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Dispute Resolution in M&A Transactions

It Does not Always Have to be a Court

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Company purchase agreements often contain dispute resolution clauses that are not adapted to the specific nature of any disputed issues in a transaction.[1] In all areas of business life, efficiency and a proportionality of effort and desired result are pursued. This should also apply to the choice of form and management of disputes. In M&A transactions, differences can arise at various levels. In addition, the pandemic, due to the spread of the Covid 19 virus, calls into question the economic basis of many transactions. This affects both ongoing and completed deals. Mechanisms are needed that also enable rapid conflict resolution. For example, it must be possible to clarify quickly whether the buyer was allowed to withdraw from the

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[1] On the frequency of arbitration clauses, see Meyding/Sorg, in: Wilhelmi/Stürner, Post-M&A Arbitration, 2019, p. 13 et seq.

transaction due to a significant change in the target company.[2] A short-term conflict resolution mechanism can help to avoid lengthy disputes about the legal consequences of the buyer's withdrawal or reduce them to follow-up questions.

The highly divergent types of possible disputes in company acquisitions are an excellent basis for differentiating solutions. For example, differences may relate to highly economic issues, such as purchase price adjustments, or may require a quick solution that at least allows the transaction to proceed, as in the case of unexpected events occurring after closing, but before completion of the transaction[3]. This contribution is also intended to encourage the conclusion of a supplementary agreement appropriate to the circumstances, taking into account the forms of conflict resolution set out in this article, if necessary when a dispute arises.[4]

Arbitration is the most common form of alternative dispute resolution. It is particularly suitable in a cross-border context, when industry-specific knowledge of international trade has to be taken into account and legal and cultural differences demand consideration. In arbitration proceedings, it has long been common practice to conduct most of these proceedings online[5], which is another major advantage, especially in view of the social distance created by the corona epidemic.

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[2] For so-called MAC (material adverse change) clauses, see Knott, Textbook on Business Acquisitions (in German), 6th edition 2019, para 1345 et seq. and below, No. 3f

[3] For these situations, see Knott, (Footnote 2) para 1344.

[4] Sceptical about this Demuth, SchiedVZ 2012, 271, 272.

[5] See below 4.3

1. Forms of dispute resolution in M&A transactions

There is a variety of forms of dispute resolution to choose from: Preceding internal escalation within the bodies of the parties, mediation (including the combination with a contentious form of conflict resolution), independent assessments by expert arbitrators, settling disputes amicably and only as a last resort by filing a claim for arbitration. Certain disputes are less complex than others, and a *fast-track arbitration* procedure may be considered. Other disputes, such as those involving breaches of confidentiality, require rapid resolution (*emergency arbitration*). A whole potpourri of mechanisms is therefore available. They only have to be used. If this is not done in advance in the acquisition contract, an additional agreement can be made for this purpose without further ado, also retrospectively in relation to the special circumstances.

The following tables provide an overview of the various forms of dispute resolution and makes a typified assessment:

Form of dispute settlement	Costs	Duration	Enforceability of Result
Ordinary courts	*Medium*	*Medium*	*Yes*
Arbitration	*High*	*Medium*	*Yes*
Mediation	*Medium*	*Quick*	*Complicated*
Expert Arbitration	*Low*	*Quick*	*No*

Form of dispute settlement	Protection of confidentiality	Legal quality	Online conflict resolution
Ordinary courts	*No*	*High - Instances*	*Usually not*

Arbitration	*Yes*	*High - case reference*	*Yes*
Mediation	*Yes*	*High*	*Yes*
Expert Arbitration	*Yes*	*High*	*Yes*

2. Preliminary negotiations, escalation within the bodies of the parties

On the basis of an escalation clause, the parties are first obliged to conduct negotiations on the point in dispute. The conduct of negotiations can also be left to the discretion of the parties. In this case, the responsibility for conducting negotiations is assigned to higher bodies if no solution can be found at the previous level. Only after the failure of the negotiations does the dispute escalate, and a formal procedure can be initiated to settle the dispute. For this purpose, the various forms of procedure mentioned above are available.

The escalation clause is suitable for most disputes in M&A transactions, especially those involving purchase price adjustments. For issues that need to be resolved in a hurry, the deadline should be correspondingly short.

The consequences of not complying with such a clause must be considered. Is compliance with such a clause an obligatory condition for the subsequent initiation of litigation? In this respect, it is important to specify in the clause whether conducting the

negotiations is mandatory.[6]

The second question concerns the legal consequences of failure to comply with the obligation to settle a dispute amicably: Is the arbitral tribunal not competent in this case[7] or must the subsequent action be considered inadmissible?[8] The difference between the two approaches is particularly important at the enforcement stage. If the jurisdiction is considered to be affected, the losing party can submit an objection of lack of jurisdiction under Art. V (1) lit. d of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[9] (New York, 10 June 1958; subsequently the "**New York Convention**").

The approach of the German Federal Supreme Court for Civil Matters avoids lengthy, time-consuming and costly disputes about the jurisdiction of the arbitral tribunal. If other legal systems are applicable, there may be a risk. English[10] law and the law of Singapore[11] assign this question to the jurisdiction of the arbitral tribunal. It is therefore important to comply with such clauses. If necessary, the legal consequence can also be determined in the

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[6] See the decision of the English High Court in the case of Emirates Trading Agency vs. Prime Mineral Exports, (2014) EWHC 2104, on the one hand, and that of the French Cour de Cassation, Chambre Commerciale, of 29 April 2014, Bulletin 2014, IV, no. 76, on the other.

[7] In this sense the High Court of Singapore in the case International Research vs. Lufthansa Systems Asia Pacific, [2012] SHGC 226 para 106.

[8] In this sense the German Federal Supreme Court for Civil Matters, decision of 14.01.2016, file no.: I ZB 50/15 and of 09.08.2016, file no.: I ZB 1/15.

[9] Federal Law Gazette 1961 II p. 121.

[10] (2014) EWHC 2104 para 73.

[11] [2012] SGHC 226 para 106.

clause itself.

Escalation clauses sound very good, but they raise the legal questions described above for those not so familiar with the subject matter. For this reason, and because in practice people will always talk to each other before escalating the dispute, these clauses are not only advantageous.

3. Expert Arbitration

Disputes arising from business acquisitions often relate to financial figures or other economic or factual matters relating to company finances. The legal consequences of such disputes are usually less complex and easier to answer once the accounting issue has been clarified. One example is questions concerning the accounting balance sheet,[12] which must be prepared as of the effective date of the business purchase agreement. The question of whether a MAC (*material adverse change*) event has occurred can also be decided by an industry expert or auditor. This way, a decision can be reached which is optimal in terms of cost and time and can be used in practice. The expert's decision forms the basis for determining the legal consequences. These can then be clarified in the contentious proceedings. However, one should also consider entrusting the decision of the legal consequences to the expert arbitrator. For example, the determination of whether a MAC event occurred allows the expert arbitrator to calculate any damages that

[12] See also Knott, (Footnote 2), para 288 et seq.

may have been incurred by the entitled party.

In the event of a dispute regarding a MAC event relating to the business of the target company, the task of the expert arbitrator may, for example, be to determine whether the expected loss of sales due to the loss of a supplier exceeds the contractually agreed materiality threshold and whether the seller is therefore entitled to withdraw from the company purchase agreement. In times of the Corona crisis, parties to business purchase agreements are likely to increasingly invoke MAC clauses, especially if the contracts were concluded before the outbreak of the virus and are now about to be closed. Both parties then have an interest in a quick settlement of their dispute. After all, it is vital to know whether the deal is going to go through or not. If necessary, the legal consequences can be clarified in a separate, contentious procedure.

The expert arbitration clause should specify the requirements for the qualification of the expert and the way in which the expert should be selected and appointed. A panel of experts (three) may also be considered. The parties should also agree that the expert's opinion is binding on both of them. Furthermore, the clause should provide for the initiation of proceedings by the complaining party and the possibility for the other party to reply. It should also be regulated whether there should be an obligation or option to hold a hearing of the parties before the procedure of drawing up the opinion is concluded. Finally, the distribution of the costs of the expert arbitrator’s activity shall be determined.

Expert Arbitration proceedings may also be conducted in accordance with the relevant regulations of the arbitration

institutions.[13] According to Art. 8 No. 2 of the ICC Expert Rules Part 3 (Administration of Expert Proceedings), the findings of the expert arbitrator are not binding on the parties unless otherwise agreed. According to Art. 22 of the DIS Rules on Expert Determination, the findings of the expert arbitrator are in principle binding, but a party may make a declaration of non-recognition (Art. 23). Thereupon the expert arbitrator's opinion is subject to judicial review. The time limits for the statements of the parties are also relatively long - the DIS expert proceeding should last a maximum of six months in total. They are not tailored to a decision, which may be required quickly, as to whether a party can invoke a MAC event and withdraw from the business purchase agreement.

It is important for the enforcement of an expert opinion to implement its findings effectively. If the expert arbitrator's opinion comes to the conclusion that the buyer still has to pay EUR 10 million in arrears, it does not make sense if the decision placed in the hands of the expert arbitrator by both parties is not recognised by the losing party. This purpose can be achieved by subjecting the parties to immediate execution in the business purchase agreement (hereinafter '**SPA**') with regard to their obligation to pay a purchase price adjustment amount determined by the expert arbitrator. Under German law, such subjection with respect to the payment of an amount not yet determined at the time of the conclusion of the contract is only effective if the amount is determined in the SPA or

[13] E.g. the DIS (German Institution of Arbitration) Rules on Expert Determination of 2010, http://www.disarb.org/de/16/regeln/dis-schiedsgutachtensordnung-10-schgo-id20, or the ICC Expert Rules, https://iccwbo.org/content/uploads/sites/3/2015/01/2015-ICC-Expert-Rules-ENGLISH-version-1.pdf

can be determined according to it.[14]

In M&A-related disputes, expert reports are particularly suitable for purchase price adjustments and for deciding whether a MAC event has occurred. In these cases, economic and financial aspects are usually in the foreground. Legal aspects are rather insignificant. However, this statement is not true if the legal issues are complex. For example, legal issues are difficult in this context when the expert arbitrator has established a MAC event, but the parties disagree about whether the buyer caused the MAC event. Such action could be, for example, the termination of a supply contract by the buyer. One should therefore either allow a review of the expert opinion by the parties. In that case, however, the expert opinion is no longer binding and the time advantage is lost. Alternatively, when defining the term 'Material Adverse Event', the expert's assignment should include a verification that the event occurred without any action by the buyer or mismanagement by the seller. The precise definition of the scope of the expert arbitrator’s mandate is therefore of great importance.

[14] Witte/Mehrbrey, NZG 2006, 241, 244.

4. Arbitration proceedings

4.1 Ordinary state courts versus arbitral tribunals

What are the criteria for determining whether the parties to the SPA should refer their disputes to a state court or a arbitration tribunal? Arbitration proceedings can be conducted confidentially; proceedings before ordinary courts are generally public. The ordinary course of law allows for appeal and, if necessary, revision. For this reason and due to the varying degrees of efficiency of the state courts, the duration of arbitration proceedings is generally significantly shorter than that of proceedings before ordinary courts. In arbitration proceedings, the parties also have the possibility to choose the applicable law more flexibly and better adapted to the circumstances of the case, for example to exclude certain areas of the actually applicable legal system. For example, rules designed to protect consumers can be excluded from application in the context of fairness control of general terms and conditions. The parties may also invoke non-national law for application, such as the *lex mercatoria*, or provide for a decision to be taken at their own discretion (*ex aequo et bono*).[15] In this context, the ICC arbitral award of 29.01.2001 is instructive.[16] It concerned a clause limiting liability in a contract for work on a special machine. The ICC Arbitration Tribunal classified this clause - contrary to the requirements of German law, - as an individual agreement. There was no economic

[15] See for example No. 24.4 of the DIS (German Institution of Arbitration) Arbitration Rules.
[16] SchiedsVZ 2005, 108.

imbalance between the contracting parties. Therefore, this clause was - as an exception in view of the circumstances of the business relations between the parties - determined to be not mandatory, even though this clause was not changed at all and was presented by the supplier of the machine as non-negotiable.

A major advantage of arbitration proceedings is that the parties can choose the judges who will decide on their dispute. In doing so, they can take into account their qualifications, specialisations and expertise. This possibility is important in disputes arising from M&A transactions. These disputes require industry-specific expertise, experience in international business transactions and knowledge of different legal cultures.

Accordingly, the parties may, when applying German law, deselect the provisions on fairness control of general terms and conditions in transactions between merchants under Sec. 1051 of the German Code of Civil Procedure (ZPO). This aspect can be important when it comes to the question of whether a provision in the SPA triggering a claim by the buyer is to be regarded as such a general contract term or condition that does not withstand the fairness control.[17] From the point of view of German law, the deselection of fairness control in arbitration proceedings is permissible. According to case law, the provisions on the control of the fairness of general terms and conditions are not among those norms which must always be observed as so-called overriding mandatory provisions because they

[17] On the question of whether a company purchase agreement is to be regarded as general terms and conditions, Knott, (Footnote 2), para 249.

protect public interests.[18] In French law, on the other hand, the majority of authors qualify the special provisions on fairness control of general terms and conditions in consumer contracts as overriding mandatory provisions (lois de police).[19]

It is often taken for granted that the parties in arbitral proceedings can choose the language of the proceedings. Court proceedings, however, must be conducted in the national language.[20] There is a Chamber for International Commercial Matters at the Regional Court of Frankfurt/Main. There, the proceedings can be conducted in English.

Another advantage of the arbitration procedure is its confidentiality. It must, however, be agreed upon in accordance with general German arbitration law. Otherwise it is not guaranteed. The rules of the arbitral institutions, for their part, contain their own provisions on the confidentiality of the proceedings.

For arbitration proceedings, the parties may not only adapt the rules of the law on the merits chosen by them to the needs of their business relationship; they may also choose the procedural rules applicable to the arbitration proceedings in a way that suits them best. For example, they are entitled to allow, exclude or restrict the submission of documents for discovery.[21]

In arbitration proceedings there is generally no second instance.

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[18] See German Federal Court of Justice for Civil Matters, ruling of 9 July 2009, ref. Xa ZR 19/08, NJW 2009, 3371, 3373.
[19] Leible, General Principles of European Private International Law, 2016, § 7.02 B.
[20] See Jäger/Zavodsky, SchiedsVZ 2019, 175, 176.
[21] See point 4.2.5 below.

On the one hand, this serves to speed up the process. However, depending on the complexity of the legal issues, this can also be disadvantageous. For this reason, there have recently been exceptions to this principle:

Pursuant to Art. 49 of the Singapore Domestic Arbitration Act, a "party to arbitration proceedings (after notice to the other parties and to the arbitral tribunal) may bring an action before the Singapore High Court on a question of law arising out of an award made in the proceedings". The situation is similar under English law: under Sec. 69 of the English Arbitration Act 1996, a "party to arbitration (after notice to the other parties and to the arbitral tribunal) may bring an action before the Court on a question of law arising out of an award made in the proceedings". From the point of view of the plaintiffs in M&A-related arbitration proceedings (i.e. usually the buyer), such provisions are of importance: If one is unjustly defeated in regards to high claims and cannot assert the claim a second time, for instance before a regular court, this is a great loss. On the other hand, the parties can appoint the institutions or persons directly, thus ensuring the quality of the arbitrators.

Another difference between arbitration tribunals and ordinary courts relates to the enforcement of judgments/awards abroad. This aspect is very important for disputes related to M&A transactions: the parties are often domiciled in different countries, so that decisions often have to be enforced abroad. In the country itself, judgments of the courts can be easily enforced. In addition, in civil and commercial matters, decisions of state courts within the EU are recognised and enforced without "exequatur", i.e. without any

further review.[22] Both domestic and EU arbitral awards have yet to be declared enforceable.[23] The New York Convention applies to arbitral awards both in relation to EU member states and other states. Outside the EU, the cross-border enforcement of arbitral awards is easier than that of court decisions. This is due to the fact that Germany currently has only three bilateral enforcement agreements for court decisions in civil or commercial matters with other states (namely Israel, Tunisia, Turkey).[24] In the absence of bilateral agreements with foreign states, the enforcement of a judgment abroad can prove to be very costly in individual cases.[25] The advantage of an almost worldwide enforceability of arbitral awards[26] will only be compensated for judgments in civil and commercial matters when the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters takes effect.[27] Under this Convention, foreign judgments are to be recognised without exequatur. However, the Convention is not yet in force.[28]

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[22] This follows from the so-called Brussels-Regulation, EC Regulation 44/2001 of 16 January 2001.

[23] The Brussels-Regulation is not applicable to arbitral awards.

[24] BeckOK ZPO/Bach, 35th Ed. 1.1.2020, ZPO § 328 marginal no. 9.3.

[25] For an enforcement in Germany all requirements of § 328 ZPO have to be fulfilled, see e.g. for Russian judgements Higher District Court Hamburg, judgement of 13.07.2016, file no. 6 U 152/1, Higher District Court Hamm, judgement of 06.09.2016, file no. 25 U 9/14

[26] The New York Convention has been ratified by more than 150 states.

[27] https://www.hcch.net/en/instruments/conventions/full-text/?cid=137; so far this convention has only been signed by Ukraine and Uruguay, but not ratified.

[28] The agreement will not enter into force until it has been ratified by two states.

4.2 Optimal structuring of the arbitration proceedings according to the specific circumstances of the M&A transaction

One of the advantages of choosing an arbitral tribunal is the flexibility of the applicable substantive and procedural law. This is important for disputes in international M&A disputes: US parties want to see elements of discovery and taking of evidence familiar to them applied even in a transaction involving Europe. Therefore, the possibilities of the individual design of the arbitral proceedings will be discussed below.

4.2.1 The role of experts

In more complex disputes concerning M&A transactions, experts support the parties in the calculation of damages. The calculation of damages and purchase price adjustment amounts is often extensive and time-consuming. For the arbitral tribunal, the question then arises as to whether it should appoint a third expert. The alternative is to form an opinion by comparing the statements of the two experts appointed by the parties. For this purpose, the arbitral tribunal may hear both experts jointly and question them by the parties and itself. This procedure is called simultaneous expert questioning,[29] colloquially also called 'hot tubbing'. It saves time and money. The arbitral tribunal will not appoint its own expert after the submission

[29] Concurrent Expert Evidence was first developed in Australia and has also become increasingly popular in English courts: See the report https://www.judiciary.uk/wp-content/uploads/2011/03/cjc-civil-litigation-review-hot-tubbing-report-20160801.pdf

of the party's expert opinion. It demands a high degree of experience from the arbitrators. They must be able to evaluate the party assessments without external support and from their own expertise.

4.2.2 Accelerated (fast track) arbitration proceedings

The arbitration rules of the most important arbitral institutions contain special provisions for accelerated proceedings.[30] Expedited proceedings are particularly suitable for claims that have a lower value. In this case, the time limits for the constitution of the arbitral tribunal are usually shorter, the case is in principle decided by only one arbitrator, the number of submissions is limited, the oral hearing is merely optional, and the award must be made within a fixed period of time, in most cases within six months after the proceedings conference.[31] The ICC rules provide for the accelerated procedure for any claim below US-$ 2 million. However, the parties may agree to a different arrangement ('opt out'). Furthermore, the institutional arbitration rules allow for an agreement on the rules for an accelerated procedure regardless of the amount in dispute. It is also possible to make a decision on the merits of the case without an oral hearing[32]. The losing party in an expedited procedure may not successfully claim a violation of procedural principles in the

[30] Decker, Arbitration Center 2019, 75, 80.
[31] See for example the DIS Expedited Rules http://www.disarb.org/de/16/regeln/-id37; Link to the ICC rules on expedited procedures: https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/
[32] See for example Art. 3.5 Appendix VI to the ICC Arbitration Rules; Art. 4 sentence 2 of the DIS Rules for accelerated proceedings

subsequent declaration of enforceability proceedings if such violation results from the application of the rules for an expedited procedure agreed between the parties.[33]

In the USA, the law of the State of Delaware or New York is usually chosen as the applicable law for business purchase agreements.[34] The law of Delaware is usually also the law applicable to the corporate law relationships of the US contractual partner. With regard to disputes arising from a business purchase agreement, the accelerated procedure under the Delaware Rapid Arbitration Act is suitable for arbitration proceedings to which the law of Delaware is applicable.[35] The law focuses on the rapid resolution of disputes. Delaying tactics, for example by involving state courts, are eliminated. The time limit for issuing the arbitral award is generally 120 days after the sole arbitrator has been confirmed. The award is automatically enforceable (in Delaware[36]) unless challenged within 15 days on specific grounds provided by law.

The adoption of rules for accelerated procedures by the arbitral institutions indicates that the time advantage of arbitration is no longer perceived as being so great. However, the rules for expedited proceedings must also be seen against the background of the costs

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[33] See Schütt, SchiedsVZ 2017, 81, 89

[34] For differences between these two state laws see https://corpgov.law.harvard.edu/2014/01/02/delaware-vs-new-york-governing-law/

[35] Title 10, Chapter 58 of the Delaware Code, https://delcode.delaware.gov/title10/c058 /i ndex.shtml; as well as the Delaware Rapid Arbitration Rules, ttps://courts.delaware.gov/rules/pdf/DeRapidArbitraion.pdf

[36] Arbitral awards from one US state must be declared enforceable in other states.

of arbitral proceedings. In this paper, the expert arbitrator's opinion is recommended for differences that can be quickly decided in M&A transactions, such as the existence of a MAC event and purchase price adjustments.[37] Of course, this recommendation only applies in the event that, in the context of such a dispute, the legal issues associated with the dispute are of secondary importance. Otherwise, the expert arbitrator's opinion should be provided within the framework of an arbitration procedure. In this case, the accelerated procedure may be suitable.[38] Furthermore, legal disputes in connection with M&A transactions are of a rather complex nature and usually require a more comprehensive taking of evidence. Therefore, accelerated proceedings are generally - except for cases with low amounts of damages - not considered a suitable option.[39]

4.2.3 Number of arbitrators depending on the amount in dispute

Unless the parties choose an expedited procedure, the number of arbitrators shall be three[40] or one[41] in accordance with the rules of the international arbitral institutions. The parties should provide for this issue. The number of arbitrators may still be determined when the arbitration procedure is initiated, or a party may request three arbitrators, for example when important witness statements are to

[37] See above at point 3.

[38] Meyer-Sparenberg/Jäckle, Beck'sches M&A Handbook, 1st edition 2017, § 85 para. 79.

[39] See also Meyer-Sparenberg/Jäckle, Beck'sches M&A Handbook, 1st edition 2017, § 85 marginal no. 78.

[40] See point 10.2 sentence 3 DIS Rules.

[41] See paragraph 12, section 2, sentence 1 ICC Rules.

be considered.

4.2.4 Significance of the seat of the arbitral tribunal

The law of the country of the seat of the arbitral tribunal - in addition to the provisions of the chosen rules and the agreements of the parties - shall apply to the procedure of the arbitral proceedings and shall determine the judicial supervision of the arbitral proceedings and the review of the award, unless the chosen rules or the agreement of the parties provides otherwise. It is particularly important in this respect to what extent ordinary courts grant interim relief as an accompanying measure.[42] In German law, Sec. 1033 ZPO expressly permits this. It is advisable to choose a seat where the legislation and the courts support the arbitration proceedings. German civil procedure law supports arbitration proceedings. According to Sec. 1050 ZPO, German courts support arbitration courts in the taking of evidence.[43] However, witnesses must then be heard in German.

The seat of the arbitral tribunal must of course have a connection with the dispute. In the case of a business acquisition between a French seller and an English buyer with respect to a target company in Germany, the parties may agree on Frankfurt as the seat of arbitration. However, Geneva, Zurich or Vienna, even Stockholm, can also be considered as alternatives. Paris and London could not be considered because of the parties' origin from these two countries.

[42] See in detail below point 4.2.6

[43] See Saenger, Code of Civil Procedure, 8th edition 2019, § 1050 marginal no. 1.

The parties are in principle also free to choose the arbitration rules. It is not necessary to choose the rules of the arbitral institution best known in the country or place of arbitration. However, the arbitrators should be familiar with the selected rules.

4.2.5 Flexible design of document production and taking of evidence

There is a great difference between the Anglo-Saxon common law and the so-called civil law legal systems, particularly with regard to the obligation to produce documents. According to common law, 'all cards are put on the table' before proceedings begin, i.e. each party can demand that the other party submit all relevant correspondence. This process, which precedes the actual trial, is called 'discovery' or 'document production'.[44] Discovery also extends to statements by potential witnesses ('depositions') who could make relevant statements.[45] In discovery proceedings, for example, the submission of documents may be required to substantiate or defend the claim.[46] Under German civil procedural law, on the other hand, it is up to the party bearing the burden of proof to present the evidence necessary to substantiate his claim. So-called "fishing expeditions" are not permitted under German law. Only in limited cases can a German court order the opponent or uninvolved third parties to produce documents (Sec. 142 ZPO). These differences should also be seen against the background that arbitration proceedings under common

[44] Theissen, IWRZ 2020, 10.
[45] Theissen, IWRZ 2020, 10, 11.
[46] See MüKoZPO/Rauscher, 5th edition 2017, EG-BewVO art. 1 marginal no. 8.

law are proceedings conducted by the parties. According to the understanding of civil law, the arbitral tribunal is the master of the proceedings and can investigate the facts of the case beyond the evidence offered by the parties.[47]

The arbitration rules remain relatively flexible. For example, the arbitration rules of the SIAC (Singapore) and the HKIAC (Hong Kong), which are issued in common law jurisdictions, provide flexible rules for document production.[48] In comparison to the principles of procedural law under common law described above, they give the arbitration tribunal a strong position for conducting proceedings. In this respect, the parties are free to make arrangements for document production in accordance with all the arbitration rules. If the parties have not reached an agreement on the taking of evidence and invoke institutional rules of arbitration, the arbitral tribunal is granted extensive discretion under most institutional rules.[49]

An agreement of the parties on discovery binds an arbitral tribunal seated in Germany.[50] The supplementary agreement should refer to the special rules on the taking of evidence, which have been designed by internationally experienced specialists in this field and are recognised in both legal systems. These rules are the IBA Rules

[47] So para. 28.2 of the DIS Arbitration Rules.

[48] See Rules 22. und 22.3 of the arbitration rules of HKIAC, https://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#22, as well as Rule 19.2 of the arbitration rules of SIAC, https://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules% 202016%20 English_28%20Feb%202017.pdf

[49] See Art. 28 DIS rules and Art. 25 ICC rules.

[50] See Schütze, SchiedsVZ 2018, 101.

on the Taking of Evidence in International Arbitration of 29 May 2010[51] as well as the Rules on the Efficient Conduct of Proceedings in International Arbitration[52] presented in spring 2018, which emphasize the leadership of the arbitral tribunal. In disputes in the context of international M&A transactions, the above-mentioned issues are often of importance: In order to prove the breach of a warranty under the purchase agreement, the buyer is dependent on documents which are not available to him but only to the target company.

4.2.6 Provisional measures in ongoing arbitration proceedings

In M&A-related disputes it is very important for the parties to be able to seek interim legal protection during the arbitration proceedings. Such urgent measures may be necessary in particular in connection with the violation of confidentiality obligations or non-competition obligations. They are ordered either by the arbitral tribunal or by the ordinary courts. Under most arbitration rules, the adoption of emergency arbitration measures is possible.[53]

However, such orders are ineffective if they are not complied with without coercion[54] or are not enforceable with the help of state

[51] Available at www.ibanet.org/Documents.

[52] https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e264 73d92 961d926948c9.pdf

[53] See Art. 25 DIS Rules; Art. 29 ICC rules in conjunction with appendix V (Emergency Arbitrator Rules)

[54] See Art. 29(2), second sentence: 'The parties undertake to comply with the order of the arbitrator in an emergency'.

courts. According to German law (Sec. 1041 (1) ZPO), both the ordinary courts and the arbitral tribunal are competent to order interim measures.[55] Interim orders of the arbitral tribunal are enforced. The legal situation is similar in Singapore, the largest arbitration centre in Asia. According to Art. 12 (5) of the International Arbitration Act of Singapore,[56] arbitration courts are entitled to issue interim measures with the same effect as ordinary courts. Para. 6 of this provision grants the enforceability of arbitral tribunal orders in the same way as ordinary court orders. Under English law,[57] ordinary courts shall only make interim orders if the arbitral tribunal is not legally or factually in a position to do so. State courts may not issue interim measures even before the constitution of the arbitral tribunal if the parties can be granted adequate legal protection by the appointment of an urgent arbitrator by the competent arbitral institution.[58]

The arbitral tribunal may not issue measures of interim relief against third parties who are not parties to the arbitration

[55] Saenger, Zivilprozessordnung (Civil Procedure Act), 8th edition 2019, § 1041 marginal no. 1; German law also follows the UNCITRAL Model Law in this respect, see footnote 57 below.

[56] https://sso.agc.gov.sg/Act/IAA1994; Singapore follows the UNCITRAL Model Law on International Commercial Arbitration, see § 17 A through J, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

[57] Art. 44 (2) lit. (e), (5) English Arbitration Act 1996; http://www.legislation.gov.uk/ukpga/1996/23/section/44; see Nils Schmidt-Ahrendts/Fabian Klein, in: Wilhelmi/Stürner, Post-M&A Arbitration, 2019, p. 172.

[58] *Gerald Metals SA v Timis Trust*, [2016] EWHC 2327 (Ch). See Nils Schmidt-Ahrendts/Fabian Klein, in: Wilhelmi/Stürner, Post-M&A Arbitration, 2019, p. 173.

agreement. For example, the buyer may be interested in obtaining an interim injunction against the target company for a violation of the non-competition clause. German courts may also order such interim measures to support arbitration proceedings conducted abroad[59]. Thus, if the place of arbitration is Vienna, and the violation of the non-competition clause is alleged to have occurred in Germany, German courts are empowered to issue an interim injunction upon request.

4.2.7 Multi-contract and multi-party procedures

In general, multi-party situations can arise when one or more parties on the side of the claimant or respondent are involved in an arbitration. In principle, the right and obligation to participate in arbitration proceedings exists only with respect to the parties to the arbitration agreement, in an M&A transaction usually the seller and the buyer. However, there may be several parties involved in a business acquisition, e.g. on the seller or buyer side. For example, a third party may also guarantee the obligations of the seller. In this constellation, all parties concerned will submit to the arbitration clause. The arbitration rules of most arbitration institutions deal with these multiparty situations. An important issue is the involvement of all parties in the appointment of arbitrators. For this purpose, Art. 20 DIS Arbitration Rules, for example, provides for a differentiating solution. Arbitration proceedings may also concern several contracts (multi-contract proceedings), for instance if the parties agree on the purchase of one or more companies on the basis of several contracts.

[59] Cf. sections 1025 (2) and 1033 ZPO.

For this purpose, the parties may, for example, decide whether claims arising out of more than one contract are to be dealt with in one arbitral procedure.[60]

Several legal relationships are also affected if the target company has a dispute with a third party, the outcome of which has an impact on the relationship between seller and buyer. For example, the owner of a patent can sue the target company for infringement. If the target company does not prevail, this triggers a claim for indemnification by the buyer under the business purchase agreement. Another example is the termination of an important customer contract of the target company, which triggers a breach of a warranty in the business purchase agreement. For this type of dispute, the SPA should contain provisions on the seller's participation in the conduct of the dispute by the target company after the closing. Furthermore, from the buyer's point of view - and in view of arbitration proceedings regarding the claim under the SPA - it is very important that the seller recognizes the final judgment in the dispute with the third party as binding on itself with regard to its liability towards the buyer.[61]

4.2.8 Inclusion of claims against R&W insurers

A particular multi-party situation arises in international M&A transactions with regard to reps & warranties insurance. Most reps & warranties insurance policies are policies taken out by the buyer,

[60] See e.g. the provision in no. 17 DIS Arbitration Rules
[61] See in detail Drude, SchiedsVZ 2017, 224, 228 et seq.

which give the buyer a direct claim against the insurance company.[62] The insurer accepts arbitration clauses for disputes arising from this relationship. The reason is the interest in confidentiality. The seller remains directly liable in the amount of the deductible of usually 1% of the purchase price and in the case of so-called 'fundamental warranties'[63]. Due to this structure, the negotiations shift from the SPA to the wording of the reps & warranties insurance policy. In the case of policies concluded by the buyer, the aim is to include the seller in the arbitration agreement between the insurer and the buyer regarding the seller's liability contribution. In this way, a uniform decision can be reached in a single procedure vis-à-vis the seller and the insurance company.

If the seller took out the insurance policy, the buyer's claims shall in principle continue to be directed against the seller.[64] However, these are linked to the seller's right of recourse against the insurance company. It is possible to assign the claims of the seller against the insurance company to the buyer.[65] As an alternative, the seller can serve a third party notice against the insurance company when the buyer asserts a claim. However, this is only possible in arbitration proceedings if the party given notice of the dispute (in this context, the insurance company) is bound to the arbitration proceedings by an existing arbitration agreement. It is therefore in the interest of

[62] However, in view of the requirement of the insurance company to submit a 'no claims declaration', the buyer can only pursue claims against the insurance company that are unknown to him at the time of the conclusion or completion of the transaction.
[63] Hoger/Baumann, NZG 2017, 811, 814.
[64] Gaudig, KSzW 2017, 42, 43.
[65] Gaudig, KSzW 2017, 42, 43.

both seller and buyer if the insurer is included in the arbitration clause of the SPA.

4.2.9 Confidentiality of the arbitration proceedings

According to German arbitration law, arbitration proceedings are not confidential without an agreement to this effect. The ICC Rules of Arbitration also do not impose an obligation on the parties to maintain confidentiality.[66] The DIS Arbitration Rules [67], however, provide in their Sec. 44.1 for an obligation to maintain confidentiality. According to Sec. 44.3 of the DIS Arbitration Rules an award may only be published with the prior written consent of all parties.

4.2.10 Litigation financing for M&A-related arbitration proceedings

Similar to reps & warranties insurance in M&A transactions, litigation financing serves to shift risk, in this case from the plaintiff to the insurance company. Process financing is also becoming increasingly important in arbitration proceedings. With process financing, the investor assumes the costs of the plaintiff's legal prosecution. The plaintiff remains the owner of the claim and enforces it. If the plaintiff is successful, he owes the investor a contingency fee. This arrangement is generally permissible under

[66] See Meyer-Sparenberg/Jäckle, Beck'sches M&A Handbook, 1st edition 2017, § 85 marginal no. 22.
[67] Available at: http://www.disarb.org/de/16/regeln/-id37.

German law.[68]

Litigation financiers call in external lawyers to examine the prospects of success. These lawyers could later be appointed as arbitrators for arbitration proceedings concerning the same subject matter. Conflicts of interest between the members of the arbitral tribunal and the litigation financier may arise here, which could affect the arbitration proceedings if they are not disclosed.[69] Pursuant to Sec. 1036 (1) ZPO, a person who is approached in connection with his possible appointment as arbitrator shall disclose any circumstances which may give rise to doubts as to his impartiality or independence. A person who has already formed an opinion on the merits of the claim may be in doubt as to his impartiality. Consequently, this circumstance must be disclosed. This person can then be challenged by the parties.

4.2.11 Optimisation of the enforcement of arbitral awards

4.2.11.1 Waiver of the right to demand that the arbitral award be set aside

The efficiency of the choice of arbitral proceedings is severely limited if an arbitral award, once made, can be set aside either by the courts of the place of arbitration or in proceedings for a declaration

[68] Rauscher, in MüKo ZPO, 5th edition 2016, introduction recital 77.
[69] Siehe https://www.financierworldwide.com/increasingly-mandatory-disclosure-of-third-party-funding-in-arbitration#.Xm-LM3t7mUk.

of enforceability.

According to a decision of the Frankfurt Higher Regional Court, the party adversely affected by an arbitral award may, after the award has been made and in knowledge of the respective grounds for nonobservance, effectively waive the assertion of these grounds in any event to the extent that the grounds for nonobservance do not serve the protection of direct state interests and are thus beyond the parties' control.[70] In this respect, German law should follow the more generous approach of the French Code of Civil Procedure. Art. 1522 (1) of the French Code of Civil Procedure provides that the parties may at any time (and thus also before the award is made) by special and express agreement waive the right to demand the setting aside of the award. Similarly, Art. 192 of the Swiss Private International Law Code[71] provides that "foreign" parties may, by express agreement in the arbitration agreement or by a subsequent written agreement, waive the right to request the setting aside of the award.

4.2.11.2 Waiver of the right to object in enforcement proceedings

Under French law, a waiver of the right to request the setting aside of an award does not automatically entail a waiver of the right to challenge the declaration of enforceability of an award.[72] The right to request the setting aside of an award and the right to oppose its

[70] Higher Regional Court of Frankfurt am Main, 10.03.2016 - 26 Sch 7/15, BeckRS 2016, 131986.

[71] See https://www.admin.ch/opc/de/classified-compilation/19870312/index.html

[72] Art. 1522 Code de Procédure Civile.

enforcement should be treated equally in French and German law. In our view, the waiver described above should in any event be possible de lege ferenda.

4.3 Online Dispute Resolution (ODR)

In times of the Corona crisis it is almost impossible to hold physical meetings and hearings. These are not permitted due to the lockdowns and assembly bans. This aspect underlines the importance of ODR. This form of dispute resolution had already developed strongly before the Corona crisis as part of the efforts to reduce costs and increase efficiency and is evidence of the continual innovation that can be observed in the practice of arbitration. For M&A transactions with parties from many countries, the use of at least elements of an online-based process management, e.g. the Case Management Conference, provides great relief.

The advantages of ODR include the ability to conduct the procedure even in global quarantine, greater cost efficiency and time savings. Before a decision is made in favour of ODR, its admissibility under the legal systems concerned must be examined. In addition to the procedural admissibility, the issuance of the arbitral judgment in electronic form should be confirmed as sufficient.[73]

A Case Management Tool (CMT) is very useful for a procedure using ODR. The CMT guarantees all parties involved the availability

[73] This is the case in all jurisdictions that leave the form of the arbitral award to the decision of the parties, such as England and Wales, the Netherlands and Switzerland.

of all documents, which can be searched by keywords. In the context of ODR, it is important to enable the parties involved to conduct the proceedings in an orderly manner despite the lack of a physical presence. No party may suffer any disadvantage, even inadvertently, as a result of the failure of the image and/or sound transmission, which only occurs at their premises and remains undetected by the court.[74] The proceedings must be conducted fairly. This means that the parties must always be granted equal access to all components of the proceedings. This can become problematic, for example, if one party does not have the necessary data rates for transmitting the image and sound due to poor infrastructure and is therefore unable to follow the proceedings in court, or only to a limited extent. Their ability to understand and react can be limited. It is also harmful if one party is unable to access the essential tools used in online proceedings due to a lack of technical support or know-how. The maintenance of data security is also of central importance.[75] The use of Augmented Reality (AR) and Virtual Reality (VR) will in future be able to replace site visits or overcome the weaknesses of virtual hearings by simulating presence digitally.

All these questions must be clarified before ODR is agreed upon, and if possible even before the Case Management Conference, so that documents do not have to be saved again. As before the take-off of an aircraft, an ODR clearance checklist must be worked through before a decision is made to carry out an online procedure. No ODR

[74] See Markert/Burghardt, Navigating the Digital Maze – Pertinent Issues in E-Arbitration, J. Arb. Stud. 2017 Vol. 27/3, 15.

[75] See https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf.

may take place without all criteria being met. Furthermore, the transmitted data including all documents must be protected against disclosure or unauthorized changes. Therefore, all parties involved in the procedure should agree on uniform procedures to ensure data security and adhere to them consistently.

Online arbitration as such is not regulated by German arbitration law. The existing legislation must be applied to this rather new phenomenon. Under German arbitration law, it is up to the parties to determine the procedural rules applicable to their arbitration. Therefore, ODR, understood as negotiation via video conference, does not encounter any legal obstacles from the perspective of German law.[76] According to Sec. 1054 (1) ZPO, however, the electronically drafted arbitral award is not admissible - it must still be drafted in writing.

The institutional arbitration regulations expressly do not yet provide for any measures for a far-reaching digitisation of arbitration proceedings. The electronic management of certain individual sections of the arbitral proceedings is sensibly regulated.[77] The Seoul Protocol on Video Conferencing in International Arbitration[78] contains principles governing all aspects of the

[76] MüKoZPO/Munich, 5th edition 2017, ZPO § 1042 marginal no. 76 f.

[77] See ICC Rules Annex IV - Case Management Techniques lit. f; similar to Art.27.4(i) and Annex 3 lit. G 2018 DIS Rules; see Schäfer, in SchiedsVZ 2019, 195, 196, see in this context also https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf.

[78] Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548D_NO=169URRENT_MENU_CODE=MENU0025OP_MENU_CODE=MENU0024.

preparation, testing and conduct of a video conference in international arbitration. In contrast to what is allowed during the coronavirus crisis, the protocol refers to a situation in which the majority of the participants in a meeting are gathered in one room and a minority joins in from outside. The Seoul Protocol does not regulate the entire online negotiation process, in which each participant joins in from outside. Rather, it contains regulations on procedural issues, cyber security and technical aspects of conducting a video conference. The great value of the protocol is to be seen in the fact that it deals comprehensively with the conditions for the successful conduct of a video conference in the context of an arbitration procedure which is, otherwise, traditionally structured.

5. Mediation in connection with arbitration or ordinary court proceedings

Mediation is a suitable dispute resolution mechanism if both parties are prepared to reach an amicable agreement in view of further future cooperation or for other reasons (e.g. cost savings or both sides recognise weaknesses in their positions). The following must be regulated - and this can also be done by reference to the mediation rules of an arbitration institution: At what stage of the procedure should mediation take place - or should it always be available as a possible solution to the conflict - for example, following an escalation -, should the result be binding and, if so, how can it be enforced?

Mediation is a confidential and structured procedure in which the

parties, with the help of one or more mediators, voluntarily and independently seek an amicable settlement of their dispute.[79] In mediation, it is up to the parties themselves to negotiate a solution to their dispute with the help of the mediator who guides the parties through mediation but does not have the power to decide the dispute.[80] Mediation can be an appropriate dispute resolution mechanism to save costs and time or where the parties are willing to reach an amicable agreement in view of future cooperation.[81] In this respect, mediation is suitable for disputes following M&A transactions. The parties often maintain business relationships outside of the transaction, for example by supplying the seller's companies after the transaction has been completed.

Mediation can take place at any stage of the proceedings. It may be stipulated in the arbitration clause as being obligatory before the beginning or before the end of the contentious proceedings. However, then the maximum duration and the individual procedural steps should also be specified. If the parties agree on mediation, it is important to determine whether its' execution is mandatory before initiating arbitration or court proceedings. This is often already done in the part of the dispute resolution clause devoted to mediation but can be adapted to the specific circumstances. Furthermore, an agreement on the maximum duration of the mediation is recommended so that the resolution of the conflict is not delayed. Unnecessary loss of time can also be avoided by agreeing on the reasons why mediation should end. This includes the declaration by

[79] Section 1(1) of the German Mediation Act.
[80] See Risse, SchiedsVZ 2012, 244, 246.
[81] See Thümmel, in: Wilhelmi/Stürner, Post-M&A Arbitration, 2019, p. 213.

one party to the other party that the mediation has ended without giving reasons. The mediator may also make this declaration. The parties either appoint the mediator themselves or leave this to the arbitral or other institution. The arbitration institution is suitable for this purpose if the mediation is combined with the arbitration proceedings. The following explanations focus on this variant.

The arbitration institutions have also issued mediation rules. With regard to the costs of mediation under the ICC Rules of Mediation and the Rules of the German Institution of Arbitration, the mediator's fees are based on an hourly rate and not on the amount in dispute. Since M&A disputes typically involve considerable amounts in dispute, differences in costs must be taken into account when selecting the Rules of Mediation.

In Germany the "Mediation Act" came into force on 26.07.2012. It grants the parties a great deal of freedom of action. This is also to be welcomed in view of the great importance of the parties' own responsibility in mediation.[82] However, the legislator did not have in mind the mediation associated with a possible contentious procedure. For this reason, the Mediation Act does not contain any provisions to protect the confidentiality of the information exchanged in the mediation procedure with a view to subsequent contentious proceedings (so-called no prejudice basis) or to suspend the statute of limitations. We recommend that the parties make contractual arrangements with regard to these two points. Depending on the circumstances, the enforcement of the mediation settlement should also be regulated. A consensual arbitral award can

[82] See Risse, SchiedsVZ 2012, 244, 254.

be considered. However, an enforceable attorney settlement or, in the case of proceedings before the ordinary courts, a so-called resolution settlement can also be concluded.[83]

For the enforcement of settlement agreements in the international context, the Singapore Convention on Mediation (hereinafter referred to as the "**Singapore Convention**")[84] will become important in the future. The EU or its member states have not yet joined. It is still to be clarified whether the EU as a whole or the individual member states must be parties to the agreement.[85] The Convention applies to settlements of international trade disputes that have been reached through the use of a mediator. It therefore only concerns B2B transactions. The settlement must then be submitted to the national competent authority. There must be no reason for refusal. These reasons are formulated on the basis of the New York Convention.[86] A novelty from the point of view of German law is the possibility created by the Convention to make a document that has not been legally verified the basis for enforcement.[87]

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[83] Sec. 796 a to c ZPO or sec. 278 (6) ZPO; see also Risse, SchiedsVZ 2012, 244, 254.

[84] United Nations Convention on International Settlement Agreements Resulting from Mediation, available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.. Sie was signed by 46 states in Singapore on 7 August 2019 and will enter into force on 12 September 2020 following ratification by Qatar as the third contracting state, see https://www.straitstimes.com/singapore/key-facts-about-the-convention

[85] https://www.gtai.de/gtai-de/trade/recht/rechtsmeldung/eu/welt-atreitbeilegung-durch-mediation -die-singapur-konvention-128240b

[86] See the full text https://www.lto.de/recht/hintergruende/h/singapur-konvention-mediationsvergleich-international-vollstreckbar-voraussetzungen-kein-eu-beitritt/

[87] Weigand, RIW 2019, issue 11, cover section, I.

According to Art. 8, acceding states can make the reservation that the application of the Singapore Convention must be agreed in the settlement agreement. The Convention greatly enhances the effectiveness of mediation in international trade. Rapid ratification in the EU is highly desirable.

5.1. Combination of Mediation with Arbitration or with Ordinary Court Procedures

5.1.1. Med-Arb/Arb-Med

In Med-Arb procedures, the parties agree in advance that they will first try to resolve their dispute with the assistance of a mediator. In the event of failure, arbitration proceedings shall be initiated immediately. The parties should therefore determine when the mediation has failed. Then the obligation to initiate arbitration proceedings arises. According to for example Art. 8.1 of the DIS Rules of Mediation[88] such events for the failure of mediation can be defined as follows: (1) A party declares the proceedings to be terminated, provided at least one mediation session has taken place previously or no mediation session has taken place within two months of the appointment of the mediator. (2) The appointment of the mediator(s) has not been made in due time and neither party has requested the appointment of a substitute mediator by the institution whose rules of mediation apply. (3) The mediator has

[88] The mediation rules of other arbitration institutions provide similar grounds for the failure of mediation.

declared the mediation proceedings terminated by written declaration to both parties. (4) The mediation proceedings were not conducted for a period of three months after their commencement. This is the case if neither a written preliminary clarification, a preliminary discussion nor a mediation meeting has taken place.

In Med-Arb proceedings, the appointment of the subsequent arbitrator, who initially acts as mediator, is affected if the parties disclose confidential information in individual discussions with the mediator. The mediator may not use this information as a later arbitrator. For German law, the view is expressed on this question that an agreement between the parties is not valid if it is aimed at excluding the setting aside of the later arbitral award on account of the participation of the mediator as arbitrator.[89] Other legal systems, like Singapore's, take a more liberal approach.[90] However, the flip side of this generous solution is a far-reaching disclosure obligation for the mediator who is subsequently appointed as arbitrator[91]. This duty of disclosure may conflict with the arbitrator's obligation to

[89] Renate Dendorfer-Ditges, in: Klowait/Gläßer, Mediation Act, 2nd ed. 2018, part 3 N. - Mediation and Arbitration, para. 39.

[90] Dendorfer/Lack, SchiedsVZ 2007, 195, 200. Sec. 17.4 des Singapore International Arbitration Act (https://sso.agc.gov.sg/Act/IAA1994#pr17-): „No objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this section."

[91] See Art. 17 Abs. 3 Singapore International Arbitration Act: „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."

maintain confidentiality. However, it is limited to information that the former mediator considers essential for the arbitration proceedings. This restriction should adequately protect confidentiality in relation to the mediation proceedings.

A variant of Med-Arb is the "Medaloa" procedure (mediation and last-offer arbitration).[92] The parties start with mediation, followed by arbitration if mediation is not successful. The arbitral tribunal then has only the choice between the last offers made by the parties in the mediation procedure for the arbitral award. This mechanism puts the parties under strong pressure to settle their conflict within the mediation procedure.

In **Arb-Med** the procedure begins with the arbitration. Compared to Med-Arb, Arb-Med has the disadvantage that it is more time-consuming, as the effort required to initiate and also conduct the arbitration proceedings is considerable.[93] On the other hand, once the pleadings have been prepared, the parties can better assess their position and distinguish strengths from weaknesses. Arb-Med induces the parties to first make a thorough assessment of the factual and legal issues by preparing the pleadings which initiate the proceedings. Afterwards, it is possible to switch to the mediation procedure at any time. This can even be done after the arbitral award has been issued, for example to speed up the enforcement.

[92] See Dendorfer/Lack, SchiedsVZ 2007, 195, 196.

[93] Renate Dendorfer-Ditges, in: Klowait/Gläßer, Mediation Act, 2nd ed. 2018, part 3 N. Mediation and Arbitration Rz. 8

The SIAC-SIMC Arb-Med-Arb (AMA) protocol[94] is relevant for the Arb-Med procedure: the arbitrator(s) and the mediator(s) provided for under the AMA protocol are usually different persons. They are appointed by the respective institution (SIAC or SIMC). However, the parties may agree otherwise, i.e. that one or more arbitrators shall also be mediator. If the mediation is successful, a consent award can be issued. The HKIAC (Hong Kong) Rules of Mediation also provide for an exclusion of the mediator's activity as an arbitrator in subsequent arbitration proceedings.[95]

From the point of view of German law, arbitral awards by mutual consent are enforceable under Sec. 1053 of the Code of Civil Procedure. Conciliation awards are also expressly provided for in Art. 33 of the ICC Rules of Arbitration 2017.

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[94] http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf. SIAC is the arbitration institution, SIMC the mediation institution in Singapore. The Model-AMA (Arb/Med/Arb)-clause is as follows: The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

[95] No. 14 of HKIAC Mediation Rules (https://www.hkiac.org/mediation/rules/hkiac-mediation-rules) stipulates: The parties undertake that the mediator shall not be appointed as adjudicator, arbitrator or representative, counsel or expert witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of the same contract.

5.1.2. Mediation with subsequent proceedings before ordinary courts (Med-Court)

As a rule, the parties agree before the start of mediation to treat the information disclosed during the mediation process as confidential and not to use it in subsequent proceedings, for example before state courts (no prejudice clause). Under German procedural law, such confidentiality and no prejudice agreements are generally recognized. However, it is being discussed whether the court where legal action is taken may, of its own motion, collect evidence on issues covered by the confidentiality agreement.[96] The following example will serve as an illustration: The parties are in dispute over a breach of warranty under the SPA. Before the mediation was conducted, they had agreed to keep the basis for the calculation of the purchase price confidential. The deal, which was deemed to be secure, did not materialise. In in the subsequent court proceedings the seller asserts his damages for loss of profit on the basis of the purchase price calculation communicated to him by the buyer. However, he does not submit the calculation documents. Can the court take evidence of this?

[96] Nils Goltermann, in: Klowait/Gläßer, Mediation Act, 2nd ed. 2018, § 4 marginal no. 24.

6. Summary

The contribution has shown the variety of forms of alternative dispute resolution for conflicts related to international M&A transactions. The decision which means to choose often depends on the state of circumstances at the moment of the outbreak of the conflict. Thus, only when the specific circumstances are known does one know whether a dispute concerning the MAC clause can be resolved by an arbitration expert outside of or within the framework of (fast track) arbitration. The parties should therefore also include an ad hoc adjustment of the dispute resolution in their planning. This allows for optimal results to be determined and implemented with regard to the quality of the solution, costs and time required.

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