994, p. 78; Klaus Peter Berger, *International Economic Arbitration*, 1993, p. 149 *et seq.*; Xavier Boucobza, *La clause compromissoire par référence en matière d'arbitrage commercial international*, Rev. Arb., 1998, p. 495.

⁶⁰⁷ See for example ICC award in case no. 7804 of 1995, unpublished (Zurich, Swiss law), cited by Train, supra note 505 para. 142 and *Richard Bothell v. Hitachi Zosen*, see supra note 554 quoted also in Hanotiau, *Complex Arbitrations*, supra note 49, footnote 77.

⁶⁰⁸ Hanotiau, *ibid.*, para. 58; V. Van Houtte, *Consent to Arbitration Through Agreement to Printed Contracts: The Continental Experience*, 16 *Arb. Int.* 14 (2000); M. de Boissésou and T. Clay, *Recent Developments in Arbitration in Civil Law Countries*, 1998 *Int. A.L.R.* 150, at 152.

In the United States, there is case law on this issue. When a contract containing an arbitration clause is incorporated by reference into a completely separate agreement, which does not contain an arbitration clause, a non-signatory to the former agreement, A, may nevertheless be required to arbitrate, if a dispute arises under the latter agreement⁶⁰⁹ which A has signed⁶¹⁰.

Where the consent of both parties to the arbitration clause was clear, in spite of the non-fulfilment of formal requirements, courts have also resorted to considerations of good faith and estoppel to uphold the arbitration agreement⁶¹¹.

B-2) Consent to an Underlying a Contract Typically Constitutes Consent to an Arbitration Agreement

The essential issue in determining the existence of an arbitration agreement is whether the parties have consented to *that* agreement (to arbitrate), as distinguished from having consented to the underlying contract. At least in principle, and also often in practice, it is entirely possible for a party to have consented to one of these agreements, but not the other⁶¹². There are numerous instances where this conclusion has been reached⁶¹³.

Nonetheless, in many cases, the only evidence of consent to an arbitration agreement will be a party's consent to the underlying contract, with no separate indications of consent to the arbitration clause specifically. In these cases, there will ordinarily be no reason to distinguish between a party's consent to the underlying contract and the arbitration clause. Nonetheless, there are important exceptions to these generalizations⁶¹⁴.

⁶⁰⁹ Carolyn Lamm and Jocelyn Aqua, *Defining The Party – Who is a Proper Party in An International Arbitration before the American Arbitration Association?*, 2002 *Int. A.L.R.*, p. 87.

⁶¹⁰ Hanotiau, *Complex Arbitrations*, supra note 49, para. 59.

⁶¹¹ Lew, Mistelis, Kröll, supra note 333, para. 7-30.

⁶¹² Born, *Int. Comm. Arb.*, supra note 52, p. 661; Samuel, supra note 601, p. 174 (“it can happen that, during contractual negotiations, the arbitral clause is unequivocally accepted by both parties and then a dispute arises as to whether agreement was ever reached over the substantive contract. In such a situation, it is submitted that the dispute concerned should be referred to arbitration for both theoretical and practical reasons.”).

⁶¹³ Born, *ibid.*

⁶¹⁴ *Ibid.*, p. 662.

The autonomy of the arbitration agreement from the main contract is a legal concept, not a factual determination. Thus, it does not mean that acceptance of the arbitration agreement must be separate from that of the main contract. Neither does it mean that the arbitration agreement cannot follow the main contract where the latter is assigned to a third party⁶¹⁵.

B-3) Consent to Underlying Contract Not Required for Consent to Arbitration Agreement

Notwithstanding the foregoing, consent to the parties' underlying contract is not necessarily required to establish consent to the associated agreement to arbitrate. Although rare in practice, the separability presumption permits consent to and formation of the agreement to arbitrate even without consent to or formation of the underlying contract⁶¹⁶.

It is of course true that parties do not ordinarily intend to agree only to an arbitration clause in the abstract, but to reject or not conclude the underlying contract⁶¹⁷. Rather, the arbitration clause has an ancillary or “parasitic” function, which is closely related to the underlying commercial contract. This function argues, in general, against

⁶¹⁵ Fouchard, Gaillard, Goldman, *supra* note 49, para. 408.

⁶¹⁶ *Ibid.*

⁶¹⁷ Segesser, *supra* note 54, p. 35 *et seq.* (“The issue of the validity of an arbitration clause in a M&A agreement may arise if a dispute starts before the agreement is signed. If a party in bad faith aborts the transaction and refuses to sign, can the other party rely on the arbitration clause which, in the opinion of both parties, had been conclusively negotiated? Insofar as it is possible to prove that the parties intended to be bound by the concluded negotiations on the arbitration clause, even if a subsequent signing of the agreement did not occur, there might be a case, depending on the substantive law applicable to the share purchase agreement, to assume a valid arbitration agreement. In most cases, however, it might not be easy to prove such an intent by the parties, and any lack of consent with regard to the main agreement usually leads to the arbitration clause also being invalidated.”); Schlosser, *Der Grad der Unabhängigkeit einer Schiedsvereinbarung vom Hauptvertrag*, in *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* 697, 704 *et seq.* (2001); B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, para. 471 (2006) (“In case a violation of a duty occurs in a pre-contractual phase (*culpa in contrahendo*), one needs to note that an arbitral tribunal, of course, can only assess such a claim, in case an arbitration agreement existed in this phase already or if such an agreement was concluded later on. Therefore, possible claims based on *culpa in contrahendo* can oftentimes only be raised in state courts.”) quoted in Born, *Ibid.*, p. 662 footnote 537.

suggestions that parties concluded a separate arbitration agreement, while not entering into an associated commercial contract⁶¹⁸.

Nonetheless, there will be instances in which the parties negotiate and agree upon the terms of the arbitration clause, even though they do not agree upon the terms of the underlying contract⁶¹⁹. There are also good reasons to conclude that, in international commercial contexts, parties will wish their arbitration agreement to exist even without formation or validity of the underlying contract – precisely to ensure a neutral, expert procedure for resolving disputes about the formation of that contract. Analytically, it is therefore essential to distinguish between the formation of the underlying contract (and defects in that formation process) and the formation of the separable arbitration agreement, and to carefully consider the evidence and parties' likely intentions with regard to each agreement⁶²⁰.

B-4) Consent on the related agreements

Consent to arbitration may also be present if a contract does not contain an arbitration clause but forms part of a contractual network which includes an arbitration agreement. This happens where parties enter into a framework agreement, containing an arbitration clause, governing their future relationship within which they conclude a number of separate contracts⁶²¹.

⁶¹⁸ Born, *ibid* p. 661- 662.

⁶¹⁹ See *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir. 2001) (“if they have agreed on nothing else, they have agreed to arbitrate”); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000) (“Courts will not allow a party to unravel a contractual arbitration clause by arguing that the clause was part of a contract that is voidable. The party must show that the arbitration clause itself, which is to say the parties' agreement to arbitrate any disputes over the contract that might arise, is vitiated by fraud, or lack of consideration or assent.”); *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Comm. Int. Union*, 20 F.3d 750, 754-55 (7th Cir. 1994) (despite apparent lack of meeting of minds on underlying contract “there was a meeting of the minds on the mode of arbitrating disputes between the parties” and “the parties had agreed to arbitrate their claims”); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991); *Judgment of 27 September 1985, O.P.A.T.I. v. Larsen, Inc.*, No. L 8169, unpublished, (Paris Cour d'appel) described in M. de Boissésou, *Le droit français de l'arbitrage interne et internationale* 825 (2d ed. 1990) (finding arbitration agreement where various provisions were noted as “draft,” but not arbitration provision); *All-Union Foreign Trade Assoc. Sojuznefteexport v. JOC Oil Ltd, Award in USSR Chamber of Commerce and Industry* (9 July 1984), XVIII Y.B. Comm. Arb. 92, 97-98 (1993) quoted also in Born, *ibid*, p. 663.

⁶²⁰ Born, *ibid*.

⁶²¹ Lew, Mistelis, Kröll, *supra* note 333, para.7-44. See, e.g., Cour d'appel Paris, 31 May 2001, *UNI-KOD sarl v Quralkali*, XXVI YBCA 1136 (2001) 1138: arbitration agreement in joint venture covers contracts concluded between members in the implementation of the joint venture.

A seldom-applied, but potentially important, theory of non-signatory status is that of joint venture liability. Although not frequently invoked, some authorities have held that one joint venture partner's commitment to arbitrate disputes related to the joint venture binds other joint venture partners⁶²². Similar results can be reached through principles of “civil conspiracy,” as applied in some national legal systems⁶²³.

Provided that the circumstances reveal that the parties intended, at least implicitly, to empower the arbitral tribunal to resolve all disputes arising out of a single group of contracts, then the tribunal shall have jurisdiction to do so. The Paris Court of Appeals reached this conclusion in the case of an employment contract annexed to a protocol, which had been signed during the sale of a company and which contained an arbitration clause⁶²⁴. The French *Cour de cassation* also allowed an arbitration clause to be extended from one contract to a second aimed at formalizing the existing agreement between the parties⁶²⁵.

The arbitration clause in the main contract may also extend to follow up or repeat contracts concluded in close connection and in support of a main contract. This is usually a question of interpretation; this may be the case if the subsequent

⁶²² See, e.g., *Itel Containers Int. Corp. v. Atlanttrafik Express Service Ltd*, 1988 WL 7562 (S.D.N.Y. 1988) (joint venture liability as basis for binding non-signatory to contract); *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1208 (5th Cir. 1978); *Hellenic Lines, Ltd v. Commodities Bagging & Shipping, Process Supply Co., Inc.*, 611 F.Supp. 665 (D.N.J. 1985); *Margate Indus., Inc. v. Samincorp., Inc.*, 582 F.Supp. 611 (S.D.N.Y. 1984).

⁶²³ See G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 191-92, 4th ed. 2007; 1 R. Casad & W. Richman, *Jurisdiction in Civil Actions* §4-3[1] (3d ed. 1998 & Supp. 2004). Compare *In re Merrill Lynch Trust Co., FSB*, 2007 WL 2404845, at *3 (Tex. S.Ct. 2007) (“while conspirators consent to accomplish an unlawful act, that does not mean that they impliedly consent to each other's arbitration agreements”).

⁶²⁴ CA Paris, Feb. 28, 1992, *Freyssinet International v. Renardet*, Rev. Arb. 1992, pp. 649, 650, and observations by D. Cohen

⁶²⁵ Cass. comm., Mar. 5, 1991, *Pepratz v. Fichou*, Rev. Arb. 1992, p. 66, 1st decision, and L. Aynès' note; RTD Com., 1992, p. 591, and observations by J.-C. Dubarry and E. Loquin. See also Trib. comm. Bobigny, Mar. 29, 1990, *Sofremines v. Samin*, Rev. Arb., 1992, p. 66, and L. Aynès' note; RTD Com., 1992, p. 592, and observations by J.-C. Dubarry and E. Loquin; Cass. com., June 9, 1970, *Sté. des Transports de Pétrole de l'est saharien TRAPES v. Mobil Producing Sahara Inc.*, extending the effects of an arbitration clause in a contract to a dispute concerning the commercial paper issued under that contract as a means of payment (1970 Bull. Civ. IV, No. 190). See also, in French domestic arbitration, Cass. 1e civ., May 14, 1996, *Sigma Corp. v. Tecni-Ciné-Phot*, Rev Arb. 1997, p. 535, and the commentary by Cohen, quoted in *Fouchard, Gaillard, Goldman, supra note 49, para. 522*.

agreements amend or complete the main contract⁶²⁶, but not where the additional contracts go beyond the implementation of the main contract⁶²⁷.

In cases where each of the contracts with the same objective contains its own arbitration clause, even where the parties have simply reiterated the same arbitration clause in each contract, there may be difficulty. Should a single tribunal be constituted to resolve all disputes arising from the contractual ensemble, or should there instead be a different arbitral tribunal for each contract? Once a dispute has arisen, and in the absence of an agreement between the parties on the point, the answer depends on the interpretation of the parties' intention at the outset. However, it is generally legitimate to presume that by including identical arbitration clauses in the various related contracts, the parties intended to submit the entire operation to a single arbitral tribunal⁶²⁸.

The problem is aggravated where the arbitration clause differs from one contract to another. This occurs quite often in practice, in spite of the resulting difficulties. In order to avoid two or more tribunals reaching conflicting decisions, one might be tempted to conclude that the better solution would be to appoint a single arbitral tribunal, or to consolidate the two or more arbitrations. The difficulties liable to occur in the event of two parallel arbitrations are illustrated in the situation where one party refuses to fulfil its obligations under one contract on the grounds that its co-contractor failed to fulfil its obligations under a second contract. In the absence of an agreement between the parties, neither the arbitral institution, nor the arbitral tribunal constituted on the basis of one or other of the arbitration clauses, will be entitled to resolve the whole dispute. Only where both arbitrations take place in a jurisdiction in which the courts are entitled to consolidate related actions, such as the

⁶²⁶ *Maxum Foundation, Inc v Salus Corp*, 779 F 2d 974, 978 (4th Cir 1985); *Hart Enterprises Int, Inc v Anhui Provincial Import & Export Corp*, 888 F Supp 587-591, XXI Y. B. Comm. Arb. 767 (1996) (SDNY 1995).

⁶²⁷ Lew, Mistelis, Kröll, *supra* note 333, para. 7.46. See also ICC case no 8420, XXV Y. B. Comm. Arb. p. 328 (2000) pp. 338-340.

⁶²⁸ See, for example, the award rendered in Geneva in ICC Case No. 5989 (1989), *Contractor v. Employers A & B*, XV Y.B. Comm. Arb. 74 (1990); 124 J.D.I. 1046 (1997), and observations by D. Hascher; see also the award made in Paris in ICC Case No. 7184 (1994), ICC Bulletin Vol. 8, No. 2, at 63 (1997). On the other hand, where parallel contracts are entered into by one party and a series of other parties, the claims brought by the latter between themselves cannot be considered as being covered by an arbitration clause, absent specific circumstances showing that to be the true intention of the parties. See Chamber of National and International Arbitration in Milan award of February 2, 1996, *Pharmaceutical Company v. Pharmaceutical Company*, XXII Y.B. Comm Arb. 191 (1997).

Netherlands, or where two proceedings refer to the same arbitration rules allowing consolidation⁶²⁹, will it be possible to avoid the difficulties associated with having separate arbitral tribunals without further exploring the true intentions of the parties. Otherwise, if an award were made on the basis of the arbitration clause contained in one contract, but concerned issues found in another contract, the decision of the arbitral tribunal could be challenged on the basis that the tribunal ruled, at least in part, in the absence of an arbitration agreement. For the same reasons, where a contract containing a clause attributing jurisdiction to the courts is related to another contract containing an arbitration clause, there can be no extension of the arbitration clause to the first contract. Thus, an award made in 1983, ICC Case No. 4392, rightly refused to extend the scope of an arbitration clause contained in heads of agreement to a related agreement, on the grounds that the related contract referred to general conditions of sale which included a clause attributing jurisdiction to the courts. The arbitral tribunal considered that, irrespective of any implied acceptance of the conditions by the purchaser, the buyer's intention was clearly incompatible with the extension of the arbitration agreement and had to be complied with. The reverse is also true: the court with jurisdiction under the second contract would not be able to rule on the obligations arising out of the first contract without violating the arbitration clause contained in that first contract⁶³⁰.

B-5) Defects of consent: Fraud (dol), mistake (erreur)

Conversely, the mere fact that a document is signed does not necessarily establish valid consent by the putative signatory. In M&A arbitrations examples of dol arises in the case of misrepresentations, withheld information, or wrong information provided on material facts. Equally, if one party intentionally deceives the other

⁶²⁹ See, for example, the possibility of consolidation afforded in cases between the same parties by Article 4(6) of the 1998 ICC Rules, prior to the signature or approval by the International Court of Arbitration of the Terms of Reference. On the position under the previous ICC Rules, see the partial award in Case No. 6719 (Geneva, 1994), Syrian party v. Two Italian companies, 121 J.D.I. 1071 (1994), and observations by J.-J. Arnaldez and, on the issue generally, Derains and Schwartz, *supra* note 138, at 62 *et seq.* On the consent given in advance, by adopting the LCIA Rules, to allow one party to the arbitration to join one or more third parties in the proceedings with the consent of such third parties but not with the renewed consent of the other parties to the proceedings, see Article 22.1(h) of the 1998 LCIA Rules.

⁶³⁰ Fouchard, Gaillard, Goldman, *supra* note 49, para 521.

regarding the nature of what he or she is signing, there is generally no assent by the latter⁶³¹.

The same objection arises in cases of mistake as to the nature of a document⁶³². In M&A transactions examples of mistake arises very often as to the value of the company. As discussed during Chapter Two, the value of the business of the company is one of the essential elements in purchase agreement. It should be indicated that recent ICC Cases No. 11961 and No. 12502 are reviewed in order to see how dol and mistake have arisen in M&A Arbitration.

ICC Case No. 11961⁶³³

The present case concerns the sale and purchase of the shares of a Luxembourg insurance company operating under the European Union's Freedom-to-Provide-Services regime (FPS), the result of three Council directives (issued in 1979, 1990, and 1994) allowing insurance companies to offer their products in the European Union forgoing authorization in countries other than the country of their registered office and setting up an establishment in those countries. Following the introduction of the FPS regime, several EU Member States took measures to prevent funds flowing to offshore centers such as Luxembourg, where at the relevant time banking secrecy was protected-also in respect of insurance companies and the proceeds of tax evasion. France levied taxes on monies invested by French residents in insurance

⁶³¹ Born, Int. Comm. Arb., supra note 52, p. 665. See, e.g., *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986) (“where misrepresentation of the character or essential terms of a proposed contract occurs, assent to the contract is impossible. In such a case there is no contract at all”); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976) (buyer bound by arbitration clause absent fraud, misrepresentation, or deceit in execution of acknowledgement); *Lynn v. Gen. Elec. Co.*, 407 F.Supp.2d 1257 (D. Kan. 2006); *Dougherty v. Mieczkowski*, 661 F.Supp. 267 (D. Del. 1987) (“defendants cannot rely on a contract which plaintiffs never signed and, on the record, never saw, to establish the existence of an agreement to arbitrate”); *Strotz v. Dean Witter Reynolds, Inc.*, 272 Cal.Rptr. 680 (Cal. App. 1990) (“if a party is unaware that he is signing any contract, obviously he also is unaware he is agreeing to arbitration”); *Lynch v. Cruttenden & Co.*, 22 Cal.Rptr.2d 636 (Cal. App. 1993); *Monro v. Bognor Urban District Council* [1915] 3 K.B. 167 (English Court of Appeal) (claim that signature on contract induced by fraud affected the validity of the entire contract including the agreement to arbitrate); *Credit Suisse First Boston (Europe) Ltd v. Seagate Trading Co. Ltd* [1999] 1 Lloyd's Rep. 784 (Q.B.) (claim that the whole contract was induced by fraud would, in principle, prevent party from relying upon jurisdiction clause within the contract) quoted in Born, *Ibid*, footnote 548.

⁶³² *Ibid*, pp. 665-666 and see also the examples given in the footnote 549.

⁶³³ Final award in case no. 11961 in Albert Jan van den Berg (ed), Y. B. Comm. Arb. 2009 - Volume XXXIV, Kluwer Law International 2009, pp. 32 – 76.

products offered by Luxembourg insurance companies and provided for an obligation to declare contributions to foreign insurance policies or face a substantial penalty. The risks inherent to the pursuit of FPS insurance activities in France and Belgium, the countries involved in the case at issue, were referred to as “industry risks” or “general risks” in the award.

By a Share Purchase Agreement (SPA), the Claimant purchased the shares in a Luxembourg insurance company (the Luxembourg company) from the Respondents – five companies of the same group (the Respondent Group) – with the aim of making it the central hub of its European insurance operations. The SPA was governed by Luxembourg law; it also contained a clause providing for ICC arbitration of disputes in Paris.

A few years later, some of the Luxembourg company's senior management, staff and brokers were arrested in France in connection with criminal investigations into suspected money laundering and tax evasion, which allegedly involved the company prior to the purchase of its shares by the Claimant. Subsequently, senior members of the management of the Defendant Group and a related bank (the Bank) were also detained.

The Claimant commenced an ICC arbitration, seeking declaratory and injunctive relief in respect of any past and future losses or damage resulting to the Claimant as a consequence of its acquisition of the Luxembourg company. The Claimant alleged that the Defendants' misrepresentations and failure to disclose material facts in respect of the transaction breached their contractual and non-contractual duties and that the Claimant suffered substantial and continuing injury as a result of the Defendants' actions. The Defendants sought dismissal of all claims; they also filed a counterclaim seeking damages on the ground that the Claimant breached a duty of confidentiality by divulging details about the arbitration to the press.

The Arbitral Tribunal denied the Claimant's request to annul the SPA on grounds of *dol* (fraud) and *erreur* (mistake), but found that Defendants committed a *culpa in contrahendo* in the negotiation phase of the SPA by intentionally withholding information and were therefore liable for damages to the Claimant. The Tribunal

further dismissed the Defendants' counterclaim, finding that there was no duty of confidentiality between the parties.

The Tribunal first confirmed its earlier Order dismissing the Defendants' application to stay proceedings pending criminal proceedings in France, holding that the issues at stake in each proceeding were fundamentally different and that there was no reason to consider that the outcome of the criminal proceedings might have an impact on the outcome of the arbitration.

The Tribunal held that the relief sought by the Claimant was admissible even though the Claimant had contributed the shares in the Luxembourg company to the capital of another company in the Claimant's group. The arbitrators held that by so doing Claimant did not waive its right to seek the annulment of the SPA. Also, there would be no practical obstacles to the performance of an award ordering the annulment of the SPA, considering that it would be within Claimant's power to take the necessary steps for such performance.

The Arbitral Tribunal then dismissed the Claimant's argument that the SPA was invalid on grounds of *dol* because the Defendant Group made misrepresentations or withheld information on material facts, with the intention of inducing the Claimant to enter into the SPA. The arbitrators first made a distinction between the “general risks” involving the conduct from Luxembourg of FPS activities in, particularly, France and the risks specific to the Luxembourg company (“the specific risks”). The former were well known at the time and a professional such as the Claimant could not ignore them. As to the latter, the Tribunal concluded that on the basis of the evidence on record, it was not proven that the Defendant Group's acts and omissions were motivated by an intent to deceive the Claimant.

Nor was the SPA invalid because of an *erreur* as to the value of the business of the Luxembourg company (rather than the value of the shares sold). Based on the evidence, the Arbitral Tribunal concluded that the Luxembourg company did not cease to be viable and that no convincing evidence was submitted that the Defendant Group's misrepresentations made the Claimant's project to make the Luxembourg company the hub of its operations in Europe no longer possible.

The arbitrators held however that the Defendants committed a *culpa in contrahendo* by breaching their duty to disclose material information in respect of the “specific risks” of the Luxembourg company during the pre-contract sale process. The tribunal reasoned that the “Claimant was in a position to figure out for itself that the conduct of FPS business in France entailed certain risks, but could not have discovered, during the sale process, that the French *Brigade de Recherches et d'Investigations Financières* (BRIF) (Financial Research and Investigation Brigade) had issued several requests relating to deposits to the Luxembourg company's account with the Bank and to certain practices of the Luxembourg company's brokers”. Although it was uncertain at the time whether the BRIF Demands would lead to a criminal investigation, the Defendant Group should have informed the Claimant of those Demands.

ICC Case No. 12502

In the recent ICC Case⁶³⁴ No. 12502 of 2009, in which there was one claimant and two respondents, the first Respondent negotiated the sale of Company X and Company M, two French companies of the Respondent Group (the Companies), to the Claimant, a French corporation ultimately controlled by a Swedish corporation (the Claimant's Swedish parent company). The Claimant's Swedish parent company and the First Respondent entered into Heads of Agreement stating their mutual intent to carry out the transaction and confirming their agreement on the basic conditions therefor. The Heads of Agreement provided for a due diligence of the Companies and stated that if no “legally binding agreement” were signed on date X, the Heads would have “no further impact on the parties”. The parties also expressed their intention that the transaction be governed by French law, but that Danish law apply specifically to the Heads of Agreement.

The Claimant's Swedish parent company sent an Enquiry List to the First Respondent requesting, inter alia, copies of all agreements limiting the business of

⁶³⁴ Final award in case no. 12502 in Albert Jan van den Berg (ed), Y. B. Comm. Arb. 2009 - Volume XXXIV, Kluwer Law International 2009, pp. 130 – 211.

the Companies and information on whether the Companies had violated any laws, regulations or permits. The due diligence took place over two months; Mr. H, managing director of Company X, had the task of collecting the necessary documents in respect of Company X.

At the conclusion of the due diligence, the First Respondent and the Claimant entered into a Share Purchase Agreement (SPA) for the sale of the shares in the Companies. The SPA explicitly superseded any prior agreement, established an Estimated Purchase Price and the manner in which the Final Purchase Price would be determined, and contained warranties by the First Respondent in respect of the Companies – inter alia, that they were not a party to anti-competitive practices. The warranties would remain valid for eighteen months after closing; the First Respondent would further indemnify the Claimant for the consequences of any procedure commenced against the Companies by a third party for a period of three years from the closing. The Claimant had the duty to notify the First Respondent in writing of any event giving rise to the implementation of these provisions within thirty days from the date when the relevant division manager of the Claimant became aware of such event. The SPA further provided that it was governed by French law but that its “legal binding effect” was governed by Swedish Law. It further contained a clause for ICC arbitration of disputes.

In a letter to the Claimant's Swedish parent company, the Second Respondent, another company in the Respondent Group and the direct parent company of the First Respondent, guaranteed the due performance of the SPA.

Approximately one month after closing, Mr. Z, the new chairman of the board of Company X, attended a meeting of a trade association of which Company X was a member. He allegedly discovered that beyond its ostensible purposes of promoting the sales of the relevant product and of gathering useful statistics regarding the markets, the trade association was also used as a tool to carry out anti-competitive practices prohibited under Art. 81 of the Treaty Establishing the European Community (EC Treaty), such as price-fixing and market sharing. Company X allegedly stopped engaging in anti-competitive practices immediately after Mr. Z attended the meeting. One month later, the Claimant's Swedish parent company paid

the final instalment on the purchase price of the Companies. Neither the Claimant nor the Claimant's Swedish parent company notified the Respondents of Mr. Z's findings.

Three years later, the EU Commission ordered Company X to undergo an investigation as to alleged anti-competitive practices and subsequently conducted an on-the-spot investigation (a “dawn raid”) at Company X's premises, seizing various documents. The Claimant submitted in the present arbitration that following the dawn raid it initiated an internal investigation and reached the conclusion that Company X had indeed participated, in at least three anti-competitive organizations during the period the First Respondent owned and controlled it.

The Claimant's Swedish parent company then informed the First Respondent of the existence of the EU Commission investigation and stated that it considered the First Respondent responsible for any possible consequences of that investigation pertaining to the period before the acquisition of Company X. The Second Respondent replied that the warranty period provided for in the SPA had expired, whereupon the Claimant commenced the present arbitration proceedings, seeking a declaration that the First Respondent and the Second Respondent were liable for the loss suffered by Company X and/or the Claimant as a consequence of any fines imposed or any other measures taken by the EU Commission.

While arbitration was pending, the EU Commission issued a Statement of Objections stating that it had found evidence of infringement of Art. 81 of the EC Treaty and indicating that it intended to render a decision finding that there had been such infringement and imposing fines. The EU Commission specified that, given the transfer of ownership of Company X from the Respondent Group to the Claimant Group, the First Respondent and the Second Respondent, on the one hand, and the Claimant's Swedish parent company and the Claimant, on the other, were jointly and severally liable with Company X.

By the present Final Award, the arbitrators dismissed the Claimant's request for a declaration of the Respondents' liability, holding that the First Respondent did not commit acts of deceit (*dol*) in order to induce the Claimant to enter into the contract,

and that although the First Respondent did breach its obligations under the warranties in the SPA, the Claimant's claim was time-barred.

The Arbitral Tribunal first held that it had *jurisdiction* over all claims, including claims for the alleged breach of the due diligence provision in the Heads of Agreement. The arbitrators found that the arbitration clause in the SPA, which referred broadly to all disputes “in connection with the contract”, encompassed all disputes concerning the negotiation and conclusion of the SPA, including the Heads of Agreement. It was irrelevant that the Heads of Agreement were between the First Respondent and the Claimant's Swedish parent company, whilst the SPA was entered into between the First Respondent and the Claimant: the parties specifically referred to the Heads of Agreement in the SPA – by providing that the latter superseded the former – so that the fact that one party was not the same, though belonging to the same group, was clearly immaterial to them.

B-6) Implied or Tacit Consent

Most legal systems recognize that a party's assent to contractual terms may be established by conduct⁶³⁵. If there is no evidence of an express agreement, courts and arbitral tribunals will often take into consideration the conduct of the party concerned as an expression of implied consent⁶³⁶ or, as a substitute for consent⁶³⁷. In most cases, however, the issue of conduct arises in relation to the role a party has played in the negotiation or performance of the agreement⁶³⁸.

⁶³⁵ Born, *Int. Comm. Arb.*, supra note 52, p. 666. *See, e.g.*, UNIDROIT, *Principles of International Commercial Contracts*, Art. 2.1.1 (2004) (“A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement”); U.N. Convention on Contracts for the International Sale of Goods, Art. 18(1); *Restatement (Second) Contracts* §§32, 45 (1981); Heinrichs, in O. Palandt, *Bürgerliches Gesetzbuch*, Introduction before §116, para 6 (66th ed. 2007) (actions implying consent can lead to formation of a contract); Samuel, supra note 601, p. 97 (tacit acceptance is sufficient for formation of ordinary contract in many jurisdictions) quoted in Born, *ibid*, p. 666, footnote 552.

⁶³⁶ Reference is sometimes made in the United States to “assumption”. *See* Lamm and Aqua, supra note 585, p. 88. According to G. Born a party's performance of its putative contractual obligations or acceptance of its counter-party's performance is often regarded as a basis for finding assent to a contract, or assumption of an existing contract and he gives the example of *Thomson-CSF, SA v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995) (“party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate”), *Ibid*, footnote 554.

⁶³⁷ Hanotiau, *Complex Arbitrations*, supra note 49, para 73.

⁶³⁸ *Ibid*, para. 74. *See, e.g.*, *DIC of Delaware, Inc. v. Tehran Redev. Corp.*, Award No. 176-255-3 (26 April 1985), 8 Iran-US C.T.R. 144, 160-162 (1985) (“it is widely accepted by municipal systems of law that one can prove the existence of an enforceable oral contract through evidence demonstrating part

In the context of groups of contracts and groups of companies that the issue of conduct as an expression of implied consent or as a substitute for consent is especially important. Unless the existence, in other contracts of the contractual chain, of a clause that is incompatible with the arbitration clause contained in the first contract, leads to the conclusion that there is no will of the parties to have all the disputes arising from the contractual relationship decided by one arbitral tribunal. Arbitrators will generally base their decision of this issue on the common intention of the parties to have their controversies brought together before – and decided together by – the same arbitral tribunal⁶³⁹. By way of illustration, in the first interim award in the Westland case⁶⁴⁰, the arbitral tribunal pointed out that:

everything depended on the intention expressed by the parties in the arbitration clause. It is necessary and therefore sufficient that, in principle, they wished to bind themselves for the arbitrators to have jurisdiction at the same time in respect of them all and for one of them to be able to initiate proceedings against all the others within one set of arbitration proceedings. It thus matters little that there are several arbitration clauses when their content shows that they make up a whole in the minds of the parties. Such are the circumstances of the present case ... The series of documents concluded constitute an indivisible whole and the four states thus truly demonstrated their desire to act together, by joining together under one name. The similarity of the clauses used in the various contracts can only serve to bear out this interpretation. It follows that the Tribunal is not merely competent as regards each of the states, AOI and ABH, but is justified in adjudicating upon their cases in one and the same award⁶⁴¹.

performance ... Such a principle must be taken to constitute a general principle of law"); *Judgment of 2 December 1982*, 1983 NJW 1267, 1268 (German Bundesgerichtshof) (contract affirmed through acceptance of other party's performance); *Judgment of 20 February 2001, Consmaremma – Consorzio tra produttori agricola v. Hermanos Escot Madrid SA*, XXVI Y.B. Comm. Arb. 858 (Spanish Tribunal Supremo) (2001) ("the silence or inactivity of a party with respect to an offer which directly or indirectly contains an arbitral clause has no effect, the Court's interpretation aims at ascertaining, from the communications and acts of the parties, whether they wished to include the arbitral clause in their contract ..."); *Athon v. Direct Merchs. Bank*, 2007 U.S. Dist. LEXIS 26841 (M.D. Ga. 2007) (agreement to arbitrate ratified by customer's use of credit card and continued payments over three years after the addition of the arbitration clause); *Irving R. Boody & Co. v. Win Holdings Int. Inc.*, 213 F.Supp.2d 378 (S.D.N.Y. 2002) ("ratification by failure to object ... serves as the equivalent of prior authorization"); *First Citizens Mun. Corp. v. Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp.*, 546 F.Supp. 884, 887 (N.D. Ga. 1982) ("Like any other contract, a contract containing an arbitration provision may be binding on the parties based upon their course of conduct.") quoted in Born, *supra* note 52, footnote 553.

⁶³⁹ Hanotiau, *ibid*, para. 75.

⁶⁴⁰ Interim Award of 5 March 1984 in ICC Case No. 3879 in Albert Jan van den Berg (ed), Y.B. Comm. Arb. 1986 - Volume XI, Kluwer Law International 1986, pp. 127 - 133

⁶⁴¹ Hanotiau, *supra* note 49, para. 75.

Several arbitral tribunals have invoked the existence of a community of obligations and interests among the parties to a group of contracts or among companies of a group that had all participated in the negotiation and performance of a project to decide that the arbitration clause included in some of the contracts could be opposed to all the parties or companies which had participated in the economic transaction through interrelated contracts⁶⁴².

For example, the existence of joint rights, obligations and interests was fundamental in the interim award on jurisdiction of an *ad hoc* arbitral tribunal dated 3 March 1999. In that case⁶⁴³, the question arose as to whether the arbitration clause contained in the agreement between the claimant and the first defendant also bound the second, third, and fourth defendants. After a very long and careful examination of the facts, the arbitral tribunal answered in the affirmative, finding that the claimant could not have regarded its relationship with first, second, third, and fourth defendants other than as a relationship with various members of a partnership with joint and several liability with respect to the claimant. Within the framework of this partnership or consortium, the first defendant most certainly acted as a legal entity, but was run and financed by the three other companies, which were the only companies that could be solvent and, moreover, had full control over the management of the first defendant⁶⁴⁴.

C) Consent on the Transfer of the Arbitration Agreement After M&A Transactions

The first problem of consent in M&A transactions is undoubtedly the situation of the arbitration clause arising after the merger and acquisition transactions. In the introduction, the author demonstrated that there are two types of merger. In the first scenario the companies A and B create a new company under the name C without

⁶⁴² See for example ICC award in case no. 2375 of 1975, 1, *Collection of ICC Arbitral Awards*, pp. 257, 259; Paris Court of Appeal, 1st Suppl. Ch., 31 Oct. 1989, 1992 *Rev. Arb.* 90 quoted in Hanotiau, *ibid*, para. 86.

⁶⁴³ See the commentary of M. De Boissésou, Joinder of Parties to Arbitral Proceedings: Two Contrasting Decisions, in ICC International Court of Arbitration Bull. Special Supplement 2003, p. 19 et seq. (hereinafter Boissésou, ICC Bulletin 2003).

⁶⁴⁴ Hanotiau, *Complex Arbitrations*, *supra* note 49, para. 87.

dissolving. In the second scenario A and B cease to exist and they establish a new company C. In both scenarios, when A and B, both parties to a contract which contains an arbitration clause, transfer their rights and/or obligations to another person (Company C); the question arises as to whether the transferee will be bound by the arbitration clause contained in the previous main contract and under which conditions. There are many possible ways of transferring rights and obligations, such as assignment of a right or a contract, universal succession, subrogation⁶⁴⁵, novation⁶⁴⁶ etc.

Merger and acquisition transactions are considered an example of “universal succession”⁶⁴⁷ or “universal transfer”⁶⁴⁸ in many books. Therefore, the author will focus more on the concepts of assignment (B-1) and succession (B-2). The author believes that even if that the forms and particulars of these legal constructs may vary in different jurisdictions and may be known under different names; in all cases, the transferee, i.e. a person that was not originally a party to the transfer contract, assumes the substantive claims, rights, and obligations of the transferor. Accordingly, from the view of arbitration two crucial questions arise. The first is whether the original contract signed before the establishment of the new company (Company C) will still be valid after the merger and/or acquisition; the second is whether an arbitration claim can be brought by or against the transferee, notwithstanding the fact that the transferee will not typically appear in the arbitration clause originally concluded between the transferors.

Our analysis will start with the assignment of arbitration clauses, but it applies *mutatis mutandis* to succession, subrogation, and other forms of transfer.

⁶⁴⁵ This frequently occurs in the case of insurers, who are subrogated to the rights of insureds. In these circumstances, the insurer is typically entitled to invoke (and is bound by) the arbitration provisions of the insured's underlying contract (from which the subrogated rights arise) quoted in Born, *supra* note 50, pp.1192-1193 and see the examples cited in footnote 267. In France it is considered that if the subrogation takes place in the course of the arbitral proceedings, it is effective immediately and entails the transfer of the procedural contract which constitutes the terms of reference. Technically, there is no “intervention” of the subrogated party in the proceedings. The transferee of the action acquires the procedural position of the transferor.

⁶⁴⁶ Novation is a term known to common law jurisdictions in particular, and refers to a mutual agreement among all concerned parties to substitute a new contract in place of a valid existing agreement quoted in Brekoulakis, para. 2.13, footnote 7. Therefore examination will be focused to assignment and succession.

⁶⁴⁷ See e.g., Brekoulakis, *supra* note 56, p. 28.

⁶⁴⁸ See e.g., Hanotiau, *Complex Arbitrations*, *supra* note 49, p. 18.

C-1) Assignment

International commerce and trade require that contractual rights and choses in action be capable of assignment⁶⁴⁹. Some early judicial decisions suggested that arbitration agreements were not capable of being transferred, apparently on the theory that they were “personal” obligations, which were specific to and binding upon only the original parties⁶⁵⁰. These decisions have been superseded, and it is now almost universally accepted that parties have the contractual autonomy to transfer or assign arbitration agreements, just as they have the power to assign or transfer other types of contracts⁶⁵¹. Again, the touchstone in such cases should be the intention of the parties, both in the original agreement and in the assignment⁶⁵².

The effect of an assignment of a contract with an arbitration clause contained therein will be determined principally by reference to the law governing the assignment in question, as well as the law governing the arbitration agreement. If the arbitration agreement is assignable under the relevant laws, there will be a further question as to the particular form, if any, which the assignment must take. This requirement must not be confused with the writing requirement that applies to the arbitration agreement itself⁶⁵³.

In principle, an assignment of a contract should have the effect of conveying the arbitration clause associated with the contract, as one associated part of the parties' agreement, to the assignee, at least, absent some sort of contractual or legal prohibition that renders the assignment ineffective⁶⁵⁴. In practice, it is seldom the

⁶⁴⁹ Stephen Jagusch and Anthony Sinclair, *The Impact of Third Parties on International Arbitration – Issues of Assignment*, in *Pervasive Problems in International Arbitration* (Kluwer, 2006), para. 15-1 (hereinafter Jagusch, Sinclair, *Impact of Third Parties*). See also VV. Veeder, *Towards a Possible Solution: limitation, Interest and Assignment in London and Paris*, in Albert Jan Van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable to Arbitration*, ICCA Congress Series No. 7, Kluwer Law International, 1996, p. 268.

⁶⁵⁰ *E.g.*, *Cotton Club Estates Ltd v. Woodside Estates Co.* [1928] 2 K.B. 463 (K.B.) at 465: “Arbitration is a personal covenant between the contracting parties, and provides as to the manner in which the debt is ascertained” quoted in Brekoulakis, *supra* note 56, p. 29, footnote 1.

⁶⁵¹ See Girsberger & Hausmaninger, *Assignment of Rights and Agreement to Arbitrate*, 8 Arb. Int. 121 (1992).

⁶⁵² Born, *Int. Comm. Arb.*, *supra* note 52, p. 1188.

⁶⁵³ Redfern and Hunter, *supra* note 49, para. 2.47.

⁶⁵⁴ Born, *Int. Comm. Arb.*, *supra* note 52, p. 1188, D. Girsberger: *The Law Applicable to the Assignments of Claims subject to an Arbitration Agreement*” in F. Ferrari and S Kröll (eds), *Conflict of Laws in International Arbitration*, 2010, p. 384; Lew, Mistelis, Kröll, *supra* note 308, para. 7-52. See, *e.g.*, *Judgment of 15 October 1997, MS “EMJA” Braack Schiffahrts KG v. Wartsila Diesel Aktiebolag*, XXIV Y.B. Comm. Arb. 317 (Swedish S.Ct.) (1999) (assignee is bound by arbitration clause, provided it

case that an arbitration agreement is entered into *intuitu personae*. The contemporary assumption is that the mere presence of an arbitration clause in a contract does not presume it to be a personal covenant incapable of being assigned⁶⁵⁵, and an arbitration agreement is not so presumed⁶⁵⁶. On the contrary, there is now a presumption that an arbitration agreement may be assigned, and that assignees validly take the benefit of it⁶⁵⁷.

Indeed, under French law, there is a presumption of “automatic” assignment of the arbitration clause together with the underlying contract⁶⁵⁸. Similarly, in the United States, most courts have held that, when a contract is transferred from one party to another entity, the arbitration clause passes along with the underlying contract⁶⁵⁹.

“knew or should have known of the clause”); *Donel Corp. v. Kosher Overseers Ass'n of Am.*, 2001 WL 228364, at *3 (S.D.N.Y. 2001) (assignee of contract may invoke arbitration clause in contract); *Cedrela Transp. Ltd v. Banque Cantonale Vaudoise*, 67 F.Supp.2d 353, 355 (S.D.N.Y. 1999) (assignee of contract may invoke arbitration clause in contract); *Shayler v. Woolf* [1946] Ch. 320 (English Court of Appeal); *Schiffahrtsgesellschaft Detlev von Appen GmbH v. Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep. 279 (English Court of Appeal); *Partial Award in ICC Case No. 6000*, discussed in Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration, 289 Recueil des Cours 9, 2001, p. 127 (hereinafter H.G. Naón: Choice of Law) (could not be ... denied that assignment of underlying contract entailed assignment of arbitration clause); *Award in ICC Case No. 9801*, in H.G. Naón, Choice of Law (“an arbitration clause must be considered an ancillary right (*Nebenrecht*) to the assigned principal rights which ... follow the assigned rights”) quoted in Born, *ibid*, footnote 247.

⁶⁵⁵ Hugh Beale (gen. ed) Chitty on Contracts: Vol 1: General Principles (29th Ed.), Sweet & Maxwell, 2004 para. 19-054; Michael Mustill & Stewart Boyd, Commercial Arbitration, 2nd ed., Butterworths, 1989, p. 137; Fouchard, Gaillard, Goldman, *supra* note 49, paras. 716-717.

⁶⁵⁶ See *Cottage Club Estates Ltd. V. Woodside Estates Co. (Amersham) Ltd* (1928) 2 KB 463; Russell on Arbitration, 23rd Edition, para. 3-019.

⁶⁵⁷ Jagusch and Anthony Sinclair, Impact of Third Parties, *supra* note 650, para. 15-14, Fouchard, Gaillard and Goldman, *supra* note 49, paras. 716-717.

⁶⁵⁸ Fouchard, Gaillard, Goldman, *supra* note 49, para. 716. See also *Award in ICC Case No. 7154*, 121 J.D.I. (Clunet) 1059 (1994), Note, Derains. According to Redfern and Hunter traditionally French law required explicit consent to transfer the arbitration agreement on assignment of the main contract (Arts 1166 and 1275 of the *Code Civil* make a distinction between perfect and imperfect novation, of which only the former discharges the original debtor of its obligations, but requires the original creditor's consent to that effect). However, recent case law has confirmed the principle of automatic assignment of the arbitration agreement with the main contract in both domestic and international contracts: Cass. Civ. 1^{ere} 27 March 2007, *Sté Alcatel Business Systems et Alcatel Micro Electronics c/v and others*, Bull Civ I, No 129; JDI No 3 July 2007, comm 18, *ibid*, footnote 84.

⁶⁵⁹ Courts have reached this position applying general principles of the law of assignment. See, e.g., *Asset Allocation and Mgt Co. v. Western Employers Ins. Co.*, 892 F.2d 566, 574 (7th Cir. 1989) (arbitration agreement may be invoked against assignee); *Lipman v. Haeuser Shellac Co.*, 289 N.Y. 76, 81 (N.Y. 1942); *S & L Vending Corp. v. 52 Thompkins Ave. Restaurant, Inc.*, 274 N.Y.S.2d 697 (N.Y. App. Div. 1966); *Star-Kist Foods, Inc. v. Diakan Hope, SA*, 423 F.Supp. 1220, 1222-23 (C.D. Cal. 1976). See also Annotation, *Arbitration Provisions of Contract as Available to or against Assignees*, 142 A.L.R. 1092 (1943); 6 Am.Jur.2d Associations and Clubs §119 (1963); A. Corbin, 4 *Corbin on Contracts* §892 (1951 & Supp. 1991); G. Wilner, *Domke on Commercial Arbitration* §13.3 (3d ed. & Update 2006).

Especially New York law adopts this general presumption, albeit with certain limited exceptions⁶⁶⁰. The same is generally true in civil law jurisdictions⁶⁶¹, including Switzerland, where recent decisions of the Swiss Federal Tribunal have confirmed that a valid assignment of the underlying contract automatically transfers the arbitration agreement⁶⁶². A similar position has been taken in Japan, India, Sweden⁶⁶³, Germany and Greece, as well as by international tribunals⁶⁶⁴. As one authority explains, with reference to German law:

*“when a person becomes the holder of a general or a limited share in a partnership which had already been organized before he joined it, he will be bound by an ‘intra-partnership’ agreement which had been attached to the original partnership contract before he joined the partnership. It is wholly irrelevant whether he acquired a general or a limited share. It also does not matter on which legal basis his entry into the partnership rests: on a statutory succession (for example, as an heir, a receiver, or a liquidator), or upon a corporate transaction (for example, as a purchaser or a donee).”*⁶⁶⁵

⁶⁶⁰ See Redfern, Hunter, *supra* note 49, para. 2.48. There was a common law principle in New York law that arbitration was an ‘obligation’ not assumed by an assignee of a contract (see *United States v Panhandle Eastern Corp. et al*, 672 FSupp 149 (D Del 1987) and *Gruntal & Co, Inc v Ronald Steinberg, et al*, 854 FSupp 324 (DNJ 1994) and *Lachmar v Trunkline LNG Co*, 753 F2d 8 at 9–10 (2nd Cir 1985); but see *Banque de Paris v Amoco Oil*, 573 FSupp 1465 at 1472 (SDNY 1983)). However, according to *GMAC Commer Credit LLC v Springs Indus* 171 FSupp 2d 209; 2001 US Dist LEXIS 5152; 44 UCC Rep Serv 2d, this principle was superseded by New York's adoption of the UCC provisions 9-318 in 1964 (now 9-404 after UCC was revised in 2000). In *GMAC Commer Credit LLC v Springs Indus*, the Court held that ‘the adoption of the Article 9 of the U.C.C. means that a finance assignee suing on an assigned contract is bound by that contract's arbitration clause unless it secured a waiver from the signatory seeking to arbitrate’, *Ibid*, footnote 85.

⁶⁶¹ See Girsberger, Hausmaninger, *supra* note 652 ; Craig, Park, Paulsson, *supra* note 475, para.11.05 (“in the absence of clear proof of contrary intent, it should be presumed that assignees of contract rights will enjoy the benefits and burdens of the arbitration clause”); *Judgment of 2 October 1997*, 1998 NJW 371 (German Bundesgerichtshof) (assignment of contractual right presumptively implies assignment of a related arbitration clause).

⁶⁶² See *Judgment of 9 May 2001*, 20 ASA Bull. 80 (Swiss Federal Tribunal) (2002). See also *Judgment of 7 August 2001*, 20 ASA Bull. 88 (Swiss Federal Tribunal) (2002).

⁶⁶³ Redfern, Hunter, *supra* note 49, para. 2.48. According to the authors the Swedish Supreme Court appears to have adopted a middle position, namely that an arbitration clause will be presumed to be assignable if the parties have not expressly agreed otherwise, but once assigned it will operate *vis-à-vis* the assignee only if that party has actual or constructive knowledge of the arbitration clause. See the decision of the Supreme Court of Sweden on 15 October 1997, *Ms Emja Braack Shiffahrts KG v Wärtsilä Diesel AB* [1998] also commented by Anne-Cécile Hansson Lecoanet and Sigvard Jarvin, in *Revue de l'Arbitrage*, 1998, Issue 2, pp. 434 – 438.

⁶⁶⁴ See Lew, Mistelis, Kröll, *supra* note 333, para. 7-52.

⁶⁶⁵ Otto Sandrock, “Intra” and “Extra-Entity” Agreements to Arbitrate and Their Extension to Non-Signatories under German Law, 19 J. Int. Arb. 423 (2002) (hereinafter Sandrock, Intra and Extra Entity). German courts have recognized the application of an arbitration clause to the (general) partners of the partnership that signed it, see *Judgment of 12 November 1990*, 1991 NJW-RR 423, 424 (German Bundesgerichtshof) quoted in Born, Int. Comm. Arb., *supra* note 52, p. 1225.

Nonetheless, in some jurisdictions, the autonomous nature of the agreement to arbitrate is occasionally asserted as a reason why the arbitration clause should not be transferred automatically with the underlying contract⁶⁶⁶. In England, although some authorities support the position that the arbitration clause is transferred automatically with the underlying contract, other authorities suggest that an agreement to arbitrate is not automatically transferred⁶⁶⁷.

Two main arguments are usually suggested against the rule of automatic transfer of arbitration clauses. First it is argued that the rule of automatic transfer violates the principles of separability and “autonomy of arbitration agreements”, and it undermines the independent status of the arbitration agreement from the main contract⁶⁶⁸. For instance the Moscow District Court in the Aero Imp. Case held that:

*“However, if the assignment of the rights from the agreement is recognized valid, this cannot be extended to the arbitration clause. Based on the principle of autonomy of the arbitration clause, according to which an arbitration clause that forms part of a contract shall be considered as a procedural agreement independent of other terms of the contract, assignment of rights from the arbitration agreement is to be formulated especially by written agreement or by conclusion of a new arbitration agreement with Aeroimp”*⁶⁶⁹.

This argument should be resisted by reason of the principle of separability (which should be understood more as a legal fiction than as an inflexible legal construct) which has little relevance in the case of transfer⁶⁷⁰. The transferee substitutes the transferor and assumes its legal position all together and in exactly the same terms. In cases where these terms include an arbitration clause, the transferee will necessarily

⁶⁶⁶ See Award in ICC Case No. 7050, in H. G. Naón, Choice of Law, supra note 655, p. 144. See also The Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, award in case no 109/1980, 9 July 1984, *All-Union Foreign Trade Association “Sojuznefteexport” (USSR) v Joc Oil Ltd (Bermuda)*, XVIII Y. B. Comm. Arb., 92 (1993) para 17. For further US cases see Girsberger, Hausmaninger, supra note 652, p. 124 referring to *Kaufman v William Iselin & Co, Inc* 143 NE 780 and *Lachmar v Trunklin LNG Co*, 753 F 2d 8 (CA 2d Cir, 1985).

⁶⁶⁷ Born, Int. Comm. Arb., supra note 52, p. 1189. Compare *Shayler v. Woolf* [1946] Ch. 320 (English Court of Appeal) (arbitration clause is transferred automatically and thus binds the assignee) and *Cottage Club Estates v. Woodside Estates Co.* [1928] 2 K.B. 463, 466 (K.B.) (assignment did not transfer to the assignee any right in an arbitration clause because the arbitration clause was a separate “personal covenant”). See Robert Merkin, Arbitration Law, paras. 3.37 to 3.47 (2004 & Update 2007).

⁶⁶⁸ Brekoulakis, supra note 56, para. 2.19.

⁶⁶⁹ *Imp. Goup (Cyprus) Ltd. V. Aeroimp (Russian Fed.)* Moscow District Court, IV 21, 1997, Y. B. Comm. Arb., 1998, p. 745.

⁶⁷⁰ D. Girsberger, supra note 655, p. 390.

be bound by it as well⁶⁷¹. The arbitration clause is in effect attached to the assigned substantive right or claim of the transferor⁶⁷², as it constitutes the procedural mechanism whereby the substantive rights of the contract will be enforced in case of default of a party⁶⁷³.

The second argument against the automatic transfer of an arbitration clause is based on the view that an arbitration agreement not only provides for rights; it equally provides for obligations, including, for example, the obligation to refrain from initiating court proceedings⁶⁷⁴. Accordingly, when courts or tribunals look into the transfer of the benefit to arbitrate and the transfer of the burden to arbitrate, and examine each question separately⁶⁷⁵.

However, it will not be fair or equitable to apply standards to determine whether the assignee can compel the debtor to arbitrate different from the standards to determine whether the debtor can compel the assignee to arbitrate⁶⁷⁶.

Without delving into complex choice of law issues beyond the scope of this chapter, in principle two laws are most relevant to determine the effect of any assignment of a contract containing an arbitration clause: the law governing the assignment itself, and the law governing the arbitration agreement (which will typically be the proper law of the main contract)⁶⁷⁷. The law governing the arbitration agreement determines the assignability of the agreement; the conditions to which the assignment is subject, and the consequences of the assignment, at least as far as relations between the assignor and its initial co-contractor are concerned... By contrast, relations between the

⁶⁷¹ See the case of Court de Cassation, 5 January 1999, *Banque Worms v. Bellot*, Rev. Arb, 2000, Issue 6. (“La clause d’arbitrage international valable par le seul effet de la volonté des contractants, est transmise au cessionnaire avec la créance, telle que cette créance existe dans les rapports entre le cédant et le débiteur cédé”). See Brekoulakis, *supra* note 56, para. 2.19.

⁶⁷² Brekoulakis, *ibid*, para. 2.21. See also D. Girsberger, *supra* note 630, p. 383, P. Delebecque, *La Transmission de la Clause Compromissoire*, Rev. Arb. 1991, p. 19 et seq.; Cour d’appel de Paris, 10 September 2003, Rev. Arb. 2004, p. 623.

⁶⁷³ Brekoulakis, *supra* note 56, para. 2.21. See also Born, *Int. Comm. Arb.*, *supra* note 52, p. 396.

⁶⁷⁴ Brekoulakis, *ibid*, para. 2.23. D. Girsberger, *supra* note 630, p. 385.

⁶⁷⁵ Brekoulakis, *ibid*, para. 2.24. See A. Sinclair, *The Assignment of Arbitration Agreements*, in E Gaillard and D Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards : The New York Convention in Practice*, 2008, p. 382 (hereinafter Sinclair, *Assignment*).

⁶⁷⁶ See Fouchard, Gaillard, Goldman, *supra* note 49, para. 712.

⁶⁷⁷ Redfern, Hunter, *supra* note 49, para. 2.47.

assignor and assignee are governed by the law chosen by the parties for that purpose⁶⁷⁸.

Particularly in common law jurisdictions, close attention is paid to the wording and intention of the original arbitration clause and the subsequent assignment contract, to determine whether the parties intended to assign the arbitration clause⁶⁷⁹. If the assignment agreement excluded the arbitration clause, then this will ordinarily be sufficient to prevent the assignee from becoming a party to that clause⁶⁸⁰. Non-assignment clauses in relation to the substantive right are often considered to exclude any assignment of the arbitration agreement. An exclusion may exist where the agreement to arbitrate is entered into on the basis of a special personal relationship. Furthermore the assignment should not lead to a deterioration of the original debtors' position. That would be the case, for example, where due to the financial situation of the assignee, the reimbursement for costs may be endangered⁶⁸¹. There may also be circumstances in which assignment of an arbitration clause produces results inconsistent with the parties' intentions (*i.e.*, a U.S. company agrees to arbitrate under CIETAC Rules in China with a German company, and then one of the parties purportedly assigns the agreement to a Chinese state-owned entity)⁶⁸².

An automatic transfer may also be excluded when the assignment takes place while arbitration proceedings are already pending. Under English law, for example, the assignee does not automatically become a party to those proceedings; a notification

⁶⁷⁸ Fouchard, Gaillard, Goldman, *supra* note 49, para. 698.

⁶⁷⁹ See, *e.g.*, *Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir. 1993); *Spray Holdings Ltd v. Pali Fin. Group, Inc.*, 269 F.Supp.2d 356 (S.D.N.Y. 2003); *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F.Supp. 1464 (S.D.N.Y. 1983); *Instituto Cubano v. The MV Driller*, 148 F.Supp. 739 (S.D.N.Y. 1957); *In re Application of Reconstr. Fin. Corp.*, 106 F.Supp. 358 (S.D.N.Y. 1952); R. Merkin, *supra* note 643, para. 3.37 to 3.47 (2004 & Update 2007).

⁶⁸⁰ See, *e.g.*, *Lachmar v. Trunkline LNG Co.*, 753 F.2d 8 (2d Cir. 1988) (assignee not bound by arbitration clause because assignment agreement excluded it); *United States v. Panhandle Eastern Corp.*, 672 F.Supp. 149 (D. Del. 1987) (same). There might be circumstances in which the effort to exclude the arbitration clause from the assigned contract would vitiate the assignment altogether, as an impermissible effort to abrogate the arbitration clause or alter a material term of the underlying contract. See also Brekoluakis, *supra* note 56, para. 2.25.

⁶⁸¹ Lew, Mistelis, Kröll, *supra* note 308, para. 7.55. See, *e.g.*, Swiss Tribunal Fédéral, 9 April 1991, 8(2) *J Int. Arb* 21 (1991); Tribunal Fédéral, 16 October 2001, *Société X v Société O*, ATF 128 III 50; *United States v Panhandle Eastern Corp*, 672 F Supp 149 (D Del 1987): assignee not deemed to be bound to the arbitration clause because the assignment contract excluded any transfer of obligations to the assignee; see for English law *Bawejem Ltd v MC Fabrications* [1999] 1 All ER (Comm) 377. See also Fouchard, Gaillard, Goldman, *supra* note 49, para. 716.

⁶⁸² Born, *Int. Comm. Arb.*, *supra* note 52, p. 1190; Fouchard, Gaillard, Goldman, *ibid*, para. 721.

to the other party and the arbitrators is required⁶⁸³. This may be of particular importance where the original party no longer exists. If the necessary notifications are not made in time, the tribunal may lose jurisdiction as one of the parties has been dissolved. Any award rendered in such a situation will be null and void⁶⁸⁴. An English Judgment involving a French Company introduced a GAFTA arbitration in London against a Swiss Company, and some months later, split among two new companies, which took over the assets and liabilities of the initial company, which was subsequently liquidated while the arbitration was still pending. One of the companies which succeeded it attempted to continue with the arbitration. The Court of Appeal recognised that the company which had succeeded the claimant and was referred to as the “assignee” was entitled to avail itself of the arbitration agreement, either by initiating a new arbitration or intervening in the arbitration already pending, but under the double condition that the assignment be notified to the arbitrators and the adverse party and that the assignee intervene formally in the arbitral proceedings; neither condition was fulfilled in the case at hand⁶⁸⁵. This judgment does not invalidate the rule that an arbitration agreement may be transferred to an assignee or, more precisely, to the successor of the company⁶⁸⁶.

Exclusion of assignment of an arbitration clause can be either express or implied. The extent to which the assignor remains bound by the arbitration agreement is primarily an issue of interpreting the arbitration agreement. On the basis of an arbitration agreement contained in the shareholders' agreement arbitration proceedings could be initiated against a shareholder who had left the company, where the dispute related to a breach of contract in connection with leaving the company⁶⁸⁷.

⁶⁸³ Robert Merkin, *supra* note 668, para 2-33, 2-37; *Montedipe SpA v JTP-RO Jugotantier* [1990] 2 Lloyd's Rep 11; *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd, The Smaro* [1999] 1 Lloyd's Rep 225, 241-243; *Baytur SA v Finagro Holdings SA* [1992] QB 610.

⁶⁸⁴ Lew, Mistelis, Kröll, *supra* note 333, para. 7.56.

⁶⁸⁵ *Baytur SA v Finagro Holdings SA* [1992] QB 610 summarised by Poudret, Besson, *supra* note 55, para. 290.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ Lew, Mistelis, Kröll, *supra* note 333, para. 7.57. See German Bundesgerichtshof, 1 August 2002, III ZB 66/01; *American Renaissance Lines v Saxis* 502 F 2d 674 (CA21974) and *Bel-Ray Co. v Chemrite Ltd* 181 F 3d 435 (3d Cir 1999).

If an assignment of an arbitration clause is validly effected, then the assignee will have rights (and obligations) under the clause. In addition, the original assignor may also retain such rights (either as to pre-assignment events or generally, depending on the terms of the assignment and any restrictions on assignability)⁶⁸⁸.

As with other non-signatory theories, questions of assignment give rise to choice-of-law issues. Commentators have noted the lack of uniform rules concerning the assignment of arbitration agreements⁶⁸⁹. In the absence of applicable international rules, arbitrators and commentators have tended to look to domestic legal regimes for a solution⁶⁹⁰.

There is also a lack of uniformity between national legal systems as to which law should determine whether an arbitration agreement has been validly assigned. In some jurisdictions, the question is treated as a procedural matter to be determined by the law of the arbitral seat⁶⁹¹. In other jurisdictions, the substantive law that governs the underlying contract has been applied to determine issues of assignability⁶⁹². As in other contexts, the better view is that the validation principle should apply to the assignability of the arbitration clause, upholding the assignment if that is the result under either the law governing the assignment agreement or the arbitration agreement⁶⁹³.

⁶⁸⁸ Ibid. See, e.g., *Award in ICC Case No. 2626*, 105 J.D.I. (Clunet) 980 (1978) (arbitration clause generally binds assignees and successors, except where agreement forbids assignment); *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435 (3d Cir. 1999) (compelling arbitration against both assignor and assignee).

⁶⁸⁹ See Mantilla-Serrano, *International Arbitration and Insolvency Proceedings*, 11 Arb. Int. 67 (1995).

As with other non-signatory issues, international arbitration conventions (including the New York Convention and the European Convention) do not expressly address the issue of the transfer of the arbitration agreement. The rules of leading arbitral institutions such as the ICC and LCIA do not expressly address issues of assignment. Some commentators have nonetheless sought to infer from Articles 7 and 8 of the ICC Rules a general principle that an arbitration clause cannot bind the assignee without his express consent. See Girsberger, Hausmaninger, *supra* note 786, p. 121. This is unconvincing and the issue is better left to generally-applicable contract law principles. See also Fouchard, Gaillard, Goldman, *supra* note 49, para 693 et seq.

⁶⁹⁰ Born, Int. Comm. Arb., *supra* note 52, p. 1192.

⁶⁹¹ See *Judgment of 30 January 1957*, BGHZ 23, 198, 200 (German Bundesgerichtshof) (characterizing the arbitration agreement as “a contract of substantive law governing procedural relations”).

⁶⁹² See, e.g., *Apollo Computer v. Berg*, 886 F.2d 469, 472 (1st Cir. 1989); *Final Award in ICC Case No. 1704*, 105 J.D.I. (Clunet) 981 (1978) (assignment of arbitration agreement valid under French law); *Award in ICC Case No. 2626*, 105 J.D.I. (Clunet) 980 (1978) (assignee bound by arbitration agreement concluded between the parties under governing German law).

⁶⁹³ Born, Int. Comm. Arb., *supra* note 52, p. 1192.

The validity of the assignment in M&A transactions may be more complicated depending on the intention of the parties. The complexity has appeared in a recent ICC case that will be studied in detail.

ICC Case No. 12745⁶⁹⁴

Mr. X – who was not a party to this arbitration but whose activities largely determined the relations between the parties – founded and managed an Italian company that bought advertising slots under “supplier agreements” and sold them to customers wanting to advertise. The by-laws of the company provided that Mr. X had a pre-emption right.

Company Z International SA (First Respondent) – a non-Italian company jointly owned by Company Z SA and a wholly owned subsidiary of Company W SA (Second Respondent) – entered the relevant Italian advertising market by (i) incorporating a wholly owned subsidiary under the name Company Z Italia srl and (ii) acquiring an interest in Mr. X's company. Mr. X's company was renamed Company Z Italia SpA; First Respondent held 51 percent of its shares, while Mr. X, who was also the company's managing director, held 49 percent.

The First Respondent and Mr. X entered into a Memorandum of Understanding (MoU) in respect of the sale. The MoU provided, inter alia, that Mr. X could oppose the first candidate chosen by the First Respondent for the position of managing director, if the First Respondent were obliged to revoke Mr. X for good cause; if Mr. X also opposed a second candidate and that candidate was appointed, then Mr. X would have the right to sell his interest in the company to the First Respondent (the Put Option). Also, the parties undertook not to sell their shares to a third party (with the exception of an affiliate company of the First Respondent) for a period of five years.

The First Respondent subsequently entered into negotiations with Company ABC (Claimant) – a joint venture owned in equal parts by Company DEF and Company

⁶⁹⁴ Final award in case no. 12745 in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2010 - Volume XXXV, Kluwer Law International 2010, pp. 40 – 128.

GHI – for the sale of the First Respondent's subsidiaries, including Company Z Italia SpA. During the negotiations, which involved the subsidiaries, Mr. X expressly mentioned his pre-emption right and the commitment of Company Z Italia SpA's shareholders not to sell their shares for five years. Mr. X also pointed out the worrying financial situation of Company Z Italia SpA. (In Italy, the relevant advertising business is characterized by a high need of working capital.)

The Claimant and the First Respondent eventually reached an agreement for the sale. The First Respondent would incorporate a new holding company (Holdco or the Holding) to which it would contribute all shares. The First Respondent would then transfer the shares in the Holding to the Claimant on a certain date, date B (the Closing Date).

In preparation for the sale, the First Respondent entered into an agreement (*Accordo*) with Mr. X. The *Accordo* provided, inter alia, that Mr. X waived his pre-emption right on the condition that: (i) the Holding replace the First Respondent as party to the MoU as of the date (*a far data*) of the transfer of the First Respondent's participation in Company Z Italia SpA (the Participation) to the Holding; (ii) the Holding sell the shares in Company Z Italia SpA to a purchaser selected exclusively among Company GHI, Company DEF, the Claimant or any of their parent companies, subsidiaries or affiliates; (iii) the sale and purchase agreement between the Holding and the selected purchaser be signed not later than date B. The *Accordo* also provided that First Respondent grant to Company Z Italia SpA a temporary advance of € 3.5 million, to be paid according to an agreed schedule. The *Accordo* was to be no longer effective if it was not signed and received by the Parties within a certain date (date A) preceding date B.

Shortly after the *Accordo* was signed, the Claimant entered into a Share Purchase Agreement (SPA) with the First Respondent and its parent companies, the Second Respondent and Company Z SA (collectively, the Respondents) for the sale of the

First Respondent's subsidiaries. Clause 12.10 of the SPA provided for arbitration of disputes by an ICC arbitral tribunal in Paris⁶⁹⁵.

As agreed among the parties, the First Respondent incorporated the Holding and then entered into several share purchase agreements with it in respect of the shares in the First Respondent's subsidiaries. A share purchase agreement was also concluded, relevantly, in respect of the First Respondent's 100 percent interest in Company Z Italia srl and the First Respondent's Participation in Company Z Italia SpA (the Holding/First Respondent SPA). The Holding/First Respondent SPA provided that title to the shares had to pass to the Holding on date B-2 at the latest. The First Respondent warranted that Mr. X's pre-emption right had been waived by the *Accordo*.

The Participation was transferred to the Holding under the Holding/First Respondent SPA by an act certified by a notary public in [an Italian city]. In the meantime, the First Respondent paid the temporary advances under the *Accordo* to Company Z Italia SpA.

Closing under the SPA (transfer of the shares in the Holding to the Claimant) took place on date B+10.

Following the Closing, Mr. X – who was still Company Z Italia SpA's managing director – showed a marked unwillingness to work with and under the new shareholder and took several steps that allegedly worsened Company Z Italia SpA's

⁶⁹⁵ The clause read: “All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) of Paris, which Rules are deemed to be incorporated by reference into this Clause. The seat for the arbitration proceedings shall be Paris (France). The arbitration shall be conducted in the English language, and the Parties agree that no translation shall be needed for the use of documents in French or for the use of French law materials. The arbitration award shall be written in English. The tribunal shall be comprised of three arbitrators appointed as follows:

- (i) if the dispute is between two Parties whatsoever, each of those Parties shall appoint an arbitrator and the two arbitrators so appointed shall agree to appoint a third arbitrator who will act as chairman of the arbitration tribunal. In the event that one of the Parties falls to appoint an arbitrator or in case of disagreement between the two arbitrators on the choice of a third arbitrator, such appointment shall be made by the International Court of Arbitration of the ICC.
- (ii) if the dispute in question is between more than two Parties, the three arbitrators shall be appointed pursuant to the provisions of the Arbitration Rules of the International Chamber of Commerce applicable in case of multiple parties.”

financial situation. Inter alia, he terminated commercial agency contracts with several agents and outsourced part of the company's activity to Company J srl, an Italian company held by one of Company Z Italia SpA's former employees. Company J srl was appointed exclusive commercial agent to sell advertising space in the name of Company Z Italia SpA; it later appeared that Company J srl, while receiving an agent's fee, did not retrocede the amounts billed to and paid by the customers to Company Z Italia SpA. Company Z Italia SpA was thus emptied of all its assets and de facto liquidated, its business being, according to the Claimant, taken over by a company constituted by former employees of Company Z Italia SpA, in particular the same employee behind Italian Company J srl.

Mr X. also claimed that he had not renounced his pre-emption right as one of the three conditions under the *Accordo* – that the Holding succeed the First Respondent as a party to the MoU before the date on which the shares in Company Z Italia SpA were transferred to the Holding – had not been met. He therefore commenced an action against the First Respondent, the Holding and Company Z Italia SpA in an Italian court, seeking an order declaring that the sale of the First Respondent's interest in Company Z Italia SpA was ineffective. His request was denied, whereupon Mr. X appealed. This proceeding was pending before an Italian appellate court at the time of the present award.

Mr. X's claim was the source of the dispute that arose between the Claimant and the Respondents and led to the present ICC arbitration and award. When the Claimant became aware of Mr. X's claim, it notified the Second Respondent – in its capacity of agent for the guarantors (that is, the Second Respondent itself, Company Z SA and the First Respondent) – that the Holding had a claim against them for several breaches of the SPA, in particular, a breach of the representation and warranty that the First Respondent had the exclusive ownership of the shares in the First Respondent's subsidiaries, including Company Z Italia SpA.

The Claimant then commenced ICC arbitration against the Respondents as provided for in the SPA. (Mr. X was not a party to the arbitration). The Claimant asked the arbitral tribunal to rule that the First Respondent: (i) failed to deliver to the Claimant (through the Holding) effective control over Company Z Italia SpA; (ii) breached its obligation to warrant the purchaser a peaceful possession of the shares of Company Z

Italia SpA, and (iii) breached its obligation to provide sufficient funding to Company Z Italia SpA until the Closing, as well as its obligation to cause Mr. X and the management and employees of Company Z Italia SpA to cooperate loyally with the Claimant. The Claimant also asked the arbitrators to rule that such breaches were in direct link of causation with the losses suffered by the Claimant due to the destruction of the business of Company Z Italia SpA, which was by then in liquidation. It further sought damages, interest and the costs of the arbitration and legal costs.

The arbitral tribunal examined whether Mr. X waived his pre-emption right, as a precondition to determining whether the Respondents breached their obligations under the SPA. Mr. X claimed that he did not waive his pre-emption right because one of the conditions set out in the *Accordo* for a waiver had not been met, namely, the Holding had not replaced the First Respondent as a party to the MoU on the date the shares in Company Z Italia SpA were transferred to the Holding. The tribunal first held that it appeared from the *Accordo* in its entirety that the parties to it – Mr. X and the First Respondent – intended that the Holding's succession to the First Respondent as a party to the MoU be effective as from the transfer of Company Z Italia SpA's shares to the Holding and that the whole transaction had to be completed on or before date B. Hence, the substitution of the First Respondent by the Holding as a party to the MoU had to be effective on the date of the filing with the notary public at the latest.

The tribunal then concluded that Mr. X's pre-emption right had not been waived because the MoU had not been assigned to the Holding, either expressly or by means of *facta concludentia* (*facta concludentia* being a party's conduct or mode of action that unambiguously points to a certain position so that another party may justifiably rely on such conduct).

The arbitrators noted that French courts tend to apply the doctrine of adequate causation concurrently with the doctrine of equivalent conditions, or even alone, in cases where several causes may be taken into account. In light of the above, the tribunal examined whether the Respondents' breach of the SPA could be deemed the adequate cause of the loss incurred by the Claimant, that is, whether, by human

foresight, the collapse of Company Z Italia SpA could be anticipated as likely to result from the Respondents' failure to properly waive Mr. X's pre-emption right.

The tribunal answered this question in the negative, finding that the cause of Company Z Italia SpA's collapse was Mr. X's conduct of the business after the take-over. The Respondents' failure to obtain a proper waiver of Mr. X's pre-emption right offered Mr. X, who was clearly unwilling to work in the new structure and lacked confidence in the new management imposed by the Claimant, the possibility to make it more difficult for the Claimant to take effective control of Company Z Italia SpA. However, the Respondents' breach of contract was not the adequate cause of Company Z Italia SpA's winding up; it only facilitated Mr. X's possibly disloyal actions against the new shareholder.

The interpretation of the *Accordo* leads to the conclusion that the parties to it intended that the succession of the First Respondent by the Holding as a party to the MoU be effective as from the transfer of Company Z Italia SpA's shares and that the whole 'Transaction' had to be completed on or before date B.

"First, the English version of the *Accordo* agreed upon by the parties translates '*a far data*' as 'as of'. It is true that the Italian version of the *Accordo* must prevail in case of discrepancy (Art. 10). However, this translation, which is a contemporaneous document, gives a first and most authoritative indication of the parties' intention at the time of contracting. One may hope (perhaps naively) that the parties did read this English translation in due time and would have reacted if 'as of' did not square with their common and actual consent.

"Second, it appears that the succession of the Holding as a party to the MoU was a primary condition laid down by Mr. X to consent to forfeit his pre-emption right on the First Respondent's interest in Company Z Italia SpA. This is easily understandable as the MoU did not only grant him a pre-emption right, but virtually secured his position of managing director of the company by obliging the First Respondent to buy him out if it intended to revoke him.

The effectiveness of the waiver of Mr. X's pre-emption right was in particular dependent upon the dissolving condition that the Holding 'succeed to the First Respondent as a Party to the MoU' (Art. 3(1) of the *Accordo*). It is common ground between the parties that, under Italian law, the contemplated substitution had to be operated by way of an assignment of contract. In other words, the First Respondent (the assignor) had to assign all its rights and obligations arising under the MoU to the Holding (the assignee). The parties also agree that Mr. X (the assigned party) had authorized beforehand the assignment of the MoU by concluding the *Accordo*. "As the Italian Supreme Court has confirmed it, it follows from the above provision that an assignment of contract authorized beforehand is not effective unless and until it has been notified to the assigned party or the latter has acknowledged it (Decision of the Italian Supreme Court of 25 August 1986). "In the instant case, Mr. X authorized the assignment of the MoU by concluding the *Accordo*. It remains to be determined whether the MoU was assigned to the Holding and, in the affirmative, whether such assignment was notified to or acknowledged by Mr. X on or before the transfer of Company Z Italia SpA's shares to the Holding, i.e. on or before the date of the filing with the notary public. "It is common ground between the parties that First Respondent did not expressly assign the MoU to the Holding. Therefore, the Arbitral Tribunal must ascertain whether the MoU was tacitly assigned by means of *facta concludentia*. As observed by the Respondents' experts themselves, a tacit assignment of the MoU would have had to be clearly and unequivocally understandable, including for Mr. X who was party to the MoU.

"The Arbitral Tribunal made two additional observations in this respect. The first one is that it would not have been necessary for Mr. X (or his lawyer) to subject the waiver of his pre-emption right to the succession of the Holding as a party to the MoU if such effect had followed from the mere transfer of Company Z Italia SpA's shares. The second one is that the purchaser of Company Z Italia SpA's shares was not designated in the *Accordo*, Art. 3(11) of which provided that it had 'to be selected exclusively among one of the following parties: Company GHI, Company DEF, the Claimant or any of their parent companies, subsidiaries or affiliates pursuant to Art. 2359 of the Italian Civil Code' [ItCC]. Actually, the Holding, which was set up on date B-32, did not exist at the time the *Accordo* was concluded.

“The share purchase agreement may therefore not constitute a clear and unequivocal conduct of the parties showing their intention to assign the MoU. Moreover, the Respondents have not shown that such conduct would have been understandable for Mr. X and that Mr. X would have taken the Respondents' conduct as a notification of the assignment.

“In light of the above, the Arbitral Tribunal finds that the MoU was not tacitly assigned to the Holding. Accordingly, there is no need to determine if, as a matter of principle, as argued by the Claimant, such a tacit assignment was prohibited by the MoU.”

“Even if the MoU had been assigned to the Holding, such assignment would not have been effective on the date of the transfer of Company Z Italia SpA's shares to the Holding. “In the present case, the Arbitral Tribunal has reached the conclusion that the First Respondent and the Holding did not even enter into an assignment of the MoU by *facta concludentia*. Accordingly, there is no need to determine whether the assignment of the MoU was tacitly acknowledged by Mr. X. As a conclusion “The Arbitral Tribunal finds that the pre-emption right of Mr. X on the First Respondent's interest in Company Z Italia SpA had not been waived on the Closing Date.”

In order to determine the assignment in M&A transactions, the author supports a concern to supplant the interpretation of the arbitration agreement, where necessary, with a careful assessment of all factors that might help a tribunal draw conclusions as to the likely *a priori* intent of the parties. Implied intent to promote efficient solutions is an important working hypothesis, as long as it is understood as one factor that needs to be looked at alongside others. As it is seen the concepts of assignment and succession has not been separated in M&A transactions.

C-2) The Latter Superseded the Former and Succession

It is well-settled that an entity that does not execute an arbitration agreement may become a party thereto by way of legal succession⁶⁹⁶. The most common means of such succession is by a company's merger or combination with the original party to an agreement⁶⁹⁷. Questions of succession in international commercial arbitration arise most often in connection with companies, rather than natural persons⁶⁹⁸.

Succession in a contract may occur through an assignment, or the sale of an ongoing business, the taking over by a new entity of all the rights and obligations of the assigned or sold business under its various contracts, or in the case of a merger between corporations. The effects of the assignment, sale of the business, or merger, i.e. whether the successor takes over or steps into, the rights and duties and the procedural position, will be governed by the substantive law applicable to the assignment, sale of ongoing business, or merger, or similarly in arbitration by the law governing the arbitration agreement⁶⁹⁹.

In some legal systems, the merging company takes over all the relationships of the merged company and, therefore, also the contract containing the arbitration clause. If an universal succession is taking place, there is no obstacle to the merging company being bound by the arbitration agreement⁷⁰⁰.

Under many national legal regimes, corporate or company law permits the merger or combination of two or more previously separate legal entities into either a new legal

⁶⁹⁶ See, e.g., *Judgment of 19 May 2003*, 22 ASA Bull. 344, 348 (Swiss Federal Tribunal) (2004) (“in principle, an arbitration clause is binding only on those parties which have entered into a contractual agreement to submit to arbitration, whether directly or indirectly through their representatives. Exceptions to this rule arise in cases of legal succession”); *Judgment of 8 February 2000*, 2000 RTD Com. 596 (French Cour de cassation civ. 1e) (“international arbitration clause is binding on any party that is a successor to one of the contractual partners”); *Int. Bhd Elec. Workers, Local No. 234 v. Witcher Elec., Inc.*, 1990 WL 89315, at *4 (9th Cir. 1990) (“a party not a signatory to an arbitration agreement cannot be forced to arbitration until and unless the court has found that it is bound by the agreement as ... successor of the signatory company”).

⁶⁹⁷ Born, *Int. Comm. Arb.*, supra note 52, p. 1185.

⁶⁹⁸ Redfern, Hunter, supra note 49, para. 2.51. On natural persons see s. 8 (1) of the English Arbitration Act 1996: ‘Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.’

⁶⁹⁹ Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd Ed., Kluwer Law Arbitration, p. 289.

⁷⁰⁰ *Ibid.*

entity or one of the pre-existing legal entities⁷⁰¹. The consequence of such “mergers” or “business combinations” is that the “merged” or “surviving” entity will be the owner of all the assets and liabilities (including contract rights and obligations) of the previously-existing entities⁷⁰². The general rule is that arbitration agreements, like other contracts, endure to the benefit of universal successors of companies; for example, in a voluntary merger, or by operation of law. Such questions involve the status of a company and are thus generally to be resolved by reference to the law of its incorporation (or, in respect of natural persons, by reference to the law of succession)⁷⁰³. For instance, in ICC Case No. 2626 the arbitrators held that:

*“The dominant trend in case law holds that an arbitration agreement is not only valid between the parties, but can also be relied upon against their heirs, their legatees, their assignees, and all those acquiring obligations. The only exceptions are cases where the arbitration agreement is drafted in such a way as to exclude successors and assignees.”*⁷⁰⁴.

Furthermore, arbitrators concluded that “the conversion of a limited liability company, which had signed an arbitration agreement, into a joint stock corporation did not prevent the arbitration agreement from being relied upon against the

⁷⁰¹ Born, *supra* note 52, p. 1185. See, e.g., *Mercantile Home Bank & Trust Co. v. United States*, 96 F.2d 655, 659-60 (8th Cir. 1938) (in both consolidations and mergers “the new corporation acquires all the assets, property rights, and franchises of the dissolved corporations, and their stockholders become its stockholders”); 19 Am.Jur.2d Corporations §2168 (2007) (“A merger is often defined as the absorption of one corporation by another”); 15 *Fletcher Cyclopedic Corporations* §7041 (2007) (“Strictly speaking, a merger means the absorption of one corporation by another; the latter retains its name and corporate identity with the added capital, franchises and powers of the merged corporation.”); French Civil Code, Art. 1844-4 (“A company ... can be absorbed by another company or participate to the constitution of a new company by means of merger”); Swiss Federal Law on Mergers, Demergers, Transformation and Transfer of Assets, Art. 3; German Umwandlungsgesetz, §1.

⁷⁰² G. Born, *Ibid. Award in ICC Case No. 6754*, in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), *Collection of ICC Arbitral Awards 1991-1995*, p. 600, (1997) (restructuring of state companies, resulting in the transfer of all assets and liabilities, including contractual rights and obligations, of company B to company C). See also A. Bonnasse, *JurisClasseur Sociétés, Traité, Fasc. 161-10* para. 11 (2001) (“The universal transmission of assets, arising out of successorial rules, means that the entire rights and obligations of the absorbed company are automatically transferred to the absorbing company”); Swiss Federal Law on Mergers, Demergers, Transformation and Transfer of Assets, Art. 22; German Umwandlungsgesetz, §20(1)1; 19 Am.Jur.2d Corporations §2254 (2007) (“[U]nless there is some provision to the contrary, either in the statute or agreement of consolidation or merger, the consolidated or resulting corporation succeeds to the powers, privileges, and property of the constituents or merged corporation.”).

⁷⁰³ Redfern. Hunter, *supra* note 49, para. 2.51.

⁷⁰⁴ ICC Award No. 2626 (1977), German company v. Italian company, 105 J.D.I. 980 (1978),

company as it existed after the conversion”⁷⁰⁵. The joint stock corporation (Società per azione) was held to be a proper respondent on the basis of universal succession under Italian law⁷⁰⁶.

When such a combination occurs, most national laws provide that the merged or surviving entity succeeds by operation of law as a party to the contracts, including the arbitration agreements, of the previously-existing entities⁷⁰⁷. In the US case, *Fyrnetics (HK) Ltd v Quantum Group Inc*, Fyrnetics entered into a licence agreement with Quantum in relation to a biomimetic sensor that Quantum had developed and patented. Fyrnetics merged with Kidde and subsequently dissolved as a separate corporate entity. When a dispute arose over the licence agreement, Kidde filed a claim against Quantum before the US courts, notwithstanding the fact that the licence agreement contained an arbitration clause. Kidde argued that it was not bound by the arbitration clause in the licence agreement which had been signed and agreed by Fyrnetics, rather than Kidde. The Seventh Circuit rejected Kidde’s argument upholding the district court’s ruling that “when Kidde caused Fyrnetics to be merged into Kidde and then dissolved, Kidde voluntarily assumed the obligation of Fyrnetics’ license agreement. Kidde, which made claims that are partly those of Fyrnetics, could not escape application of the license agreement’s arbitration requirement by effectively legislating Fyrnetics out of existence”⁷⁰⁸.

In a more recent ICC Case⁷⁰⁹, an arbitral tribunal sitting in Paris was hearing a dispute between French claimant X and a Spanish respondent Company Y. After the determination of the arbitrators mission (acte de mission) X was succeeded by another Company, Z. The Arbitral Tribunal held that:

⁷⁰⁵ Ibid, and see observations by Y. Derains. Compare with ICC Award No. 3742 (1983), *European contractor v. Three Middle Eastern state owned entities*, where the tribunal refused to rule on the consequences of the assignment to other entities of the assets of the state-owned entity that signed the arbitration agreement. The tribunal's grounds for so doing—the fact that the companies resulting from the reorganization were not included in the terms of reference—are unsatisfactory in the author’s view (111 J.D.I. 910 (1984), and observations by Y. Derains) quoted also in Fouchard, Gaillard, Goldman, *supra* note 49, para. 715 and footnote 51.

⁷⁰⁶ Redfern, Hunter, *supra* note 49, para. 2.51, footnote 94.

⁷⁰⁷ Born, *Int. Comm. Arb.*, *supra* note 52, pp. 1185-1186. *Judgment of 13 June 1963*, 1964 Rev. arb. 125 (Paris Cour d’appel); *Judgment of 9 June 1998, C. Srl v. L.S. SA*, 16 ASA Bull. 653 (Swiss Federal Tribunal) (1998). See also Fouchard, Gaillard, Goldman, *supra* note 49, para. 715 (1999); Redfern and Hunter, *supra* note 49, para. 2-51 (2009); Poudret, Besson, *supra* note 55, para. 290.

⁷⁰⁸ *Fyrnetics (H.K.) Ltd v. Quantum Group, Inc.*, 293 F.3d 1023, 1029 (7th Cir. 2002). See Brekoulakis, *supra* note 56, para. 2.69. Born, *ibid*, p. 1186, especially footnote 238.

⁷⁰⁹ *ICC Case No. 3281*, 109 J.D.I. (Clunet) 990 (1982).

“It results from the terms of the minutes of the Shareholders meeting [approving the merger between Z and X] that Z is subrogated in all the rights and obligations of X, notably on those resulting from the arbitration agreement.”⁷¹⁰.

In that case there were different conclusions presented by successor. The conclusions of Company Z were different than the conclusions of Company X. However the arbitral tribunal held that:

“the conclusions of company Z do not exceed the limits of the competence of the arbitral tribunal defined in the “acte de mission” and in contrary are contended with the reduced the pretence mentioned initially by company X⁷¹¹.

National courts⁷¹² and arbitral awards⁷¹³ have held that the same result generally applies in other instances of corporate succession, when one entity assumes the rights and obligations of another entity as a matter of applicable national company

⁷¹⁰ L’assemblée générale ... après avoir constaté que le projet (de fusion avec la société X...) a été approuvé par l’Assemblée générale des actionnaires de la société X ... déclare approuver à son tour ce projet et accepter les rapports effectués au titre de la fusion par la société X... que Z ... se trouve subrogée dans toutes les droits et obligations de la société X ... et, notamment, dans ceux découlant des contrats sus-visés”. See J.D.I (Clunet), 1982, p. 990.

⁷¹¹ Ibid. “Considérant que les conclusions prises par Z ... dans son mémoire du ... n’excèdent pas les limites de la compétence du Tribunal arbitral définies par l’acte de mission et se bornent, au contraire, à réduire les prétentions initialement exprimées par la société X”.

⁷¹² See, e.g., *Judgment of 15 October 1997, MS “EMJA” Braack Schiffahrts KG v. Wartsila Diesel Aktiebolag*, XXIV Y.B. Comm. Arb. 317 (Swedish S.Ct.) (1999) (“It must generally be accepted that where a change in parties has taken place by a universal assignment, the universal successor is bound by the arbitration clause...”); *Judgment of 8 February 2000*, 2000 RTD Com. 596 (French Cour de cassation civ. 1e) (“The international arbitration clause is binding on any party that is a successor to one of the contractual partners.”); *AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 803 N.Y.S.2d 118 (N.Y. App. Div. 2005) (sale of substantially all assets of predecessor company constituted *de facto* merger and bound successor company to arbitration agreement signed by predecessor); *Vann v. Kreindler, Relkin & Goldberg*, 54 N.Y.2d 936, 938 (N.Y. App. Div. 1981) (“By treating that agreement as continuing in force after the dissolution of the original partnership, the members of the successor partnership demonstrated their intention to be governed by that agreement’s arbitration clause”).

⁷¹³ See, e.g., *Award in ICC Case No. 2626*, 105 J.D.I. (Clunet) 980 (1978); *Interim Award in ICC Case No. 3879*, XI Y.B. Comm. Arb. 127 (1986); *Award in ICC Case No. 6223*, discussed in H. G. Naón, *Choice of Law*, *supra* note 655, p. 142; *Interim Award in ICC Case No. 7337*, XXIV Y. B. Comm. Arb. 149, 153 (1999) (“It is a general principle of law that a contract can bind only the parties that have entered into it. There are, however, exceptions. A party may be substituted by universal succession or singular succession. An agreement to arbitrate is therefore valid between the parties and their legal successors.”); *Final Award in ICC Case No. 9762*, XXIX Y.B. Comm. Arb. 26 (2004) (one state ministry held to be successor to earlier ministry and therefore bound by contract and arbitration clause).

law⁷¹⁴. For instance in the first interim award in the *Westland* case⁷¹⁵, the arbitral tribunal pointed out that:

[i]n certain circumstances, those who have not signed an arbitration clause are nevertheless bound by it (and can avail themselves of it as a means of objection, if proceedings are instituted against them before the ordinary courts). This is true for the successor in title or any other successor, for example whosoever may acquire rights over property or a concern with assets and liabilities of the nature referred to in article 180 et seq. of the Swiss Federal Code of Obligations or for an assignee. It is thus that two awards given under the aegis of the ICC held that in cases of subrogation and of universal succession, the subrogated party and the successor were bound by an arbitration clause.

In a more recent ICC Case⁷¹⁶, an arbitral tribunal sitting in Paris and hearing a dispute between French claimant and Jordanian Respondents. Respondent 1 was a limited partnership organized under Jordanian Law; Respondent 2 was a corporation incorporated in Jordan. The issue to be resolved was whether Respondent 1 had ceased to exist or had been transformed into a different entity, or whether it had merged into a corporation which would have succeeded it in all its assets and liabilities. On the basis of the application of Jordanian Law, the Arbitral Tribunal concluded that Respondent 1 had been transformed into Respondent 2. Nevertheless, the Arbitral tribunal considered what would be the procedural consequences of such transformation or absorption. In the view of the arbitral tribunal, such matter is governed by the procedural law applying to the arbitration. Since the ICC arbitration rules governing the procedure do not contain any provision in this respect, the Arbitral Tribunal considered whether the parties had chosen the law governing the procedure.

The Arbitral Tribunal held that the choice of law stipulation in the contracts giving rise to the dispute referring to French Law also extended to the applicable procedural

⁷¹⁴ See, e.g., *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548-51 (U.S. S.Ct. 1964) (holding that employer, who was successor to merged entity that had entered into arbitration agreement with employees, was bound by arbitration agreement because there was “substantial continuity of identity,” and public policy argues in favor of binding successor entities to arbitration agreements in such circumstances); *Award in ICC Case No. 2626*, 105 J.D.I. (Clunet) 980 (1978).

⁷¹⁵ Hanotiau, *Complex Arbitrations*, supra note 49, para. 36. See also in Clunet, 1978, p. 980.

⁷¹⁶ Award of 1991 in ICC Case 6223 (unpublished). The case has been summarised by H. G. Naón in *Choice of Law*, supra note 655, pp. 142-143.

law, a circumstance corroborated by the fact that France had been chosen as the place of arbitration. The Arbitral Tribunal was of the view supporting the application of French Law to the procedure parallel to the application of French Law to the substance that the prevailing view in France is that, despite the autonomy of the arbitration clause vis-à-vis the contract containing it, in most cases the parties intend to submit both to the same law except when there is a contrary indication⁷¹⁷.

The Arbitral Tribunal finally concluded that under French Law, both in case of transformation of a company into another or of absorption of a company by another, the rights and obligations under the arbitration clause and the right to use, or to participate or continue participating in arbitration proceedings remain in, or are acquired by, the company, resulting from the transformation or absorbing the original holder of such rights and obligations. Thus, it concluded that Respondent 2 was the only rightful party to the arbitration on the respondent side of the proceedings⁷¹⁸.

Most authorities have held that the national law governing the issue of succession also applies to a non-signatory's succession to an arbitration agreement⁷¹⁹.

According to Born, the better view is that, the validation principle applies, providing for succession to the arbitration agreement if that result would be obtained under either the law governing the underlying succession (*e.g.*, the merger) or the arbitration agreement. Further, national law rules of succession would be subject to international prohibitions against discriminatory and idiosyncratic legislation. Thus, if local law provided that all obligations of a locally-incorporated company were transferred in a merger or other reorganization, with the exception of agreements to arbitrate (either generally or with foreign companies), that limitation would be ineffective under the Convention's neutrality and non-discrimination principles⁷²⁰.

⁷¹⁷ Ibid.

⁷¹⁸ Ibid.

⁷¹⁹ Courts usually apply the same law to determine succession to an arbitration agreement without analysis. *See, e.g., Fyrnetics (H.K.) Ltd v. Quantum Group, Inc.*, 293 F.3d 1023 (7th Cir. 2002); *AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 803 N.Y.S.2d 118 (N.Y. App. Div. 2005) (sale of substantially all assets of predecessor company constituted *de facto* merger and bound successor company to arbitration agreement signed by predecessor).

⁷²⁰ Born, *Int. Comm. Arb.*, *supra* note 52, p. 1187, footnote 247.

By the effect of a universal or individual transfer (merger, demerger, succession, novation, subrogation, transfer of contract or transfer of debt), the actual parties to the arbitration clause (the new shareholders, the new owner of the company, the heirs, the transferees of the contract or the debt, the subrogated party) may be different from the ones who signed the clause in the first place⁷²¹.

It is commonly recognised that the universal successor is bound by the arbitration clause concluded by the person whom he succeeds, under the reservation of an agreement to the contrary, in particular where such a clause had a strictly personal character⁷²². Other cases of universal succession such as takeovers, merger of companies, or the acquisition of the assets and liabilities of a company cause the transfer of the arbitration agreement to the new owner or the new combined company in the case of a merger⁷²³.

It is generally agreed that when X transfers to Y a contract containing an arbitration clause which it has concluded with Z, if a dispute arises, it is Y and not X that has the right to start the arbitration proceedings against Z, as the new party to the contract and therefore to the arbitration clause⁷²⁴. If, on the other hand, the assignment is invalid under the applicable law, only the original party has standing and only on its own behalf⁷²⁵.

From a purely company law perspective, it is relatively clear that any new partner or shareholder will be subject to the arbitration provision in a company charter or a partnership deed, regardless of specific acceptance thereof. Exercising rights and

⁷²¹ Hanotiau, *Complex Arbitrations*, supra note 49, para. 34, footnote 46. In France, for example, it is unanimously accepted that in case of conventional transfer (transfer of claim, transfer of contract and personal subrogation), the arbitration clause is transmitted to the transferee.

⁷²² See Poudret, Besson, supra note 55, para. 289.

⁷²³ Steingruber, supra note 574, p. 154. Swiss Federal Tribunal, ASA Bulletin 1998, p. 653 = RSDIE 1999, p. 593, with an approving note by Knoepfler; for Sweden see SAR 2004/1, p. 98, ICC Award No. 3281 applying this case law (Poudret, Besson, para. 290) quoted by Steingruber, *ibid.*, p. 154, footnote 952.

⁷²⁴ See for example ICC award in case no. 7154 of 1993, 121 *J. Droit Int (Clunet)* 1059 (1994); 3 and note by Yves Derains. In the United States, see for example the decision of the United States District Court for the Southern District of New York in *Cedrela Transp. Ltd. v. Banque Cantonale Vaudoise*, 67 F. Supp. 2d 353 (S.D.N.Y. 1999) and the many references cited. See also Jagusch, Sinclair, *Impact of Third Parties*, supra note 625.

⁷²⁵ ICC Case No. 6363 of 1991 published in 17 *Y.B. Comm. Arb.* 186 (1992).

deriving benefits as a shareholder or partner within a corporate or partnership structure, which itself contains an arbitration clause, suffices to subject the new party to that clause⁷²⁶. As one authority explains, with reference to German law:

*“when a person becomes the holder of a general or a limited share in a partnership which had already been organized before he joined it, he will be bound by an ‘intra-partnership’ agreement which had been attached to the original partnership contract before he joined the partnership. It is wholly irrelevant whether he acquired a general or a limited share. It also does not matter on which legal basis his entry into the partnership rests: on a statutory succession (for example, as an heir, a receiver, or a liquidator), or upon a corporate transaction (for example, as a purchaser or a donee).”*⁷²⁷

The same analysis applies to transfers of corporate shares⁷²⁸. New shareholders are automatically bound by the arbitration clause contained in a company's constitutive documents, simply by virtue of their status as shareholders, without the need for a separate agreement⁷²⁹.

Equally, a party's purported acquisition of corporate shares or partnership interests – even if invalid – also generally subjects it to the corporate charter's or partnership deed's arbitration clause with regard to disputes over the validity of that acquisition.

⁷²⁶ Born, Int. Comm. Arb., supra note 52, p. 1225. Sandrock, Intra and Extra Entity, supra note 641, p. 423 (“the arbitration agreement automatically travels with the partnership contract. It is regarded as an accessory and incidental right of the general partner and therefore binds all new general partners, irrespective of whether they have attached their signature to the arbitration agreement or not”); *Nova (Jersey) Knit Ltd v. Kamgarn Spinnerei GmbH* [1977] 1 Lloyd's Rep. 463 (House of Lords) (arbitration clause in partnership agreement applies to new partner); *Final Award in ICC Case No. 9762*, XXIX Y.B. Comm. Arb. 26 (2004); *Vann v. Kreindler, Relkin & Goldberg*, 54 N.Y.2d 936, 445 (N.Y. App. Div. 1981) (applying New York law to a partnership agreement containing an arbitration clause); Müller & Keilmann, *Beteiligung am Schiedsverfahren wider Willen?*, 2007 SchiedsVZ 113, 115; Hanotiau, Analysis, supra note 374, p. 257 (“Persons other than the formal signatories may be parties to the arbitration agreement ... because they are ... members with the signatories of a general partnership or a community of rights and duties”).

⁷²⁷ Sandrock, Intra and Extra Entity, supra note 666, p. 423. German courts have recognized the application of an arbitration clause to the (general) partners of the partnership that signed it, see *Judgment of 12 November 1990*, 1991 NJW-RR 423, 424 (German Bundesgerichtshof) quoted in Born, *Ibid.*

⁷²⁸ Sandrock, Intra and Extra Entity, *ibid.*, pp. 432-434; Geimer, in R. Zöller (ed.), *ZPO* §1066, para. 9, 26th ed., 2007; *Judgment of 25 October 1962*, 1963 NJW 203, 204 (German Bundesgerichtshof); *Judgment of 2 March 1978*, 1978 NJW 1585 (German Bundesgerichtshof); *Judgment of 28 May 1979*, 1979 NJW 2567 (German Bundesgerichtshof) quoted in Born, *Ibid.*, p. 1226.

⁷²⁹ *Judgment of 2 October 1997*, 1998 NJW 371 (German Bundesgerichtshof); Sandrock, “Intra” and “Extra-Entity” Agreements to Arbitrate and Their Extension to Non-Signatories under German Law, 19 J. Int. Arb. 423, 436 (2002) quoted in Born, *Ibid.*

The act of exercising rights attached to corporate shares or partnership interests is sufficient to subject the party claiming such rights to the arbitration clause associated with them⁷³⁰.

National courts have generally rejected arguments that shareholders' disputes and the “internal affairs” of corporate governance are non-arbitrable. There is no reason that arbitral tribunals cannot satisfactorily resolve issues of corporate law, just as they resolve other legal issues. Nonetheless, in some jurisdictions, questions have arisen as to the arbitrability of particular matters (such as the validity of shareholder resolutions). In Germany, for example, there was disagreement regarding the arbitrability of the validity of shareholder resolutions, which was eventually resolved in favour of arbitrability, provided that all shareholders in the company are party to the arbitration⁷³¹. Other types of disputes among shareholders to a German company are in principle fully arbitrable⁷³².

A more complicated situation arises from the sale of an ongoing concern, or where a subscription of capital takes place by a contribution in kind, consisting of the transfer of an ongoing concern. If the transfer of the contract is not provided for by the applicable substantive law, as a consequence of the sale of an ongoing business or of its contribution in kind, then respectively the purchaser and the corporation, to which the ongoing concern has been contributed, do not take over the arbitration clause or the arbitration submission. In those jurisdictions, like Italy, where the purchaser of a business takes over, except when agreed otherwise, the contracts entered into for the conduct of that business (provided they do not have a personal nature), the purchasing company should also take over the seller's position in arbitral proceedings⁷³³.

⁷³⁰ Born, *Ibid*, p. 1226.

⁷³¹ *Judgment of 29 March 1996*, 1996 NJW 1753 (German Bundesgerichtshof); Geimer, in R. Zöller (ed.), *ZPO* §1030, ¶9 (26th ed. 2007). Similar authorities exist under Austrian law. *See, e.g., Judgment of 10 July 2007*, 4 Ob 108/07v (Austrian Oberster Gerichtshof); *Judgment of 19 October 1989*, 7 Ob 681/89 (Austrian Oberster Gerichtshof).

⁷³² Geimer, in R. Zöller (ed.), *ZPO* §1030, para. 10 (26th ed. 2007) quoted in Born, *Int. Comm. Arb.*, *supra* note 52, p. 1226.

⁷³³ Rubino-Sammartano, *supra* note 700, pp. 289-290.

D) Conclusion of Chapter V

In the previous chapters it was determined that “consent” of the parties is the main obstacle in dealing with the problems of consolidation of parallel proceedings and how to clarify the limits of each ADR mechanism which escalate to arbitration in M&A transactions. It was determined that consent arose at the inception of M&A transaction and remains relevant throughout.

The central importance of consent to this thesis culminates in the final chapter, where the manifestation of consent in M&A transactions is first focused on. There are many different ways how consent can become concrete, however, it has been seen that parties’ consent can also arise without written instruments. Therefore it is important to focus on the identification of consent. While consent by conduct or incorporation by reference is used by practitioners, however, applying this methods during M&A arbitration can be problematic.

Moreover, in order to determine the existence of an arbitration agreement consent can be derived from consent to an underlying contract. This is highly relevant to M&A transactions given the numerous agreements involved. However the scope of this consent can come under scrutiny where it is present across different agreements giving rise to the issues of consistency and continuity. Further to this, research examines consent in related agreements. The lack of framework on related agreements discussed in Chapter Three, impacts upon consent to these agreements. Absence of a contractual network in M&A transactions causes increased complexities in issues of consent across inter-related arbitration agreements in different phases.

Parties should pay close attention to the drafting of arbitration agreement or multi-tiered dispute resolution clauses across their contractual network in order not to further lengthen or complicate the process. M&A transactions are often derailed by court petitions by aggrieved parties. Where an arbitration clause is provided for, as is the generally the case, the author disagrees that the intervention of the courts will be an appropriate solution. First of all, the intervention of national courts will be the main obstacle to the nature of arbitration as the chosen dispute resolution

mechanism, and secondly, even if there is an intervention, the courts too will focus on the intention of the parties and to the facts of the M&A transactions, resulting in proceedings parallel to arbitration. In this case, arbitration, as a private confidential and efficient way of resolving problems, will partially lose its effectiveness. Therefore, the author believes that “consent”, which is the foundation of arbitration, should prevent the intervention of national courts.

From analysis of case law, it has been seen that arbitration tribunals have relied upon contract law principles in dealing with complex issues of consent. Most notably, in relation to defect in consent, such as fraud and/or mistake etc. As Prof. Hanotiau mentions in his Freshfields Lecture in 2010, parties defending objections to consent often rely on classical mechanisms of assignment, agency, subrogation, estoppel, succession, third party beneficiary, veil piercing and alter ego⁷³⁴. This chapter, limited to the topic at hand, focused on assignment and succession, which more commonly appeared in M&A transactions, as well as the case of consolidation of parallel proceedings.

In the case of assignment the party substituting the original signatory of the arbitration clause in the arbitration procedure invokes the mechanism of assignment of the contract containing the clause, or the assignment of certain rights under this contract. The transmission of the arbitration clause by application of this mechanism is not always based on express consent. If the entire contract is assigned, the consent of the assignee to arbitrate will be presumed from his consent to the substantive assignment. In some cases, however, the reasoning of the courts, for example, the French Courts, does not seem to be based on presumed consent but rather on the fact that the arbitration clause is deemed inseparable from the economy of the contract⁷³⁵.

As a general rule it is accepted that unless there is some provision to the contrary, either in the statute or agreement of consolidation or merger, the consolidated or resulting corporation succeeds to the powers, privileges, and property of the constituents or merged corporation. For the question of whether the arbitration agreement is included in this power, the jurisprudence of many countries and

⁷³⁴ Hanotiau, Freshfields Lecture, *supra* note 195, p. 540.

⁷³⁵ Karim Youssef, *Consent in Context*, West, 2009, p. 86 and 90-91.

arbitration institutions answered positively. However, in the final chapter with the recent examples of ICC Cases quoted in detail, the author sought to prove that whether during the M&A transactions or after completing the M&A transactions (for instance after the merger of company A and B which established a new company C) in order to precise the survival of the arbitration clauses, focus should not only be on the general rules of assignment or succession (universal or individual), but also on the intention of the parties with the attention to the facts.

For instance in ICC Case No. 11961, the arbitral tribunal uses classical theories of contract law including consent by conduct and they found conduct sufficient to determine the scope of SPA and *rationae personae* of the arbitration clause. They found SPA automatically invalid because of error but arbitral tribunal did not pay attention to other conduct between parties. However, in M&A transactions, *erreur* or other defects cannot stop the consent of parties, if they wish to continue to next stages of M&A transactions. Parties can continue to deal with the transaction and these defects will not have an effect for arbitration clauses. This case is also noteworthy because it relies centrally on contract law principles neglecting arbitration rules on separability and arbitration rules on consent if any. Relying on contract law principles is understandable given the absence of specific rules on consent in M&A arbitration, however, whether this approach or the approach which embraces analysis all relevant factors will be used remains in question. Therefore, M&A arbitration guidelines can act as a road-map as to which method should apply in relation to consent.

In a more recent case, ICC Case No. 12502, the Arbitral tribunal paid attention to the scope of arbitration clauses where more than one arbitration clause existed, employing the doctrine of the “latter superseded the former”. Focus is on the arbitration clause in the SPA in a broad sense relying on its text in relation to “all disputes in connection with the contract”. The tribunal inferred a connection between the SPA and the heads of agreement (letter of intent) despite the fact that the latter was concluded with different parties to the former. Bearing in mind the discussions in Chapter Three grounded on the fourth question in working hypothesis, this can be considered the high watermark in determining the “connection” in order to define multi-contact. The tribunal uses the broad definition of connection with the

presumption of consent with reference to “all disputes” rather than strictly relying on fundamental contract law principles.

In another recent case, the ICC Arbitral Tribunal examined consent in terms of “assignment” and “succession”. In determining whether consent was present for assignment the Tribunal looked to whether consent was expressly provided or by *facta concludentia*. Amidst this determination succession was also considered in light of whether a full transfer of shares has occurred. Further to this determination the Arbitral tribunal considers whether the assignee has acknowledged or been notified in ascertaining whether consent is present. Firstly, the arbitral tribunal found that the doctrine of the latter superseded former could not apply in this instance, because the consent derived from the clear and unequivocal conduct of the parties in the SPA could not trump the prohibition of such consent in the memorandum of understanding. This relation between the SPA and MoU is similar to that of assignment and succession in so far that when interpreting an arbitration agreement it can be necessary to supplant careful assessment of all factors which point to the intent of the parties. This expansive approach is the result of a deficit in existing rules. The transitory definition of consent also contributes to this expansive approach, because its limits have not been defined.

In examining these three recent ICC cases, there is no common approach to determining issues related to consent. The lack of common approach accommodates the complexity of M&A transactions by being fluid as to the peculiarities of specific individual transactions. There is, however, little predictability and defined procedure which parties and practitioners can rely upon.

Given the absence of a definition of assignment and succession in arbitration rules, the practitioners have no choice but to consider all factors in an inclusive way. This notwithstanding and the fact that consent cannot be defined or determined in specific regulations generally, a structured procedure must be based on defined guidelines concerning assignment and succession.

In the author’s opinion, this is the most important point especially in M&A transaction because; at the conclusion of the M&A process a new company can be

created independently from the companies which created it. This company will be liable on the arbitration agreement that the previous companies have signed. In absence of a rule in arbitration institutions, parties need some guidelines on this point, because rules can have disadvantages too. All aspects of M&A arbitration deal with consent, it is not possible to deal the “consent” problem with a rule, but guidelines can be pragmatic and beneficial.

It cannot be argued that concept of consent is fixed. It is in constant development similar to the actual situations to which it must be applied. In recent years, situations surrounding M&A transactions are more complex than they were in the past, given the increased number of contracts involved. However, consent as a component of multi-contracts in itself has not changed fundamentally. Therefore, in line with Prof. Hanotiau’s ideas this author recommends a modern approach focusing on facts can give a better, more instructive understanding of consent in M&A transactions, which pays attention to economic realities, trade usages, and the complex dimensions of M&A transactions and connected agreements in multi-contract scenarios. This transitory concept of consent should no longer be restricted to express consent or presume existing rules, but account for various expressions and give increased importance to the conduct of the parties involved in M&A transactions.

As a starting point to promulgate this modern understanding of consent, the author recommends “M&A Arbitration Guidelines”, leading parties of M&A in every stage of the transaction concerning dispute resolution and addressing some of the pitfalls highlighted in this thesis. Naturally, these guidelines would not be mandatory and imperative. However, the nature of these guidelines may become increasingly persuasive and applicable depending on the complexity of “consent” and on connected agreements or parallel proceedings which often arise in M&A transactions. Parties may avoid these guidelines by providing for contrary binding regulations on M&A arbitration, owing to the fact that their consent must be respected.

These guidelines are revisited in the final conclusion with the outcome of each chapter’s finding. In summarising the main points of this thesis, the working hypothesis will be addressed and the fruits of research will be presented.

CONCLUSION

The purpose of this thesis was to examine arbitration in M&A transactions and focus particularly on the problem of consent in two different aspects in M&A transactions: first the “consolidation of parallel proceedings” during M&A transactions; second the problem of consent in “assignment” and “succession” after M&A transactions.

The M&A process is complex and the sources and nature of possible disputes are numerous, yet not usually difficult to resolve. The first part of the author’s research focused on the theoretical approaches, such as terminology, different phases of M&A transactions, possible disputes arising out of M&A transactions, and the role of arbitration in such context. Because of the peculiarities of M&A transactions, there is often no clear answer for dispute resolution problems; different answers may be given to the same queries, *inter alia* depending on when the issue arises in the process⁷³⁶. In the author’s opinion, there are many different aspects and items which should be considered aside from the point in time a dispute or disputes arise in order to determine appropriate solutions. Therefore, when speaking of the problem of consent in M&A Arbitration, several approaches should be analysed, and several distinctions are needed.

During comparative studies, it is remarked that mergers, acquisitions, and takeovers are not same notions. Their scopes are different from each other and these transactions are long and involve very complex issues. The author believes that examining the terminology of notions provided necessary insight and paved the way to finding responses to the questions posed in the working hypothesis.

During the examination of comparative law, it was seen that complexity still exists in many national laws because of the non-existence of a clear definition of merger, acquisition, or takeover. Finally, research found acquisition as a commonly accepted “way” of merger, however, all the acquisitions are not concluded as mergers. In the definition of acquisition, corporate control is not mandatory, however, in order to define takeover it is necessary to acquire control. In this regard acquisition seems

⁷³⁶ H. Peter, *supra* note 83, p. 12.

broader than takeover. In tackling these varying notions, the author formulated a working definition of an M&A transaction with which to address the specific issues addressed concerning arbitration in M&A transactions.

Consecutive Phases of M&A Transactions

The first chapter undertook the study of the phases and processes of M&A transactions in order to create of foundation for the study of the interface of arbitration with this long and complex procedure. As a standard process, it can be divided into three periods demarcated by two main events of the transaction (signing and closing).

It can be useful to distinguish these phases for various reasons, including inter alia, the fundamentally different legal regime that applies to each of them. This process can be divided into these stages:

- a) Negotiation phases
- b) Signing Phase
- c) Closing Phase
- d) Post-Closing Phase
- e) Representations, Warranties and Indemnification

In order to resolve the disputes efficiently with arbitration, it is important to define and delimit the scope of review, determination and adjudication of an individual case in a precise manner and to avoid any conflicts or unnecessary overlap of the different dispute resolution methods. A special challenge for the parties and arbitrators will be to define and implement a procedure which allows complex issues to be resolved in the short time available, as the closing of an important transaction cannot be put on hold for too long⁷³⁷.

In addressing its task of clearly defining the stages of M&A transactions, research for Chapter One notably found a consistent deficit in rules specific to M&A

⁷³⁷ Segesser, supra note 54, p. 54.

arbitration. This deficit in rules highlighted clear problems: the primary one being the issue of consent. Case law displayed that in the absence of a definition of consent in M&A arbitration or related rules; practitioners rely upon contract law principles, however, no defined procedure has been developed. It was concluded that there has emerged in recent years, a dynamic concept of consent which goes beyond contract law principles and considers all relevant factors. This expansive approach implies that consent cannot be reduced to codification. Related to this point the author has suggested a non-binding guideline on consent as applicable to the letter of intent and other such instruments in M&A transaction. Such a provision may infer the early manifestation of valid consent in the letter of intent on future instruments of the transaction where the parties have not provided otherwise.

Arbitration and M&A Transactions

In Chapter Two, it has been seen that arbitration is an effective dispute resolution mechanism in M&A at every stage of a transaction with features that make it an attractive alternative to court litigation, despite certain procedural particularities and pitfalls to look out for when drafting arbitration clauses. To avoid these difficulties, which are addressed and detailed in later chapters, attention should be paid to the careful drafting of an arbitration clause or agreement, preferably and necessarily done jointly between the transaction and the arbitration lawyers, or alternatively a model clause of a well-known arbitration institution should be chosen. Research for Chapter Two showed, however, that there is a lack of model clauses suitable for M&A transactions provided by the institutions, which often results in tailored clauses specific to particular transactions.

During M&A transactions, arbitration has undoubtedly a great many positive aspects and problems. It was not the author's intention to deal with all problems and issues concerning M&A arbitration, but particular aspects of arbitration such as frequent problems in price adjustment, expert arbitration, representations and warranties, put and sale options etc. are studied⁷³⁸. Issues in M&A arbitration were examined using the chronological structure followed in Chapter One, thus in analysis of the pre-

⁷³⁸ See sec. 3 of the Chapter II.

signing phase conflicts arising from the letter of intent and due diligence were addressed and in post-signing violation of covenants and non material adverse changes. Lastly, multi-party and multi-contract issues and their interrelation are concentrated. Analysis further highlighted the deficit in existing arbitration rules, allowing for in depth study of particular topics in forthcoming chapters. In this way, Chapter Two's findings served as a bridge into Part two of the thesis.

The most concrete finding from Chapter Two was that issues concerning arbitration are less problematic where well drafted clauses appear in the network of instruments in M&A transactions. Well drafted arbitration clauses in those instances can demarcate their scope of application as against each other or ensure consistency throughout.

The lack of existing arbitration rules as applicable to M&A transactions was confirmed and reinforced the need for non-binding guidelines suitable to rectify this deficit.

In the second part of the thesis, practical solutions to the theoretical foundations are examined. Research is limited to cooperation and coordination of parallel proceedings, multi-step processes and "assignment" and "succession" under the title of consent in M&A arbitrations.

Coordination and Cooperation of Arbitral Proceedings in M&A Transactions

In progressing to the second part of the thesis, Chapter Three addresses the third and fourth questions raised in the working hypothesis. Concerning the latter it has been observed that institutional rules are limited to multi-party and multi-contract arbitration. The thesis found that M&A arbitrations are not typical examples of multi-contract arbitration owing to the lack of definition of connection which is required for such rules to apply. While there is a relation across the instruments of the phases of M&A transactions, it cannot be consistently held that a sufficient connection will arise to satisfy the rules. Therefore, consolidation cannot be availed

of by the parties, which often leads to parallel proceedings being invoked by one or more of the parties.

The central issue concerned where different arbitration clauses, or parallel proceedings in national courts or feature in a dispute, and how the cooperation of these proceedings would function in order to eliminate the contradictory decisions?

Various solutions have been put into practice. These include: the possibility for national courts to appoint the same arbitrator to hear disputes; or the consideration of an “umbrella clause” by the parties⁷³⁹; or a stay of the proceedings for coordinating parallel or multiple proceedings, in particular in the examples of vertical disputes.

To address the risks of multiple or parallel proceedings on the other hand, *res judicata* and *lis pendens* are among the solutions proposed in order to avoid contradictory decisions. These mechanisms have proven to have expansive procedural implications, and where parallel proceedings are involved it must be examined whether such proceedings refer to the same or related disputes. Where determined to be the same or related dispute the first award issued applies to the later related awards. This may be unsuitable for application in M&A arbitration arising at different phases where negotiations have continued during the transaction rendering earlier awards inapplicable to the current terms of the instruments of later negotiations.

Research has also seen that the most common proposition is the consolidation of proceedings as an effective mechanism to avoid contradictory awards. However, without the parties’ consent, the possibility to consolidate different proceedings will depend on the provisions of the applicable arbitration rules and national legislation⁷⁴⁰. It is accepted that the obvious theoretical impediment for consolidating arbitral proceedings is that dispute resolution through arbitration is founded on the consent of parties; this means that absent consent, arbitration proceedings ought only be conducted between parties to the arbitration agreement. Perhaps for this reason

⁷³⁹ See Richard Bamforth, Katerina Maidment, All join in or not? How well does international arbitration cater for disputes involving multiple parties or related claims?, ASA Bulletin 2009, Issue 1, p. 20.

⁷⁴⁰ Lew, Mistelis, Kröll, *supra* note 333, p. 389.

neither the UNCITRAL Model Law nor the UNCITRAL Arbitration Rules, even the 2010 revision, contain provisions on the consolidation of arbitration proceedings⁷⁴¹. Considering the importance of these rules, which are a resource for many countries, in the author's opinion the significant issue is the importance of the "consent" of parties on the "autonomy of arbitration clauses". Therefore, as seen in Chapter III, the consolidation of related court proceedings and arbitral proceedings raises important obstacles both on the conceptual and procedural level. Moreover, in M&A transactions, which are more complicated than the normal commercial arbitration procedures, "consent" will be essential.

In order to deal with these obstacles, it has been reiterated throughout this thesis that guidelines should be proposed. Especially the author finds that a definition of connection would be highly beneficial in clarifying the relationship between instruments in M&A transactions which would define the scope of varying arbitration agreements or in the alternative promote consistency throughout. It is envisaged that the scope of application of arbitration agreements would apply to material elements to which they relate to.

Guidelines setting-out terms for connection would consider inapplicable *lis pendens* and *res judicata* rules unless otherwise agreed by the parties, given their unsuitability to M&A arbitrations. Thus, the same legal ground criteria would not apply under the guidelines.

The principle of party autonomy imposes that any consolidation necessarily depends on the agreement of all the parties involved. Therefore, in the author's opinion, given the potential disadvantages of consolidation, and the lack of conformity with party autonomy, intervention by the courts in this respect should be limited. The author believes that any consolidation must entirely depend on the consent of the parties involved, in order to solve their disputes in the most efficient way.

Again, guidelines can assist in the consolidation of parallel proceedings by expanding on the current rules' reliance on the expression by the parties of their wish

⁷⁴¹ See *supra* sec. 3 of the Chapter IV for the works of UNCITRAL Work Group II on International Arbitration and Conciliation on this matter.

to consolidate proceedings. The Guidelines would encourage consolidation based on the intent of the parties beyond written expression and consideration of the surrounding facts of the case.

Multi-Step Processes in M&A Transactions

Another solution which is employed in practice in order to avoid contradictory decisions of multiple or parallel proceedings is interrelating alternative dispute resolution (ADR) proceedings⁷⁴² with arbitration. Chapter Four concentrated on this interrelation of ADR with arbitration, specifically in M&A transactions, being unable to explore all ADR proceeding types.

Concerning the fifth question of the working hypothesis, the chapter's findings indicate while a hybrid staged process involving ADR with arbitration could serve as a practical mechanism in M&A arbitration, the issue of parallel proceedings was by no means eliminated by such a process.

The mechanism operates by proposing varied ADR mechanisms for specific issues or as a primary stage of dispute resolution before ultimately resorting to arbitration or court proceedings. One advantage of the using different ADR mechanisms is that parallel proceedings can be managed and not necessarily interfere with the progress of a transaction, if different ADR methods are used simultaneously on matters relating to different phases of the transaction and progress along concurrent lanes.

It has been remarked that issues arise as to the binding nature of ADR mechanisms. An aggrieved party may frustrate an ADR outcome by applying to a court or initiation arbitral proceedings. Similarly, problems are faced when seeking enforcement of ADR outcomes.

While enforcement may be sought through the intervention of national courts, in the author's opinion, however, this is not the most appropriate solution. Firstly, there are no harmonized rules regarding the proceedings. Therefore, courts will pay attention

⁷⁴² See Chapter IV.

to the drafting of these clauses in order to determine the operation of the ADR mechanisms and their related arbitration provisions, must pay attention to the intention of parties.

In any case, “consent” will be the main issue to be taken into consideration in any case, and it is the author’s opinion that arbitration proceedings can better consider the “consent” of parties than national court proceedings. The private nature of arbitral hearings can offer a procedure which truly respects the intention of the parties, in a competent and efficient manner, while retaining respect for legality and public policy.

Further problems arise given the lack of regulation of ADR mechanisms. Confidentiality and the undefined role of experts, conciliators, or mediators involved in the process have been identified important factors which could dissuade the use of ADR in a tiered approach with arbitration in M&A transactions. For example, when certain information arising in the mediation or conciliation phases is not protected by procedural guarantees, the likelihood of this information being introduced in later court or arbitral proceedings emerges. Similarly, practitioners representing the parties in these ADR mechanisms may become privy to information which renders their later involvement in formal proceedings into question.

In proposing guidelines for multi-tiered ADR clauses to address the procedural issues involved, any guidelines must respect the consent of the parties. Therefore, where a precise clause is drafted, demarcating the operation and interaction of the different ADR methods, guidelines should not cloud the parties’ clear intentions. Guidelines should determine where it would be appropriate for parallel ADR mechanisms to operate concurrently to best serve the continuation of the transaction. Such guidelines should provide directions for when ADR mechanisms’ non-binding results can be challenged by an aggrieved party and assist in the parties’ adherence to non-binding resolutions where that was intended by the parties.

Findings thus concluded that multi-tiered dispute resolution clauses can go some way to addressing parallel proceedings in M&A arbitration, but similar to consolidation, clear expression of the parties’ intention to avail of these means must

be provided for. It is on this basis that parties consent as the principal issue must be finally dealt with in this thesis.

Issues of Consent in M&A Arbitrations

After determining the importance of “consent” of the parties, Chapter Five has shown that it is vital to prove identification and manifestation of consent. As a general rule, it is accepted that “consent” be expressed by written instruments, either directly or by incorporation by reference. Similarly, underlying consent can be derived from related agreements in the contractual network of M&A transaction. However, there are cases where consent is presumed to be implied.

The recent ICC Case law has shown diverging approaches to consent by varying tribunals. Whereas most rely on contract principles in the absence of definition of consent, others have taken the approach to consider the entire surrounding circumstances of the case in ascertaining consent.

Further to these findings the author is in agreement with the conclusion that there now exists a transitory definition of consent which expands on reliance on contract principles alone. In accordance with the second question posed in the working hypothesis, we have seen that this transitory definition of consent, while preferable, also acts to stave off efforts at codifying the regime. This leads one to wonder whether the inconsistent approach of tribunals to date can adequately be addressed. Given this finding it is held that consent cannot be codified by rules per se thus guidelines should support the emerging transitory definition and supplement the lack of rules while assisting the regime of consent in M&A arbitrations.

On the other hand, Chapter Five focused on “assignment” and “succession” after the merger and acquisition transaction has been completed. The introduction has shown that merger can arise in two different ways: firstly when companies A and B create a new company C without dissolving; and secondly when A and B cease to exist and they establish a new company C. In both scenarios, the question arises where A and B are parties to a contract containing an arbitration clause which transfers their rights and/or obligations to the new company (Company C), will the transferee will be

bound or not by the arbitration clause contained in the previous main contract and under which conditions. The logic of consolidation and succession is the same. It is accepted as a general rule that, unless there is some provision to the contrary, -either in the statute or agreement of consolidation or merger-, the consolidated or resulting corporation succeeds to the powers, privileges, and property of the constituents or merged corporation.

On the question of whether that includes arbitration clauses or agreements as well, it was observed that there is no specific rule defining the assignment and succession. Therefore, the consent of the parties will need to be interpreted. Particular doctrines namely the latter superseded the former have been used in practice but were often shown to be inapplicable in M&A transaction scenarios. However, especially in M&A arbitrations, mere interpretation is not sufficient to prove the consent of parties; it should also be endorsed by the facts of transactions and the fluency of different phases. Interpretation of consent for assignment and succession can be best assisted by guidelines on the matter also. This can be achieved using indicators of the parties' consent which will impact on their obligations and responsibilities and meanwhile take account of all relevant facts.

As mentioned above, this thesis focused on the transfer of arbitration agreements in M&A transactions and first of all "assignment" has been studied. In order to determine the assignment in M&A transactions, the author supports a concern to supplant the interpretation of the arbitration agreement, where necessary, with a careful assessment of all factors that might help a tribunal draw conclusions as to the likely a priori intent of the parties. This method is necessary for "succession", because in doctrine and comparative studies, it is accepted as a general rule that unless there is some provision to the contrary, either in the statute or agreement of consolidation or merger, the consolidated or resulting corporation succeeds to the powers, privileges, and property of the constituents or merged corporation. Therefore, it is accepted that the arbitration agreement succeeds to the company. The author believes that the automatic application of this rule may be problematic for M&A transactions. In the author's opinion during the M&A transactions focus should not only be on the general rules of assignment, or succession (universal or individual), but also on the intention of the parties, with attention also on the

concrete fluency of the facts. On that point the author disagrees that the intervention of the courts will be an appropriate solution because the intervention of national courts will affect the autonomy of arbitration agreements in a negative way, and secondly, even if parties are agreed on court intervention, national courts will also have to check and refer to the “consent” of the parties in any case.

In M&A arbitrations, it is strongly advised that lawyers do their arbitration related drafting work at the negotiation stage. This is suggested because arbitration clauses in merger transactions present unique problems in arbitration procedure.

It is commonly suggested that on the one hand a well-drafted arbitration clause can alleviate many problems by tailoring the process to the transaction. On the other hand, a poorly drafted clause will create a myriad of tangled problems at every stage of arbitration. These problems relate to a two-fold question: the selection of the type of arbitration and the corresponding *lex arbitri* and the shaping of the arbitral disputes related to merger transaction⁷⁴³.

In spite of this, many problems occur during M&A arbitration. Furthermore, there are not many studies on specific topics in this field.

The issues that have been analysed throughout this work amount only to research on specific points of M&A arbitration. There are lots of topics which should be examined entirely in different studies. For instance, arbitrability is of the utmost importance. As a classically sensitive area, it raises several questions relating to the jurisdiction of the arbitral tribunal itself, and competition and anti-trust law, which are complex matters. If the merger involves competition and anti-trust law issues, mandatory provisions of the domestic law of the venue in these areas, if any, must be carefully studied before deciding on that location as the seat of arbitration⁷⁴⁴.

⁷⁴³ Cremades, *Settlement of Disputes in Cross-Border Mergers & Acquisitions in Cross-Border Mergers and Acquisitions and the law*, supra note 24, pp. 96-97.

⁷⁴⁴ Ibid.

The extension of arbitration clauses in M&A transactions is also a further important topic which should be studied. This is particularly an issue in situations with group company structures and transactions and especially conditions for piercing the corporate veil should be analysed in detail.

The application of fast-track arbitration in M&A disputes can also be one of the issues for future researchers to study. In practice, there are number of substantial arbitration cases where fast-track and expedited procedures have been applied successfully to monitor and enforce undertakings in merger control proceedings, and in certain EU exemption cases, within very short time frames. If arbitration has worked and continues to work in such complex circumstances as merger control issues, there are good reasons to assume that arbitration could also be tailored to satisfy the needs of the parties in solving their disputes⁷⁴⁵.

The ambition of this thesis was to highlight arbitration in merger and acquisition transactions, and especially the role of consent in parallel proceedings during M&A transactions and beyond completion in arbitration agreements or clauses in the “assignment” and “succession” stages. While doing this the author aimed to remind readers that the resolution of a dispute by private judges without the parties’ consent is not arbitration⁷⁴⁶. It has been shown that given the transitory definition of consent, guidelines in this area would best serve practitioners in the area, where such guidelines were to receive widespread acceptance in the practice of M&A arbitration. This author would hope to see such guidelines emerge in the future.

⁷⁴⁵ Segesser, *supra* note 54, p. 54.

⁷⁴⁶ See Lew, Mistelis, Kröll, *supra* note 333, para. 5-21.

BIBLIOGRAPHY

Books and Thesis

ABA, Model Asset Purchase Agreement with Commentary, Business Law Section, Chicago 2001.

Ahrens, Jan Michel, Die subjective Reichweite internationaler Schiedsvereinbarungen und ihre Erstreckung in der Unternehmensgruppe, Frankfurt, 2001.

Alexander Nadja, International and Comparative Mediation – Legal Perspectives, Kluwer Law International, 2009.

B'Uhler Michael W and Webster Thomas H., Handbook of ICC Arbitration-Commentart, Precedents, Materials, 2nd Ed., Sweet&Maxwell, 2008

Begg, Peter F.C., Corporate Acquisitions and Mergers, Kluwer Law International, 1986

Berg A. Van Den, The New York Arbitration Convention of 1958 177, 1981.

Berger Bernhard, Kellerhals Franz, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Stämpflis juristische Lehrbücher, Stämpfli Verlag AG Bern, 2006.

Berkovitch, E., M. P., Narayanan, Motives for Takeovers: An Empirical Investigation, Journal of Financial and Quantitative Analysis 76 (1), p. 347-362.

Beyer, Gerry W., Modern Dictionary for the Legal Profession, 4th Ed., New York, 2008.

Black's Law Dictionary, 8th Ed., Bryan A. Garner, 2004.

Blessing Marc in Honsell, Vogt, Schnyder, Internationales Privstrecht, 1st Ed., 1996, Einleitung zum Zwölften Kapitel, no. 275.

Blessing Marc, ADR (Alternative Dispute Resolution), in: Stephen Berti (ed.), International Arbitration in Switzerland, 2000.

Born Gary B., International Arbitration and Forum Selection Agreements: Drafting and Enforcing”, 3rd Edition, Kluwer Law Arbitraion 2010(cited Born, Drafting and Enforcing).

Born Gary B., International Commercial Arbitration in the United States, 2nd Ed., Kluwer, The Hague 2001.

Born Gary B., International Commercial Arbitration, Kluwer Law International, 2009 (cited Born, Int. Com. Arb.).

Borowsky, Martin, Das Schiedsgutachten im Common Law, Ein rechtsvergleichender Beitrag zum Begriff der Schiedsgerichtsbarkeit, Broschiert, 1998.

Borris, Christian, Streiterledigung beim Unternehmenskauf, in Law of International Business and dispute Settlement in the 21st Century (Liber Amicorum Karl-Heinz Böckstiegel, 2001).

Bourque, F., Le règlement des litiges multipartites dans l'arbitrage comercial international, Thesis University of Poitiers, France, 1989.

Brekoulakis, Stavros L., Third Parties in International Commercial Arbitration, Oxford Univ. Press, 2010.

Bühning-Uhle C, Kirchhoff L and Sherer G, Arbitration and Mediation in International Business: Procedures for Effective Conflict Management, Alphen aan den Rijn: Kluwer Law International, 2006.

Burkhardt Martin, Vertragsanpassungen bei veränderten Umständen in der Praxis des schweizerischen Privatrechts, Bamberg 1996.

Cabrilac Michel, Mouly Christian, *Droit des Suretés*, 5th Ed., Litec, 1999.

Cane, Peter, Conaghan, Joanne (eds.), *The New Oxford Companion to Law*, Oxford University Press, 2008.

Carney, William J., *Mergers and Acquisitions: Cases and Materials*, Foundation Press 2000.

Cossio Francisco González de, *El Arbitraje y la Judicatura*, Editorial Porrúa, 2007

Craig W. L., Park W.W., Paulsson Jan, *International Chamber of Commerce Arbitration*, 2000 (cited Craig, Park, Paulsson)

Dore Isaak I., *Theory and Practice of Multiparty Commercial Arbitration*, Graham & Trotman/M. Nijhoff, 1990.

Eiholzer, *Die Streitbeilegungsabrede* (1998), p. 181 et seq.

Engel, Pierre, *Traité des obligations en droit suisse*, Bern, 1997.

Fawcett James (ed.), *Declining Jurisdiction in Private International Law*, Report to the XIVth Congress of the International Academy of Comparative Law, Athens 1994, Oxford University Press, Oxford 1997.

Ffrench, H. Leigh, *International Law of Take-overs and Mergers, The EEC, Northern Europe and Scandinavia*, Quorum Books, 1986.

Fontaine, Marcel, *Les lettres d'intention dans la négociation des contrats internationaux*, *Droit et pratique du commerce international*, Les Nouvelles Conventions, européenne et communautaire, en matière de brevets, Masson, Vol. 3, 1977.

Fouchard Philippe, Gaillard Emmanuel, Goldman Berthold, Fouchard, Gaillard and Goldman on International Commercial Arbitration, Kluwer Law International, 1999 (cited Fouchard, Gaillard, Goldman)

Freund J.C., Anatomy of a Merger, New York, 1975.

Gaughan, Patrick A., Mergers, Acquisitions and Corporate Restructuring”, 4th Edition, John Wiley & Sons Inc., New York, 2007.

Guyon Yves, Traité des contrats, Paris, 1997

Hanotiau Bernard, Complex Arbitrations, Kluwer Law International, Multiparty, Multicontract, Multi-Issue and Class Actions, The Hague, 2006 (cited, Hanotiau, Complex Arbitrations)

Hartl Martin, Das Schiedsgutachten im italienischen Recht, 1993.

Heinrichs in Palandt, BGB, 63rd Ed., 2004, §317 no.6.

Henn, Harry G., Alexander John R., Laws of Corporations and Other Business enterprises, West Pub., 3rd Ed., 1983

Hitt, M.a., J.S. Harrison, and R. D. Ireland, Mergers and Acquisitions: A Guide to Creating Value for Stakeholders, Oxford University Press, 2001.

Horn, Norbert (ed.), Cross- Border Mergers and Acquisitions and the law, Studies in Transnational Economic Law, Vol. 15, Kluwer Law International.

Johnston, Alexander, The City Take-over Code, Oxford University Press, Clarendon, 1980.

Jolles Alexander, Canals de Cedie Maria, Confidentiality (Ch. 6), in Kaufmann-Kohler & Stucki Balise (eds.), International Arbitration in Switzerland: A Handbook for Practitioners, Kluwer Law International, 2004.

Kassis Antoine, *Réflexions sur le règlement d'arbitrage de la chambre de commerce internationale – Les déviations de l'arbitrage institutionnel*, L.G.D.J. Paris, 1988

Lake, Ralph, Draetta, Ugo, *Letters of Intent and Other Precontractual Documents*, 2nd Ed., Salem, 1994.

Levy, Nicholas, *European Merger Control Law: A Guide to to the merger regulation*, Vol.1, Lexis Nexis Ed., 2003.

Lew Julian, Mistelis Loukas A. and Kröll Stefan, *Comparative International Commercial Arbitration*, 2003 (cited Lew, Mistelis, Kröll).

Martin A. Elizabeth, Law Jonathan (eds.), *Oxford Dictionary of Law*, 6th Ed., 2006

Martin A. Elizabeth Law, Jonathan,. (eds.), *Oxford Dictionary of Law*, Oxford University Press, 2009.

Nassar Nagla, *Sanctity of Contracts Revisited: A study in the theory and practice of Long-Term International Commercial Transactions*, Martinus Nijhoff Publishers, London 1995.

OECD 2001: *New patterns of Industrial Globalisation: Cross Border Mergers and Acquisitions and Strategic Alliances*, OECD Publishing, 2001, Paris

Poudret Jean François, Besson Sébastien, *Comparative Law of International Arbitration*, 2nd Ed., 2007.

Redfern Alan, Hunter Martin, Blackaby Nigel and Partasides Constantine, *Redfern and Hunter on International Arbitration*, Oxford University Press, 2009, (cited Redfern and Hunter).

Reed, Stanley Foster, Lejoux, Alexandra, Nesvold, H. Peter, *The Art of M&A: A Merger Acquisition Buyout Guide*, 4th Edition, 2007.

Rüede Thomas, Hadenfeldt Reimer, Schweizerisches Schiedsgerichtsrecht, Schulthess, 1980.

Samuel Adam, Jurisdictional Problems in International Commercial Arbitration, Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law, Publication of wiss Institute of Comparative Law, 1989.

Simler, Philippe, Cautionnement et garanties autonomes, 2nd ed., Paris, Litec, 1991,

Slade Stephen Kenyon, Mergers and Takeovers in the US and UK Law and Practice, Oxford University Press, 2004.

Steingruber A. M., Notion, Nature and Extent of Consent in International Arbitration, Queen Mary University of London, PhD Thesis, 2009.(Unpublished thesis)

Tercier, Pierre, Le droit des obligations, Zurich 2004.

Train François Xavier, Les Contrats liés devant l'Arbitre du Commerce International, LGDJ, 2003.

Tschäni Rudolf, Planta Andreas Von, Oertle Matthias, Corporate Acquisitions and Mergers in Switzerland, Zürich, 2000.

Ury, Brett and Goldberg, Getting Disputes Resolved–Designing Systems to Cut the Costs of Conflict, San Francisco, Jossey-Bass 1988.

Watter, Rolf, Unternehmensübernahmen, Zürich 1990, pp. 130-132.

Weinberg M. A., Blank M.V., and Greystoke A. L., Weinberg and Blank on Takeovers and Mergers, 4th Ed., Sweet & Maxwell, London, 1979.

Weston F. J., M. L. Mitchell and H. J. Mulherin, Takeovers, Restucturing and

Corporate Governance, Pearson Prentice Hall, Upper Saddle River, New Jersey, 2004.

Articles

Abdulla Zina, The Arbitration Agreement in Kaufmann-Kohler G., Stucki Blaise., International Arbitration in Switzerland, A Handbook for Practitioners, 2004, The Hague, Kluwer Law International, pp. 15-32.

Bamforth Richard, Maidment Katerina, All join in or not? How well does international arbitration cater for disputes involving mutiple parties or related claims?, ASA Bulletin 2009, Issue 1, pp. 3-25.

Banerjee, A and E.W. Eckard, Are mega-mergers anticompetitive? Evidence from the first great merger wave. Rand Journal of Economics, 29, p. 803-827.

Barron William M., Court-Ordered Consolidation of Arbitration Proceedings in the United States, J. Int. Arb. 1987, Issue 1, pp. 81-86.

Baum Axel, Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A, in Tagungsbeiträge zur DIS-Vortragsveranstaltung “Schiedsgerichtsbarkeit bei M&A”, 24 and 25 April 2001, DIS-Materialien Bd., Dresden, VIII/01, at pp. 80-84

Berger Klaus Peter, Integration of Mediation Elements into Arbitration, “Hybrid Procedures and “Intuitive” Mediation by International Arbitrators, Arb. Int. 2003, Issue 3, pp. 387-403.

Berger Klaus Peter, Set-Off in International Economic Arbitration, Arb. Int., 1999, pp. 53-84.

Berger, Klaus Peter, International Economic Arbitration in Germany: A New Era, Arb. Int., 1992, pp.101-120.

Berger, Klaus Peter, Law and Practice of Escalation Clauses, Arb. Int. 2006, Issue 1, pp.1-17.

Besnard-Goudet R., *Promesse de Société*, Ed. de Jurisclasseur, 2001, fasc. 7-30, §10 et seq.

Bitter, Jan Willem, *Consolidation of Arbitral Proceedings in the Netherlands: The Practice and Perspective of the Netherlands Arbitration Institute*, in *Multiple-Party Actions in International Arbitration*, Permanent Court of Arbitration 2010, pp. 221-238.

Blessing Marc, *The Law Applicable to the Arbitral Clause and Arbitrability*, in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress 1999, pp. 168-188.

Boo, Lawrence G. S., *Commentary on Issues Involving Confidentiality in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Volume 12, Kluwer Law International 2005, pp. 523-528.

Branson David J. and Wallace Richard E. Jr., *Court-Ordered Consolidated Arbitrations in the United States: Recent Authority Assures Parties the Choice*, *J. Int. Arb.* 1988, Issue 1, pp. 89-94.

Stippl, Christopher: “*International Multi-Party Arbitration: The Role of Party Autonomy*”, *The American Review of International Arbitration*, 1996, p.47-69.

Carter, James H., *Part II - Issues Involving Confidentiality*, in *Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Vol. 12, Kluwer Law International, 2005, pp. 484-496.

Carter, James H., *Part I- Issues Arising from Integrated Dispute Resolution Clauses*, in *Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Vol. 12, Kluwer Law International, 2005, pp. 446-469.

Chiu, Julie, C., Consolidation of Arbitral Proceedings and International Commercial Arbitration, *J. Int. Arb.*, 1990, No. 7, Issue 2, pp. 53-76.

Von Krause, Christophe, , New French Arbitration Law Clarifies Role of National Courts and Reinforces Recognition and Enforcement of Arbitration Awards, in *Kluwer Arbitration Blog*, 25 February 2011.

Cohen, Daniel, Arbitrage et groupes de contrats, *Rev. arb.*, 1997, Issue 4, pp. 471-504.

Collins, Michael, Privacy and Confidentiality in Arbitration Proceedings”, *Arb. Int.*, 1995, No. 11, Issue 3, pp. 321-336.

Cremades, Bernardo M., Madalena Ignacio, Parallel proceedings in International Arbitration, *Arb. Int.*, *Kluwer Law International* 2008, Vol. 24, Issue 4., p. 507-540.

Cremades, Bernardo M., Multi-tiered Dispute Resolution Clauses, in *CPR Institute European Committee, Better Solutions for Business: Commercial Mediation in the EU*, The Hague 2004.

Cremades, Bernardo M., Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, *Arb. Int.*, 1998, No.14., Issue 2, pp. 157-172.

Cremades, Bernardo M., Multi-Tiered Dispute Resolution Clauses, available at <www1.fidic.org/resources/contracts/cremades_2004.pdf>.

Crivellaro, Antonio, Consolidation of Arbitral Procedures in Investment Disputes in Bernardo M. Cremades and Julian D.M. Lew, *Parallel State and Arbitral Procedures in International Arbitration*, ICC Publishing 2005, pp. 79-126.

Devos E. P.R. Kadapakkam, and S. Krishnamurthy, S., How Do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies, *Review of Financial Studies*, doi:10.1093/rfs/hhn019, 2008.

Dimatteo, Larry A., Sacasas, Rene, Credit and Value Comfort Instruments: Crossing the Line From Assurance to Legally Significant Reliance and Toward a Theory of Enforceability, 47 Baylor Law Review., pp. 358-424.

Dong, M., D. Hirschleifer, S. Richardson, and S.H. Teoh, Does Investor Misevaluation Drive the Takeover Market? Journal of Finance 61(2), 2006, pp. 725-762,

Ehle, Bernd D., Arbitration as a Dispute Resolution Mechanism in Merger and Acquisitions, extended and reviewed version of a speech given at the conference “International Business Transactions” organised by the Center of International Legal Studies (CILS) in Salzburg, 20-23 November 2004, published in The Comparative Law Yearbook of International Business 2005, pp. 287-309.

Fai Edwin Tong Chun, Dewan Nakul, Drafting Arbitration Agreements with “Consolidation” in Mind?, AIAJ, 2009, Issue 1, pp. 70-94.

Farnsworth, E. Allan, Negotiations of Contracts and Precontractual Liability: General Report, in Conflits et harmonisation, Mélanges en l’honneur d’Alfred E. Von Overbeck, Fribourg, 1990.

Farnsworth, E. Allan, Precontractual Liability and Preliminary Agreements: Fair Dealings and Failed Negotiations, Columbia Law Review, No. 87, 1987, pp. 218-294.

Figueres Dyalá Jiménez, Multi-tiered Dispute Resolution Clauses in ICC Arbitration in ICC International Court of Arbitration Bulletin, Vol. 14, No:1, Spring 2003 pp. 71-73.

File, D. Jason, United States: Multistep Dispute Resolution Clauses, 3 Mediation Committee Newsletter 1, IBA Legal Practice Division, July 2007.

Final Report on Lis Pendens and Arbitration, in Report of the Seventy-Second Conference, Toronto 2006

Gaillard Emmanuel, Switzerland Says Lis Pendens Not Applicable to Arbitration, in NYLJ, 7 August 2006.

Gaillard Emmanuel, The Consolidation of Arbitral Proceedings and Court Proceedings in Complex Arbitrations, ICC International Court of Arbitration Bull. Special Supplement 2003, pp. 35-42.

Ginkel Eric Van, The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal, J. Int'l Arb., 2004, Issue 1, pp. 1-65.

Goergen M., and L. Renneboog, Shareholder Wealth Effects of European Domestic and Cross-Border Takeover Bids, European Financial Management 10 (1), 2004, pp. 9-45.

Guarin, Marc F., International Approaches to Court-Ordered Consolidation of Arbitral Proceedings, The American Review of International Arbitration, 1993, Issue 4, pp. 519-536.

Gugler K., D.C. Mueller, B. B. Yurtoglu and C. Zulehner, The Effects of mergers: an international comparison, International Journal of Industrial Organization 21, 2003, pp.625-653.

Günther, Klaus, Die Bedeutung von Schiedsvereinbarungen im M&A Bereich, in Tagungsbeiträge zur DIS –Vortragsveranstaltung 'Schiedsgerichtbarkeit bei M&A, 24 and 25 April 2001, DIS-Materialien Bd., Dresden, VII/01.

Hanotiau, Bernard, Consent to Arbitration: Do we Share a Common Vision, Arb. Int. 2011, Vol. 27, Issue 4, pp. 539-554. (2010 Annual Freshfields Lecture, London, 21 October 2010)

Hanotiau Bernard, Multiple Parties and Multiple Contracts in International Arbitration, in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration, Oxford University Press 2009, pp. 35-69 (cited Hanotiau, Multi Party Actions)

Hanotiau Bernard, Problems Raised by Complex Arbitrations involving Multiple Contracts-Parties-Issues – An Analysis, J. Int. Arb., 2001, No.18, pp. 251-360 (cited Hanotiau, Analysis).

Hanotiau Bernard, Quelques réflexions à propos de l'autorité de chose jugée des sentences arbitrales, in Liber Amicorum Lucien Simont, Brussels: Bruylant, 2002.

Hanotiau, Bernard, Complex- Multicontract- Multiparty Arbitrations, Arb. Int., 1998, Vol.14, Issue 4, pp. 369- 394.

Harford, J., Corporate Cash Reserves and Acquisitions, Journal of Finance 54(6), 1999, p. 1969-1997.

Hascher Dominique T., Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?, J. Int. Arb. 1984, Issue 2, pp. 127-144.

Hascher Dominique, L'autorité de la chose jugée des sentences arbitrales, address to the French Committee on Private International Law, 7 February 2001, in Travaux du comité français de droit international privé, Pedone, 2004, pp. 11-16.

Hobér, Kaj, Parallel arbitration proceedings – Duties of the arbitrators, in Parallel State and Arbitral Procedures in International Arbitration, ICC Publishing 2005, pp. 243-268.

Hayward, M. L. A., and D. C. Hambrick, Explaining the premiums paid for large acquisitions: Evidence of CEO hubris. Administrative Science Quarterly, 42, 1997, p. 103-127.

Herrmann, Gerold., Does the World Need Additional Uniform Legislation on Arbitration?, Arb. Int. 1999, Issue 3, pp. 211-236. (The 1998 Freshfields Lecture)

Hof, J.J. van Haersoltevan, Consolidation under English Arbitration Act 1996: A View from the Netherlands, *Arb. Int.* 1997, Issue 4, p. 427-430.

Houston J. F. , C. M. James, and M.D. Ryngaert, Where Do Merger Gains Come From? Bank Mergers from the Perspective of Insiders and Outsiders, *Journal of Financial Economics*, (60), 2001, p. 285-331,

Hunter J. Martin, Comment: Commentary on Integrated Dispute Resolution Clauses in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, 2004 Beijing Volume 12 (Kluwer Law International 2005) pp.470-477.

Ignacio Suárez Anzorena, La acumulación de arbitrajes: acumulación de problemas?, in Fernando Mantilla Serrano (ed.), *Arbitraje Internacional: Tensiones Actuales*, 2007, p. 342 et seq.

ILA, *Res judicata and Arbitration*, in Report of the Seventy-First Conference, Berlin 2004.

Isler, Peter R., Letter of Intent, in Rudolf Tschani (Ed.), *Mergers&Acquisitions VI*, Zurich 2004.

Jagusich Stephen and Sinclair Anthony, The Impact of Third Parties on International Arbitration – Issues of Assignment, in *Pervasive Problems in International Arbitration*, Kluwer, 2006, pp. 291-320.

Jarvin, Sigvard, Canada's Determined Move Towards International Commercial Arbitration, *J. Int. Arb.*, 1986, Issue 3, pp. 111-116.

Jolles Alexander, Consequences of Multi-Tier Arbitration Clauses, *Arbitration* 2006, No. 72, Issue 4, pp. 329-338.

Jones Doug, Various Non-binding (ADR) Processes, in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series, 2004 Beijing Vol. 12, Kluwer Law International, 2005, pp. 367 – 414.

Justin D'Agostino, Simon Chapman and Ula Cartwright-Finch, New Hong-Kong Arbitration Ordinance, Kluwer Arbitration Blog, 01 June 2011 available in www.kluwerarbitration.com

Kauffmann-Kohler Gabrielle, Chazournes Laurence Boisson de, Bonnin Victor and Mbengue Makane Moïse, Consolidation of Proceedings in Investment Arbitration: How can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently?, ICSID Rev. – Foreign Investment Law Journal, 2006, No. 21, Issue 1, pp. 59-125.

King, D. R, D.R. Dalton, C.M., Daily, and J.G. Covin, J.G., Meta-analyses of post-acquisition performance: Indications of unidentified moderators. Strategic Management Journal, 25, p. 187-200.

Klein P. G., Were the acquisitive conglomerates inefficient? Rand Journal of Economics, 32, p. 745-761.

Lamm Carolyn and Aqua Jocelyn, "Defining The Party – Who is a Proper Party in An International Arbitration before the American Arbitration Association?", 2002 Int'l A.L.R., pp. 84-92.

Lang, L., R. Stulz, and R. Walkling, A Test of the Free Cash Flow Hypothesis: The Case of Bidder Returns, Journal of Financial Economics, 29(2), 1991, pp. 315-335.

Leboulanger Philippe, Multi-Contract Arbitration” J. of Int. Arb. 1996, Issue 4, pp. 43-97.

Level, Patrice, Joinder of Proceedings Intervetion of Third Parties, and Additional Claims and Counterclaims, ICC Int. Court of Arb. Bull., 1996, No. 7, Issue 2, pp. 36-44.

Lew Julian D. M., The Law Applicable to the Form and Substance of the Arbitration Clause, ICCA Congress Series No.9, Paris 1999, p. 114-145.

Lew Julian D. M., Multi-Institutionals Conciliation and the Reconciliation of Different Legal Cultures, in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series, 2004 Beijing, Vol. 12, Kluwer Law International, 2005, pp. 421-429.

Lew, Julian D. M., Expert Report of Dr. Julian Lew (in ESSO/BHP v. Plowman) Arb. Int., 1995, pp. 283-296.

Lewellen, W. C. Loderer, and A. Rosenfeld, Decisions and Executive Stock Ownership in Acquiring Firms, Journal of Accounting and Economics 7, 1985, pp.209-231.

Ly Filip de and Sheppard Audley, ILA Final Report on Lis Pendens and Arbitration, Arb. Int., 2009, No. 25, Issue 1, pp. 3-34 (cited Ly and Sheppard, Lis Pendens).

Ly Filip de, Sheppard Audley, ILA Interim Report on Res Judicata and Arbitration, Arb. Int. 2009, No. 25, Issue 1, pp. 35-66 (cited Ly and Sheppard, Res Judicata).

Malmeinder U., and G. Tate, Who makes acquisitions? CEO overconfidence and the market's reaction, Journal of Financial Economics 89, 2008, p. 20-43.

Malmeinder U., and G. Tate, CEO Overconfidence and Corporate Investment, Journal of Finance 60 (6), p. 2661-2177.

Martynova, M., and L. Renneboog, A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand? Journal of Banking and Finance, 32(10), 2008, pp. 2148-2177.

Mc Cormack H.M., Recent U.S. Legal Decisions on Arbitration Law, J. Int. Arb., 1994, Issue 4, pp.73-104.

Mueller D. C., A Theory of Conglomerate Mergers, *Quarterly Journal of Economics* 83,1969, pp. 643-659.

Murkherjee T. K., H. Kiymaz and H.K. Baker, Merger Motives and Target Valuation: A survey of Evidence from CFO's, *Journal of Applied Finance* 14, p. 7-24,

Naón Horacio A. Grigera, (ed.), Committee on International commercial Arbitration, Complex Arbitrations (Multi-Issue, Multi- Party, Multi-Contract): First Interim Report of the Sixty-Sixth Conference of the International Law Association, Buenos Aires Conference – 1994, *The ILA 1994*, pp. 699-704.

Naughton Philip Q.C., Country Report for England, in *Enforcement of Multi-tiered Dispute Resolution Clauses*, IBA Newsletter of Committee D (Arbitration and ADR), Vol: 6 No:2, October 2001.

Nicklisch Fritz, Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects, *J. Int. Arb.*, 1994, No. 11, Issue 4, pp. 57-72.

Obeid Nayla Comair, Consolidation and Joinder in Arbitration: The Arab Middle Eastern Approach, in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, 2009 Dublin Vol. 14, Kluwer Law International 2009, pp. 500-510.

Peter Henry, Liebeskind, Jean Christophe, Letters of intent in the M&A Context in *ASA Special Bulletin* No. 24, 2005 pp. 266-281.

Peter Henry, M&A Transactions: Process and Possible Disputes”, in *ASA Conference “Arbitration of merger and acquisition disputes”*, *ASA Special Bulletin* No. 24, 2005, pp. 1-16.

Peter Wolfgang, Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes, *Arb. Int.*, 2003, No. 19, Issue 4, pp. 491-505.

Piñeiro, Álvaro López de Argumedo, Multi-Step Dispute Resolution Clauses in M. Á. Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010), pp. 733-746.

Platte, Martin, When Should an Arbitrator Join Cases?, *Arb. Int.* 2002, Issue 1, pp. 67-82.

Poudret Jean-François, La clause arbitrale par référence selon la Convention de New York et l'art. 6 du Concordat sur l'arbitrage, in *Recueil des Travaux Offerts à M. Guy Flattet*, 1985, p. 523 et seq.

Pringle, R.H.B., Agreements to Submit Disputes in the Construction Industry for Expert Determination, *The International Construction Law Review* 1999, pp. 620-625.

Pryles Michael and Waincymer Jeff, Multiple Claims in Arbitration Between the Same Parties” in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series*, 2009 Dublin Volume 14, Kluwer Law International 2009, pp. 437-499.

Raeschke-Kessler: “Die deutsche Rechtsprechung zur Schiedsgerichtsbarkeit von 1989 und die neuere Rechtsprechung zu Schiedsgutachten, in: *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit*, Vol. 3, 1989, p. 213.

Rau, P. R., and T. Vermaelen, Glamour, Value and the Post-Acquisition Performance of Acquiring Firms, *Journal of Financial Economics* 49, pp. 101-116.

Reichert Klaus, Ireland: Appointment of arbitrators by the courts under the arbitration (International Commercial) Act 1998, *Int. ALR*, 2002, Issue 1, N-1.

Report of Working Group on Arbitration on the work of its forty-sixth session”, New York, 5-9 February 2007, UNCITRAL, 40th Sess.,

Reymond, Claude, Le contrat de “Joint Venture”, in *Innominatverträge*, Zürich 1988, pp. 383-396.

Reymond, Claude, La clause arbitrale par référence, *Recueil des Travaux Suisses sur l’arbitrage international*, 1984, p. 85 et seq.

Robinson Peter, Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened, *J. Disp. Res.*, 2003, p. 135-174.

Ruedin, Roland, La Lettre d’intention en droit Suisse, in *Hommage a Paul-René Rosset a l’occasion de son 70ème anniversaire*, Neuchatel 1977

Sachs Klaus, The Interaction Between Expert Determination and Arbitration, in *ASA Special Series No. 24*, 2005, pp. 235-246.

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

Sachs, Klaus, Schiedsgerichtsverfahren über Unternehmen skaufverträge – unter besonderer Berücksichtigung kartellrechtlicher Aspekte (Arbitration on M&A contracts – including specific consideration of competition law aspects), *SchiedsVZ*, 2004, Issue 3, pp. 123-129.

Sanders, Pieter, Unity and Diversity in the Adoption of the Model Law, *Arb. Int.*, 1995, Issue 1, pp. 1-38.

Sandrock, Otto, The Extension of Arbitration Agreements to non-signatories: An Enigma Still Unresolved, in *Corporations, Capital Markets and Business in the Law*, *Liber Amicorum Richard M. Buxbaum*, 2000, pp. 461-487.

Sandrock, Otto, “Intra” and “Extra-Entity” Agreements to Arbitrate and Their Extension to Non-Signatories under German Law, 19 J. Int. Arb. 423 (2002) (quoted as Sandrock, Intra and Extra Entity)

Sawada Toshio, Hybrid Arb-Med: Will West and East Never Meet?, 14 ICC International Court of Arbitration Bulletin, 2003, Issue 2, pp. 29-36.

Scanlon and Spiewak, Enforcement of Contract Clauses Providing for Mediation, in Alternatives to the High Costs of Litigation, 2001, No. 19, (May) 1.

Scherer Matthias, Editor Note: When Should an Arbitral Tribunal Sitting in Switzerland Confronted with Parallel Litigation Abroad Stay the Arbitration?, ASA Bulletin, 2001, Issue 3, pp. 451- 457.

Schlabrendorff, Klaus von, Schiedsgerichtsbarkeit bei M&A – Mehrparteiensituationen und Inter-Omnis Wirkung, in Tagungsbeiträge zur DIS-Vortragsveranstaltung “Schiedsgerichtsbarkeit bei M&A”, 24 and 25 April 2001, DIS-Materialien Bd., Dresden, Bd. VIII/01, p. 35 et seq.

Schleiffer, Patrick, No Material Adverse Change, in Rudolf Tschani (ed.), Merger & Acquisitions VI, Zurich 2004.

Schlosser, Ralf, Der Grad der Unabhängigkeit einer Schiedsvereinbarung vom Hauptvertrag, in Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel, 2001, pp. 697 et seq.

Schlosser, Ralf, Les Lettres d’intention: Portée et sanction des accords précontractuels, in Jérôme Bénédict et al. (eds.), Etudes en l’honneur de Baptiste Rusconi, Lausanne, Bis&Ter, 2000.

Schollen Anne, Les Lettres de parrainage ont-elles toujours de bonnes intentions?, RDAI 1994, pp. 793-804.

Segesser Georg Von, Arbitrating Pre-Closing Disputes in Merger and Acquisition Transactions in ASA Special Bulletin No: 24, 2005, pp. 17-54.

Sessler Anke and Leimert Corina, The Role of Expert Determination in Mergers and Acquisitions under German Law, Arb. Int., 2004, No. 20, Issue 2, pp. 151-165.

Sheppard Audley, Res Judicata and Estoppel, in Parallel State and Arbitral Procedures in International Arbitration, pp. 219-242 (cited Sheppard, Parallel State)

Shleifer, A., and R. W. Vishny, Takeovers in the '60s and the '80s: Evidence and Implications, Strategic Management Journal 12, pp. 51-59.

Shookman Jamie, Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis, J. Int. Arb., 2010, No. 27, Issue 4, pp. 361-378.

Sheppard Audley, The Scope and Res Judicata Effect of Arbitral Awards in Arbitral Procedure at the Dawn of The New Millennium, Brussels: CEPANI, Bruylant, 2005 (cited Sheppard, Millenium)

Söderlund, Christer, Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings, J. Int'l Arb. 2005 No. 22, Issue 4, pp. 301-322.

Tschäni, Rudolf, Post-Closing Disputes on Representations and Warranties, in ASA Special Bulletin No. 24, 2005, pp. 67-85.

Utz Weitzel, Killian J McCarthy, Theory and Evidence on Mergers and Acquisitions by Small and Medium Entreprises, Utrecht School of Economics Tjalling C. Koopmans Research Institute Discussion Paper Series 09-21, August 2009.

Veeder V.V., Observation – England and Wales High Court (Commercial Court), 11 October 2002, Revue de l'Arbitrage, 2003, pp. 537-541.

Veeder, V.V., Consolidation: More News from the Front-Line: The Second Shui On Case, Arb. Int. 1987, Issue 3, pp. 262-266.

Veeder, V.V., Issue Estoppel, Reasons for Awards and Transnational Arbitration, in ICC Court of International Arbitration Bulletin, on “Complex Arbitrations”, 2003.

Veeder, V.V., Multi-Party Disputes: Consolidation under English Law –The Viemira – a Sad Forensic Fable, Arb. Int. 1986, No. 2, Issue 4, pp. 310-322.

Veeder, V.V., Towards a Possible Solution: limitation, Interest and Assignment in London and Paris, in Albert Jan Van den Berg (ed), Planning Efficient Arbitration Proceedings: The Law Applicable to Arbitration, ICCA Congress Series No. 7, Kluwer Law International, 1996, p. 268-293.

Vicuña, Francisco Orrego, Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation, Disp. Res. J., 2002, pp.

Vischer, Markus, Due Diligence bei Unternehmenskäufen (Due Diligence in Business Acquisitions, SJZ, Zurich 2000, No: 10, pp. 229-236.

Wallace Don, Consolidated Arbitration in the United States- Recent Authority Requires consent of the Parties, J. Int. Arb. 1993, Issue 4, pp. 5-18.

Whitesell Anne Marie and Romero Eduardo Silva, Multiparty and Multicontract Arbitration: Recent ICC Experience, in ICC International Court of Arbitration Bull. Special Supplement 2003, pp. 7-18.

Regulations, Directives

1989 Colombian Decree on arbitration,

Federal Code on Private International Law of 18 December 1987

International Arbitration Act (Cap 143A, 2002 Ed) Sect. 23.

Neue Zürcher Zeitung, 27/28 November 2004.

Neue Zürcher Zeitung, 11 October 2004 (Ahold bekommt Recht – überhöhte Forderung für ICA – Kauf zurückgewiesen)

Singapore Arbitration Act Sect. 57 (Cap 10, 2002 Ed);

The Ordinance of the Swiss Takeover Board on Public Takeover Offers of 21 July 1997 (Takeover ordinance; SR 954.195.1)

Third Council Directive 78/855/EEC

UN Doc. A/57/17, Annex 1, pp. 54, 58.

UN Doc. A/CN.9/619 (25 June-12 July 2007) para. 120).

TABLE OF CASES

3rd Circuit Century Indemnity v. Certain Underwriters at Lloyd's 2009 WL 3297322 (2009);

Agrifoods International cooperative Ltd. v. (1) Agropur, Coopérative Agro-Alimentaire and (2) Ultimas Foods Inc. Aliments Ultima Inc., Ontario Superior Court of Justice, Decision of 23 March 2001, ASA Bulletin 19/2 (2001), pp. 355-366.

Aiton Australia Pty Ltd v. Transfield Pty Ltd [1999] 153 FLR 236 at 250;

Ali Shipping Corp v. Shipyard Trogir.

AMF Incorporated v. Brunswick Corp. [1985] 621 F.Supp. 456, 461

Apparel Art International, Inc. V. Amertex Enterprises Ltd., 48 F. 3d 576, 583 (1st Cir. 1995);

Hugo Marom Aviation Consultants Ltd. v. Recon/optical Inc., 1991 US Dist LEXIS 6877 (7th cir. 1991).

ARW Explor. Corp. v. Aguirre, 45 F.3d 1455 (10th Cir. 1995)

Associated Brick Mason Contractors, Inc. v. Harrington, 820 F.2d 31 (2d Cir. 1987)

Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich , 2002, UKPC 1129.

ATF 100 II 18 (1974) = JdT 1974 I 354.

ATF 102 II 80, 84 (1976).

ATF 103 II 190 (1977) c. 1 =JdT 1978 I 157

ATF 103 III 97 (1977), *Blum v. Bancofin*, at 106 and 107.

ATF 105 II 75 (1979), 80.

ATF 105 II 75 (1979), 81 = JdT 1980 I 67.

ATF 105 II 80 (1979) = JdT 1980 I 71.

ATF 105 II 80 (1979).

ATF 115 II 484, JT 1990 I 210

ATF 128 III 191, *infra* n.97.

ATF 31 II 640 (1905).

ATF 46 II 373 (1920) = JdT 1921 I 42.

ATF 68 II 302 (1942).

B.F. Goodrich Co. v. McCorkle, 865 S.W.2d 618, Texas Court of Appeal, 1993.

Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3d Cir. 1978)

BGE 108 II 102;

BGE 107 II 419;

BGE 81 II 213

BGE 122 III 426, 428 et seq.

Bothell v. Hitachi Zosen Corp., 97 F.Supp.2d 1048, 1051-53 (W.D. Wash. 2000)

C. And K. v. S. Compagnie S.A., Geneva Court of Justice, Decision of 15 October 1999, ASA bulletin 2000, at pp. 793-802.

Cable & Wireless Plc (C&W) v. IBM United Kingdom Ltd (IBM) [2002] 2 All E.R. (Comm) 1041 at 1054.

Case no. 4A_46/2011 of 16 May 2011 in www.kluwerarbitration.com.

Cass. 86/4137, 89/1892, 94/7890 and 95/1460

CB Richard Ellis, Inc. v. American Environmental Waste 1998 WL 903495 (EDNY);

Cecala and others v. Moore and others 982 F. Supp. 609;

Cedrela Transp. Ltd. v. Banque Cantonale Vaudoise, United States District Court for the Southern District of New York, 67 F. Supp. 2d 353 (S.D.N.Y. 1999)

Chiron Corp. V. Ortho Diagnostic Sys, 207 F. 3d 1126,1130-1131 (9th Cir. 2000),

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

Clarence Holdings Ltd v. Prendos Ltd, [2000] D.C.R. 404 (Auckland District Court).

Collins & Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16 (2d Cir. 1995)

Compania Espanole de Petroleos S.A. v. Nereus Shipping S.A. 527 F. The Second Circuit

Compare Nova (Jersey) Knit Ltd v. Kamgarn Spinnerei GmbH [1977] 1 Lloyd's Rep. 463 (HL).

Cour d'Appel de Paris, 25ème Chambre, Section B, arrêt du 17 Septembre 2004.

Decision BGH, reported in Neue Juristische Wochenschrift, Heft 12, 1984, pp. 669-670

Design Benefit Plans v. Enright 940 F. Supp. 200 (ND.Ill. 1996);

Dow Chemical Firms et al. V. Isover Saint-Gobain, ICC Case Number 4131, Y. B. Comm. Arb., 1984, at pp. 130 and 134.

Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd [1995] 36 NSWLR 709;

Enron Corp. Ponderosa Assets, LP v. Republic of Argentina, ICSID Case no.01/3, decision on jurisdiction, 2 August 2004,

ESSO/BHP v. Plowman (1995) 128 ALR 391;

Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc. (Swedish Supreme Court Case No. T-6-111-98).

Euro Petroleum Trading Ltd v. Transpetroleum International Ltd, Irish High Court, decision of 31 January 2002.

Fluehmann v Associates Financial Services 2002 WL 500564 (D Mass).

Fomento Construcciones y Contratas SA v. Colon Container Terminal SA, Swiss Federal Court, judgment of 15 May 2001, ATF 127 III (2001).

German Federal Supreme Court BGHZ 48, 25 (30 et seq.).

German Federal Supreme Court BGHZ 6, p. 338.

Hassneh Insurance Co of Israel v. Mew, op. cit., fn. 5; Insurance Co v. Lloyd's Syndicate [1995] 1 Lloyd's Rep 272.

Hooper Bailie Associated Ltd v. Natcon Group PTY Ltd [1992] 28 NSWLR 194;

Horst Reineccius, First Eagle SoGen Funds, Inc, Pierre Mathieu and la Société Hippique de la Châtre (Claimants) v. Bank for International Settlement (Respondent), Partial Award made by the Permanent Court of Arbitration dated 22 November 2002, Case number 2000-03, ASA Bulletin 2004, pp. 116-131.

Hugh Morrow and others v. Chinadotcom Corp. and others [2001] NSWSC 209.

ICC Award No. 3281

ICC Case No. 12745, Final award, in Albert Jan van den Berg (ed), Y. B. Comm. Arb. 2010 - Volume XXXV, (Kluwer Law International 2010) pp. 40 – 128.

ICC Case No. 2272, in S. Jarvin & Y. Derains (eds.), Collection of ICC Arbitral Awards 1974-1985 11 (1990), pp. 11-13.

ICC Case No. 5124 (unpublished)

ICC Case No. 6719, partial award, 1991, J.D.I., 1994, 1071-1081.

ICC Case No. 11404, 20 May 2003.

ICC Case No. 12502, Final award, in Albert Jan van den Berg (ed), Y.B. Comm. Arb. 2009 - Volume XXXIV, Kluwer Law International 2009, pp. 130 – 211.

ICC Case No. 2375 of 1975, award, Collection of ICC Arbitral Awards, 1974-1985, pp. 257-262.

ICC Case No. 3267 of 28 March 1984, 12 Y.B. Comm. Arb., 1987, pp. 87-96.

ICC case No. 3383 of 26 October 1979, 7 Y.B. Com. Arb., 1982, pp. 119-123.

ICC Case No. 3879, Interim Award, 11 Y.B. Comm. Arb., 1986, pp. 127-134.

ICC Case No. 4392, (Award) 110 J.D.I. (Clunet), 1983, pp. 907- 910.

ICC Case No. 5281 of 1989, award, 7 ASA Bull, 1989, pp. 313-333.

ICC Case No. 5989, Final Award, 15 Y.B. Comm. Arb. 1990, pp. 74-82.

ICC Case No. 6363 of 1991, final award, 17 Y.B. Com. Arb., 1992, pp. 186-211.

ICC Case No. 6829 (Final Award), 19 Y.B. Comm. Arb., 1994, pp. 167- 183.

ICC Case No. 7154 of 1993, award, J. Droit Int'l (Clunet), 1994, pp.1059-1064.

ICC Case No. 7184, Final Award, ICC Ct. Bull. 1997, No. 8, Issue 2, p. 63-64.

ICC Case No. 7893, Interim Award, 27 Y.B. Comm. Arb., 2002, pp. 139-152.

ICC Case No. 8910 (1998), Partial Award, in 127 JDI

ICC Cases 7385 and 7402, 1992 final award, 18 Y.B. Comm. Arb., 1993, pp. 68-79.

IPOC International Growth Fund Ltd. (Bermuda) v. LV Finance Group Ltd. (British Virgin Islands), ICC Case number 12875/MS, final award of 16 August 2000, Mealey's International Arbitration Report, Volume 19, Number 9, September 2004.

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA, 863 F.2d 315 (4th Cir. 1988)

John Hancock Mutual Life Insurance Co. v. Thomas W. Olick, 151 F. 3d 132, 136-137 (3rd Cir. 1998);

Judgment of 1 December 1995, Paris Cour d'appel, Ministère de l'Agriculture d'Irak v. Hochtief, Rev. arb., 1996, pp. 456-460.

Judgment of 11 January 1995, Paris Cour d'appel, commented in Cohen: Arbitrage et Group de contrats, Rev. arb., 1997, pp. 471-504.

Judgment of 18 April 1989, Cour d'appel de Paris, Rev. arb., 1990, pp. 901-916.

Judgment of 19 October 2000, 16 Sch 01/00, reported at www.dis-arb.de (Oberlandesgericht Schleswig)

Judgment of 20 December 1995, DFT 121 III 495 (Swiss Federal Tribunal).

Judgment of 9 December 1987, G.I.E. Acadi v. Thomson-Answare, 1988 Rev. arb. 573

Kassationsgericht Zürich, decision of 15 March 1999, (2002) ASA Bull. 373 at p. 374;

Kis France SA and KIS Photo Indus. SA v. Société Générale, Judgment of 31 October 1989, Paris Cour d'appel, 16 Y.B. Comm. Arb., 1991, pp.145-149.

Kis France v. Société Générale, CA Paris, October 3, 1989, Rev. Arb. P. 90 (1992), XVI Y. B. Com. Arb. P. 145 (1991);

LCIA Arbitration no. 9178, 20 December 2000.

Lister v. Romford Ice and Cold Storage Co Ltd [1957] AC 555, [1957] 1 All ER 125, HL.

Liverpool City Council v. Irwin [1977] AC 239, [1976] 2 All ER 39, HL;

London and Leeds Estates Ltd v. Paribas Ltd (No 2) [1995] 02 EG 134,

Lord Keith in Arnold v. National Westminster Bank plc, 1991, 2 AC 93 at 111 (HL).

Myanma Yaung Chi Oo Ltd v. Win Win Nu [2003] 2 SLR 547.

Netherlands Curacao Co., NV v. Kenton Corp., 366 F.Supp. 744 (S.D.N.Y. 1973).

Nordin v. Nutri/System, Inc., 897 F.2d 339, 345 (8th Cir. 1990);

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

North River Ins. Co. v. Philadelphia Reinsurance Corp. 856 F. Supp. 850 (S.D.N.Y. 1994).

O.I.A.E.T.I. v. Sofidif Paris le 19 Décembre 1986, Cour d'appel de Paris commented by Emmanuel Gaillard, Rev. Arb. 1987, pp. 275-292.

Paris Court of Appeal, 1st Suppl. Ch., 31 Oct. 1989, Rev. Arb. 1992, pp. 90-93.

Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons, 408 A.2d 963 (Del. Ch. 1979)

Peyrin and others v. Société Polyclinique des Fleurs, Cour de Cassatio, 6 July 2000, Rev. Arb., 2001, pp. 749-750.

Reteitalia Spa (Italie) v. Lagardère SCA (France), Swiss Federal Tribunal, 1st Civ. Ch., Decision of 26 May 1999, ASA Bulletin 2000, at p. 331-336.

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

SA JDA Software France et autres v. SA Kiabi, Judgment of 11 April 2002, Paris Cour d'appel, Rev. arb., 2003, pp. 1265-1276.

SBC Interactive Inc. v. Corp. Media Partners, 714 A.2d 758, 759 (Del. 1998).

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

Société Ouest Africaine des Bétons Industriels v. Republic of Senegal, ICSID Award No. ARB/82/1 (25 February 1988), 17 Y.B. Comm. Arb., 1992, pp. 42-72.

Sofidif v. O.I.A.E.T.I. Bull. Civ. 1988.I, No:64, Cass. Civ. 1re, 8 March 1988, *Rev. Arb.* 1989, p. 481.

Sonatrach Petroleum Corp. (BVI)v. FerrellInt'lLtd [2002] 1 All E.R. (Comm.) 627 (Q.B.).

Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (the Pyramid case), French Cour de cassation, decision on jurisdiction of 14 April 1988, 16 Y.B. Com. 1991 pp. 16-39.

Sweden SAR 2004/1, p. 98.

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

Swiss Federal Tribunal, 1st civil Chamber, Decision of 16 March 2004, 4P14/204, *ASA Bulletin* 4/2004, at pp. 770-781.

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

Swiss Federal Tribunal, 9 June 1998, C. Srl v. L.S. SA, *ASA Bulletin* 1998, p. 653 = *RSDIE* 1999, p. 593, with an approving note by Knoepfler;

The Viemira (Aiden Shipping Co. Ltd. V. Interbulk Ltd)., Lloyd's Rep. 1984/2, p. 66.

UNCITRAL Unpublished award of 26 February 2002, T. v. C. et al.

UNI-KOD sarl v. Ouralkali, Judgment of 31 May 2001, Paris Cour d'appel, 26 Y.B. Comm. Arb., 2001, pp. 1136-1140.

United Kingdom v. Boeing Co. 998 F. 2d 68 (2d. Circuit 1993), Mealey's International Arbitration Report C-1;

United States v. Panhandle Eastern Corp. Et al., 118 FDR 346, 10 Fed R Serv 3rd 686 (D. Del. 1998);

Unocal Corp. v. Mesa Petroleum C., 493 A.2d 946 (Del. 1985).

Walkinshaw v. Diniz [2000] 2 All E.R. (Comm.) 237 (Q.B.);

Zurich Chamber of Commerce Award, Case No. 273/95, 31 May 1996, 23 Y.B. Com. Arb. 1998, pp. 128-148.

WEB SITES

AAA Drafting Dispute Resolution Clauses – A Practical Guide (January 2004). Also available online at <www.adr.org>. (LAD : June 2011)

Concepts of Conciliation and Mediation and Their Differences, Justice M.

Jagannadha Rao, in

http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf

(LAD: June 2011)

<http://www.colorado.edu/conflict/civil-rights/topics/1950.html>(LAD: June 2011)

http://www.euram2008.org/Dokumenti/track/Teerikangas_TP54.pdf (LAD: February 2013)

<http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm> (LAD: June 2011)

http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Delaware_General_Corporation_Law.html
(LAD: February 2013)

In France see the med-arb simultanés procedure developed by CMAP, which involves parallel mediation and arbitration processes with different disputes resolution practitioners, www.cmap.fr. (LAD: May 2011)

International Arbitration: Corporate Attitudes and Practices 2006, available at <www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf>. The question does not appear to have been repeated in the Queen Mary/PwC survey, completed in 2008 and most recent in 2010 sponsored by White and Case. (LAD: March 2011)

National Conference of Commissioners on Uniform State Laws, “Uniform Mediation Act with Prefatory Note and Comments” (UMA Report), available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm> (LAD: March 2011)

The draft report of the CEDR Commission on Settlement in International Arbitration, 2009, p. 3 available at www.cedr.com. (LAD: April 2011)

The Uniform Mediation Act has been adopted by Illinois and Nebraska. For the current status of Uniform Laws refer to the National Conference of Commissioners on Uniform State Laws at www.nccusl.org (LAD: May 2011)

www.larousse.fr/encyclopedie (LAD: October 2008)

www.srinstitute.com (LAD: October 2008)

http://www.euram2008.org/Dokumenti/tracks/Teerikangas_TP54.pdf, 8th Euram, 14-17 May 2008,: Perspective on M&As: Theories, Methods and Experiences (LAD: February 2013)