Global Arbitration Review

The Guide to M&A Arbitration

Editor
Amy C Kläsener

Third Edition

The Guide to M&A Arbitration

Third Edition

Editor

Amy C Kläsener

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2020
For further information please contact Natalie.Clarke@lbresearch.com

Publisher
David Samuels

Account Manager
Bevan Woodhouse

Editorial Coordinator
Tommy Lawson

Production and Operations Director
Adam Myers

Head of Content Production
Simon Busby

Copy-editor
Katrina McKenzie

Proofreader
Claire Ancell

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-255-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ALIXPARTNERS

ALLEN & OVERY

BOIES SCHILLER FLEXNER (UK) LLP

CMS FRANCIS LEFEBVRE AVOCATS

DENTONS

ESIN ATTORNEY PARTNERSHIP

FIELDFISHER

FORENSIC RISK ALLIANCE

FRESHFIELDS BRUCKHAUS DERINGER LLP

K&L GATES LLP

KIM & CHANG

KING & WOOD MALLESONS

LAW OFFICES OF THOMAS WEBSTER

NAGASHIMA OHNO & TSUNEMATSU SINGAPORE LLP

NOERR LLP

PETER & KIM LTD

THOUVENIN RECHTSANWÄLTE KLG

WACHTELL, LIPTON, ROSEN & KATZ

WHITE & CASE SA

WITHERS LLP

Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to M&A Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the third edition of this guide on mergers and acquisitions within the world of arbitration. It is a practical know-how text in two parts. Part I identifies the most salient issues in M&A arbitration, while Part II surveys substantive principles from select regional perspectives.

We are flattered to have worked with so many leading firms and individuals to produce *The Guide to M&A Arbitration*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, mining, challenging and enforcing awards and (soon) IP, in the same practical way. We also have books in the series on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). Our thanks to the Editor, Amy C Kläsener, for her vision and energy in pursuing this project and to our colleagues in production for achieving such a polished work.

Contents

Introduction 1
Amy C Kläsener

Part I: Key Issues in M&A Arbitration

1 Drafting Arbitration Clauses in M&A Agreements 7
Anne Véronique Schlaepfer and Alexandre Mazuranic

2 Joinder and Consolidation in M&A Arbitration 16
Anke Meier

3 Conflicts between Expert Determination Clauses and Arbitration Clauses 28
Wolfgang Peter and Daniel Greineder

4 Special Issues in Connection with Warranty and Indemnity Insurance 42
Amy C Kläsener and Thomas H Webster

5 The Role of the Quantum Expert in M&A Disputes 58
Andrew Grantham, Kai Schumacher and Greg Huitson-Little

6 Managing Expert Determinations 67
Gerald M Hansen

7 Third-Party Funding in International Arbitration 76
Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti

8 Drafting M&A Contracts to Minimise the Risk of Disputes 100
Jonathan M Moses

Part II: Survey of Substantive Laws

9 China 117
Ariel Ye and Huang Tao

10 France 123
Jean-Fabrice Brun and Edouard Vieille

11 Germany 130
Michael Rohls

12 Hong Kong 139
Paul Starr

13 Italy 149
Alessandro Scagliarini

14 Japan 159
Hiroki Aoki

15 Russia 166
Andrey Panov

16 Singapore 172
Philip Jeyaretnam SC and Lau Wen Jin

17 South Korea 181
Chul-Won Lee, Una Cho and Hye Won Chin

18 Switzerland 189
Michael Bösch and Patrick Rohn

19 Turkey 197
İsmail G Esin, Yalın Akmenek, Ali Selim Demirel and Demet Kaşarcıoğlu

20 United Kingdom 206
William Hooker and Irene Ding

21 United States 213
Martin F Gusy

The Contributing Authors 221

Contributors' Contact Details 237

Part II

Survey of Substantive Laws

18

Switzerland

Michael Bösch and Patrick Rohn[1]

Frequency of M&A disputes

Although there are no official statistics on the frequency of M&A disputes in Switzerland, it seems fair to say that the number of M&A disputes has increased in recent years.[2] Reasons for this may lie, among other things, in M&A transactions having become increasingly complex and transaction procedures becoming continually more professionalised (due diligence, auction procedures, etc.).

M&A disputes between privately held companies are often resolved by arbitration, but the proceedings are generally confidential. According to the latest statistics of the Swiss Chambers' Arbitration Institution (SCAI),[3] which administers arbitral proceedings under the Swiss Rules of International Arbitration (the Swiss Rules), 20 per cent of the new cases filed in 2018 related to 'corporate/M&A/joint ventures', amounting to 18 per cent of all matters in dispute between 2004 and 2018. While almost all arbitral proceedings under the Swiss Rules were seated in Switzerland, one cannot deduce from the statistics whether the underlying disputes relate to international or purely domestic M&A transactions.

Based on the publicly available data on M&A disputes before the courts, no increase in the frequency of M&A litigation seems to have occurred in recent years, but this may be because M&A disputes are often settled with the assistance of the court.

1 Michael Bösch and Patrick Rohn are partners at Thouvenin Rechtsanwälte KLG.

2 A trend often described with the saying 'after closing is before a dispute'.

3 See www.swissarbitration.org/statistics, visited on 4 September 2020.

Form of dispute resolution

While there are no official statistics comparing the frequency of M&A disputes resolved by arbitral tribunals as opposed to courts, our experience shows that the vast majority of M&A agreements, especially in international transactions, provide for arbitration as the preferred dispute resolution mechanism.

Apart from the general advantages of arbitration, such as flexibility of the arbitral proceedings, there are several additional advantages:

- confidentiality of the arbitral proceedings in contrast to litigation, which is generally public;
- shorter time frames until disputes are finally resolved and success rate of actions for annulment: awards rendered by a tribunal with its seat in Switzerland can be set aside only by the Federal Supreme Court, which renders decisions within approximately six months of filing the action for annulment;[4] the success rate of such actions is on average approximately 7 per cent only;[5]
- the parties may choose their arbitrators and, in doing so, ensure that the tribunal has specific M&A expertise, in particular regarding frequently arising complex valuation and accounting issues; and
- right to choose the language of the proceedings – in court litigation, the parties will have to use the local language although their transaction documents will often be in English and the parties are not fluent in a local language.

In connection with purchase price adjustments, parties regularly provide for a two-stage mechanism, namely expert determination and arbitration. Often accountants will be appointed by the parties as experts to resolve specific price-adjustment issues, which are generally fact-based. Because an expert determination does not qualify as an award, the tribunal must frequently deal in the arbitral proceedings with a party's request to dismiss the expert determination.

Grounds for M&A arbitrations

M&A disputes are typically categorised as (1) pre-signing disputes, (2) pre-closing disputes, (3) closing disputes, and (4) post-closing disputes. In practice, post-closing disputes are the most frequent.

The grounds for M&A arbitrations and their estimated relative frequency follows.

- Price adjustment, including earn-out (very frequent): for obvious reasons, price adjustment and earn-out disputes are very common. The disputes predominantly arise (1) when one party exceeds its discretion in applying the statutory or contractually agreed accounting principles in connection with a closing balance sheet, for example, (2) out of diverging interpretation of contractual provisions, or (3) because of undue influence on the target's management with the aim to cause a significant impact on the earn-out amount.

4 Felix Dasser and Piotr Wojtowicz, 'Challenges of Swiss Arbitral Awards', *ASA Bulletin*, Volume 36, No. 2, 2018, pp. 276, 282.

5 ibid., p. 280.

- Misrepresentations and breach of warranties (very frequent): typically, the buyer will allege that the seller is in breach of contract or, conversely, the seller will attempt to disclaim its representations and warranties alleging that the buyer, during the transaction process, was made aware of a specific fact or gained its own knowledge about it.
- Fundamental error (very frequent): closely inter-related to claims for misrepresentation and breach of warranty; buyers often sue sellers either to rescind and unwind the sales contract or to reduce the price.
- Pre-contractual failure to disclose or fraud (frequent): as with claims based on fundamental error, these are closely inter-related to claims for misrepresentations and breach of warranties; they target either the rescission and unwinding of the sales contract or a price reduction.
- Failure to complete a transaction (rare): in particular, after the 2007–2008 financial crisis, in a few M&A transactions, buyers eventually desisted from closing the transaction.

Fraud and failure to disclose

The scope of the seller's pre-contractual duties of disclosure is a common area of controversy. Whether a pre-contractual disclosure duty exists and how far-reaching it is depend on the circumstances of the case, in particular on (1) the type and complexity of the transaction, (2) the knowledge of the parties involved, and (3) how they conduct the negotiations. As a rule, the disclosure requirements in M&A transactions are generally all-embracing because the target has a complex structure and negotiations are usually intensive.

Active deception and deception through concealment (failure to disclose) are, from a legal point of view, the same. If the buyer asks questions during the sales negotiations, the seller must answer them truthfully or at least explain transparently why he or she does not want to answer them. Moreover, the seller must actively inform the buyer if he or she knows (or should have known) that the buyer has an inaccurate understanding about certain facts relating to the target that are essential for the decision to buy the target and for the pricing. A duty to inform also exists in the case of defects a buyer cannot detect but that concern important characteristics, and also if the seller is aware of and accepts the reasonable possibility that the buyer might not detect the defect. In other words, the fact that the buyer was to some extent negligent in the due diligence process does not exclude per se the finding of deliberate deception through concealment (failure to disclose). The seller is only released from the duty to inform the buyer if he or she, in good faith, could reasonably assume that the buyer would easily detect the defect when exercising due diligence and acting with the required care. If the seller is silent about information of importance to the buyer, he or she must therefore have a valid reason to assume that the buyer recognises the defect. Only in such cases are sellers released from their liability, unless they made specific representations that turned out to be false.[6]

6 Article 200(2) of the Code of Obligations (CO).

In the event of deliberate deception (including failure to disclose), any waivers and limitations of liability are invalid and unenforceable.[7] The seller remains liable for breach of warranty and misrepresentation, and the buyer can challenge and rescind the contract.[8] The seller's liability for breach of warranty and misrepresentation is also not limited by any failure on the buyer's part to give prompt notice of defects.[9]

The seller, however, is not liable if the buyer knew of the defects, even though the seller tried to deceive him or her, or the seller maliciously concealed the defects.[10] If the buyer knew of the defects, the seller is only liable if he or she undertook to indemnify and hold the buyer harmless.

Burden of proof

Under Swiss law, the burden of proof forms part of the substantive law and not – as in common law – of the procedural law. Therefore, if the substantive law applicable to the dispute is Swiss law, the tribunal will generally also apply the Swiss concept of burden of proof and concurrently the closely connected concept of burden of substantiation.

Pursuant to Article 8 of the Civil Code, the burden of proving the existence of an alleged fact rests, unless the law provides otherwise, on the party that seeks to rely on it. If the parties are in a dispute regarding a price adjustment, for example, the party requesting the price adjustment will generally carry the burden of proof (and substantiation) for its claim.

One of the exceptions to the burden of proof allocation is provided for in Article 97 of the Code of Obligations (CO) containing the default liability provision relating to contractual damages. While the claimant will have to substantiate and prove (1) the respondent's breach of contract, (2) the damage and the *causal nexus* with the breach, and (3) the amount of damage, the respondent carries the burden to substantiate and prove that he or she was not at fault. This burden-shifting complements and qualifies in essence as a presumption of fault on the part of the respondent.

Burden-switching for the mere reasons that the party bearing the burden of proof encounters obstacles in proving an alleged fact is not admissible. Yet in practice tribunals might reduce the general standard of proof, apply factual presumptions or an obligation to cooperate on the other party. Burden-switching might, however, occur in connection with alleged negative facts (*negativa non sunt probanda*).

Regarding the applicable standard of proof, it seems fair to say that tribunals generally exercise a less strict approach than courts in applying the concepts of substantiation and proof in relation to damages claims, for example.

Knowledge sharing

When assessing the scope of the seller's duty to disclose or when the seller's representations are qualified and limited 'to the seller's best knowledge and belief', the question arises as to what knowledge is attributable to the seller.

7 Article 199 CO.

8 Article 28 CO.

9 Article 203 CO.

10 Article 200(1) CO.

The buyer will usually require that the seller's knowledge be defined in more detail. The functions and persons whose knowledge is attributable to the seller will be listed in the transaction agreement, and the buyer will also try to include the directors and the management of the target in that list.

Absent an agreement of the parties, the knowledge of the seller's directors, management and other representatives, including outside counsel and M&A advisers, who were involved in the sale of the target is attributable to the seller. However, the knowledge of directors, management and other employees of the target is as a rule not attributable to the seller unless such persons were involved in the transaction and acted on behalf of the seller.

Remedies

M&A disputes and the available legal remedies vary according to the stage of the transaction in which they arise. While under certain circumstances in a closing dispute, a party may reasonably seek specific performance because the other party refuses to close the transaction notwithstanding all closing conditions being fulfilled or waived, such remedy would not seem to be feasible in a pre-signing dispute. For example, a tribunal may order the seller to transfer the shares in the target to the buyer against payment of purchase price (closing dispute), but it cannot order the parties to sign the transaction agreement if the essential terms and conditions of the agreement have not yet been agreed (pre-signing dispute).

If a party to the signed (but not yet closed) transaction agreement defaults in performing its obligations, such as taking the required actions to fulfil the closing conditions, the defaulting party as a rule becomes liable for the damage resulting from the delay.[11] The other party can adhere to the contract and demand specific performance or damages (positive interest), or it can rescind the transaction agreement and demand damages (negative interest), according to Articles 107 to 109 of the CO. While compensation of the positive interest seeks to put the damaged party financially in a situation that would have existed if the contract was properly fulfilled, compensation of the negative interest seeks to put the damaged party financially in a situation that would have existed if the parties had never negotiated the contract (for further details see 'Measure of damages', below).

Most M&A disputes arise after closing and they concern, on the one hand, contractual representations, warranties and indemnities and, on the other, earn-out provisions and price adjustment calculations. In earn-out and price adjustment disputes, the remedy is payment of the amount due, though the transaction agreement usually provides that an independent expert determines the earn-out amount or adjustment (see above). In earn-out disputes, the seller usually has a contractual remedy for disclosure and production of the relevant financial statements and accounting documents of the target to verify the earn-out amount due.

In case of misrepresentation and breach of warranty, the buyer may sue to either rescind and unwind the sales contract or have the sale price reduced to compensate for the decrease in the target's value. Moreover, the buyer may claim direct and indirect damages (positive interest), though this requires as a rule that the seller be at fault, namely by deliberately deceiving the buyer or breaching a duty to disclose relevant information. Broadly speaking, the legal consequences of unwinding, price reduction or damages can be based on either

11 Article 103 CO.

warranty rights or the concepts of fundamental error or fraud. It is important for the buyer to decide on which concept to base claims before sending a notice of breach to the seller, as the buyer's declaration may prejudice rights that arise from the other legal concept.

The remedies available to the buyer in the case of misrepresentation and breach of warranty are usually agreed in the sales contract. Typically, the parties either exclude all remedies or they limit the seller's liability to damages (positive interest) that are capped at a certain amount. Such waivers and limitations are valid and enforceable except in cases of deliberate deception, including failure to disclose.

Measure of damages

As a basic principle under Swiss law, damage is every involuntary and therefore unintentional loss, by way of (1) a decrease of assets, (2) an increase of liabilities, or (3) a loss of profit. The approach is strictly economic: the purpose of damages is compensatory rather than punitive. The aggrieved party has a claim for damages in an amount equal to the difference between the actual economic situation and the hypothetical economic situation but for the breach of warranty, or the misrepresentation or any other breach. This full compensation for the damage sustained is called the 'positive interest'.

As a rule, the main damage of the buyer results from and corresponds to the reduced value of the target. Therefore, the principles for calculating the damages (positive interest) are similar to those for purchase price reductions. Broadly speaking, the amount of damages equates to the difference between the actual value of the target and the value that the target would have if the warranties and representations were true and accurate. Ultimately, this requires a valuation of the target, though in practice tribunals tend to assume that the hypothetical value of the target in a defect-free condition corresponds to the price the parties agreed in the sales contract.

In certain situations – for example, if the seller defaults in taking the required actions to fulfil the closing conditions and the buyer decides to rescind the sales contract – the damaged party is entitled to negative interest. Compensation of the negative interest seeks to put the damaged party financially in a situation that would have existed if the parties had never negotiated the contract. This enables the damaged party to recover all cost and expenses relating to the transaction that turned out to be useless.

Special substantive issues

If a seller sells shares in a company to the buyer, the statutory warranty of the seller under Swiss law covers only the shares but not the company. According to the case law of the Federal Supreme Court, this is also true when the seller sells a stake of more than 50 per cent in the target and the object of the purchase is de facto the target and not its shares. Fortunately, this odd and outdated case law is rarely of any relevance because the seller usually makes specific representations and warranties in the sale and purchase agreement that concern the target and extend the seller's liability to certain qualities of the target. Moreover, even if there were no such representations and warranties in the agreement, the buyer can base claims for rescission, price reduction or damages on the concepts of fundamental error or fraud so that the above case law concerning warranty rights becomes irrelevant.

Under Swiss law a buyer must inspect the object of the purchase (target) as soon as feasible in the normal course of business and, if the buyer discovers defects for which the seller is liable under warranty, the buyer must notify such defects without delay and in sufficient detail.[12] Should the buyer fail to do so, the target is deemed accepted except for defects that cannot be revealed in the course of a customary inspection. Also, an action for breach of warranty becomes time-barred two years after closing, even if the buyer does not discover the defects until later.[13]

These requirements for asserting a warranty claim are quite strict, and buyers are only exempted from them if they can prove that the seller deceived them. The statutory requirements and time bars are, however, not mandatory, and the parties are free to agree on certain periods for representations and warranties and for the serving of a notice of breach, which the parties usually do.

Special procedural issues

Chapter 12 of the Private International Law Act (PILA) contains the *lex arbitri* for international arbitration in Switzerland. Pursuant to Article 182 of the PILA, the parties are free to apply whichever procedural rules they wish, except that minimal procedural guarantees such as equal treatment and the right to be heard must be ensured by the tribunal at all times.

The principle of equal treatment in connection with the constitution of tribunals in multiparty disputes – a frequent scenario in M&A disputes – is addressed in Article 8(3-5) of the Swiss Rules in that, similar to many other modern arbitration rules, the parties' agreed procedure shall apply first, and only if they cannot reach a consensus will the SCAI Arbitration Court (Court) step in. If the parties fail to designate an arbitrator within the time limit set by the Court, it may appoint all the arbitrators. Consequently, the Court has the explicit power to revoke an appointment.[14] This not only ensures equal treatment of the parties when constituting the tribunal but it is also entrusted with sufficient flexibility to tackle specific particularities of multiparty disputes.

In respect of consolidation of arbitral proceedings the Swiss Rules contain detailed provisions on how to consolidate proceedings. Notably, and in contrast to other institutional arbitration rules, it is not necessary that the proceedings relate to the same parties. According to Article 4(1) of the Swiss Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the case shall be consolidated, taking into account all relevant circumstances, 'including the links between the cases and the progress already made in the pending arbitral proceedings'. If the Court decides to consolidate the proceedings, which it usually will only do in well-justified cases and with the consent of the parties concerned, the parties 'shall be deemed to have waived their right to designate an arbitrator' and the Court may appoint new arbitrators.

Unlike in consolidations, the tribunal rather than the Court must decide on joinder requests from an original party or from a third person.[15] There is no explicit time limit in the Swiss Rules for a request to be made but the tribunal must take into account all

12 Article 201 CO.

13 Article 210 CO.

14 Article 5(3) Swiss Rules.

15 Article 4(2) Swiss Rules.

relevant circumstances when forming its decision. While this provision sets the procedural framework for the joinder of a third person, the joinder often requires an extension of the arbitration agreement by virtue of legal theories under the applicable law, such as legal succession or piercing the corporate veil.

Finally, according to Article 192 of the PILA, the parties can either fully waive their right to file an action for annulment with the Federal Supreme Court or limit it to one or several of the grounds listed in Article 190(2) of the PILA; however, only if none of the parties has its domicile, habitual residence or business establishment in Switzerland, and the waiver or limitation is made by an express statement.

Appendix 1

The Contributing Authors

Michael Bösch
Thouvenin Rechtsanwälte KLG

Michael Bösch specialises in commercial arbitration. He has acted as counsel and arbitrator in dozens of international and national arbitrations, under institutional rules such as the ICC, LCIA and Swiss Rules and also ad hoc. His cases involve a wide area of matters, in particular M&A transactions and shareholders' agreements, but also agency and distribution, sale of goods, and construction, including turn-key projects. Michael is frequently called on to speak at arbitration conventions and is the co-author of the firm's Arbitration Newsletter Switzerland on selected decisions of the Swiss Federal Supreme Court relating to actions for annulment of arbitral awards. Through his corporate and commercial advisory work, Michael has developed a robust and profound understanding of various business sectors, enabling him to also use this expertise in contentious matters for the benefit of his clients or the tribunal. Since 2018, *Who's Who Legal: Arbitration* has recognised Michael as a 'Future Leader' in the partner category and he is lauded by peers as 'an excellent lawyer' who is 'intelligent, knowledgeable and responsive' and further as 'a sharp-thinking' lawyer who 'epitomises the practitioner and arbitrator who gives succinct and no-nonsense advice and decisions'. His arbitration work is also recommended by *The Legal 500* and *Leaders League*. Michael holds an LLM from Georgetown University Law Center, Washington, DC, and is a Fellow of the Chartered Institute of Arbitrators.

Patrick Rohn
Thouvenin Rechtsanwälte KLG

Dr Patrick Rohn specialises in domestic and international commercial litigation and arbitration, with a particular focus on disputes relating to distribution, licensing, unfair competition and corporate transactions and relations. Patrick has advised and acted as counsel in international arbitrations under the ICC, WIPO, UNCITRAL and Swiss Rules for companies from various sectors, including the pharmaceutical, biotech, medical devices,

technology and trade sectors. He frequently represents parties in complex contractual, corporate disputes (including M&A, joint venture and insolvency-related matters), and he has considerable expertise related to cross-border asset tracing and recovery, and the enforcement of foreign judgments and arbitral awards. *The Legal 500: EMEA* recommends Patrick for litigation ('brilliant mind'; 'exceptional analyst and tactician') and *Who's Who Legal: Litigation 2020* recognises Patrick as a 'Future Leader' in the partner category ('strong analytical and strategic skills'; 'professional, fast and proficient'). *Leaders League* recommends Patrick for both commercial litigation and international arbitration. Patrick is also listed by the International Distribution Institute and the Swiss Chambers' Arbitration Institution as an arbitrator with specific experience in the field of distribution (IDArb list of specialised arbitrators).

Thouvenin Rechtsanwälte KLG
Klausstrasse 33
8024 Zurich
Switzerland
Tel: +41 44 421 45 45
m.boesch@thouvenin.com
p.rohn@thouvenin.com
www.thouvenin.com

M&A disputes can be unique in their hostility and complexity. *The Guide to M&A Arbitration* – published by Global Arbitration Review – is a practical guide on what merger parties should think about when it comes to disputes. It pools the wisdom of specialists on how to prevent these disputes arising and how best to resolve them when it is too late. The guide is structured in two sections. Part I consists of eight chapters on planning and procedural issues, covering everything from drafting clauses to how to structure contracts to minimise the potential for disputes. Part II offers a geographical survey of important differences in national laws that may affect the outcome of a dispute. It is written by 38 specialists from a variety of backgrounds and takes a practical approach throughout.

Visit globalarbitrationreview.com
Follow @garalerts on Twitter
Find us on LinkedIn

an LBR business

ISBN 978-1-83862-255-8