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Fast-Track Arbitration in
Merger and Acquisition
Disputes

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Reprinted from
International Arbitration Law Review
Issue 4, 2008

Sweet & Maxwell Limited
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(*Law Publishers*)

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DISPUTES IN THE FAST LANE: FAST-TRACK ARBITRATION IN MERGER AND ACQUISITION DISPUTES*

ALICE BROICHMANN†

LT Fast track; International commercial arbitration; Strategic alliances

Introduction

Its swiftness renders arbitration attractive as a conflict resolution instrument for merger and acquisition (M&A hereinafter) cases. Nevertheless, M&A arbitration proceedings, complex in their nature, are not immune to delays due to the nature of disputes, dilatory conducting of proceedings by the arbitral tribunal or delay of the proceedings by the parties. In arbitration in general there are more and more regulations to expedite proceedings which—in order to obtain an arbitral award more quickly¹—provide for a timely tightening of time frame of the arbitration proceedings.² As far as can be seen, little use is made of such regulations in M&A cases. This is surprising because, in the case of M&A transactions, promptness is an objective necessity through the

entire sales process, because it entails agreeing on and implementing decisions regarding business management rapidly, starting with internal preparation up to the execution of an agreement.³ Therefore, it would only be logical and in the interest of the parties involved, in particular that of financial investors, to settle M&A transaction disputes on a “fast track” with expedited arbitration.

Background of fast-track arbitration

The term fast-track arbitration was coined in the 1990s, when the duration of arbitration proceedings in international economic transactions was increasingly criticised, not least because of increased cash-flow considerations during periods of recession.

In the face of this criticism, the major arbitral institutions searched for solutions. At the same time, a few fast-track cases conducted before the International Court of Arbitration of the International Chamber of Commerce (ICC) made a name for themselves at the beginning of the 1990s, which were brought to a close within an extremely short time and thus gained a certain prominence. At the end of 1991, four related arbitration proceedings with a value in dispute amounting to several \$100 million were initiated with the ICC, two of which were introduced under general arbitration clauses, while the other two were to be settled under fast-track provisions. The subject of the dispute was a complex redetermination of purchase price for a commodity product. The parties were related but not identical. There were numerous petitions regarding the consolidation of the fast-track cases with the two other cases, as well as questions of jurisdiction and of the independence of one of the arbitrators nominated by the parties. In summary, these cases combined the classic characteristics of difficult arbitral proceedings with the added pressure of an extremely tight deadline. As a result, one of the two fast-track proceedings was concluded within a period of 60 days, the other within a period of 80 days.⁴ Exactly one year later, again at the beginning

*This article is a slightly revised version of “Streiten auf der Überholspur—Fast-Track-Arbitration bei M&A-Streitigkeiten” in *Transaktionen, Vermögen, Pro Bono—Festschrift zum zehnjährigen Bestehen von Pöllath and Partners*, (2008), pp.115–134.

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1. At the Court of Arbitration of the International Chamber of Commerce (ICC) the average duration of arbitration proceedings is 18 months, *cf.* Raeschke-Kessler and Bühler, “Aufsicht über den Schiedsrichter durch den ICC Schiedsgerichtshof (Paris) und rechtliches Gehör der Parteien” (1987) Z.I.P. 1157, 1162; von Schlabrendorff, “Internationaler Schiedsgerichtshof der Internationalen Handelskammer (ICC)” (2003) *SchiedsVZ* 34, 36; at the China International Economic and Trade Arbitration Commission (CIETAC) an arbitral proceeding usually takes one year, see Trappe (2006) *SchiedsVZ* 258, 265; thereby it should be assumed that the average duration of proceedings will respectively increase when only considering complex M&A cases.

2. This is also reflected in practice. For instance, 46% of all proceedings conducted under the Swiss Rules of International Arbitration in 2004 were conducted as expedited procedures: Scherer “Acceleration of Arbitration Proceedings—The Swiss Way: The Expedited Procedure under the Swiss Rules of International Arbitration” (2005) *SchiedsVZ* 229, 230.

3. Pöllath and Partners (ed.), *Unternehmensfortführung durch Nachfolge oder Verkauf* (2007), para.909.

4. See ICC cases Nos 7385 and 7402 (1993) *Yearbook Commercial Arbitration* 68; Davis, “Fast Track Arbitration: Different Perspectives” (1992) 3(2) *ICC International Court of Arbitration Bulletin* 4, 5; Smit “Fast-Track Arbitration”

of the year, in another ICC case the parties carried out a dispute in the fast (track) lane in the truest sense of the word: Since a dispute developed between a racing team and the host of the F1 championship immediately before a Grand Prix race regarding the proper varnishing of two race cars, a prompt decision was required. The ICC Arbitration Court succeeded in making such a prompt decision—just 38 days passed between commencement of the arbitration proceedings and the rendering of the award and the participation of the racing team in the imminent Grand Prix was thereby ensured.⁵

Term and characteristics of fast-track arbitration

Even though the understanding of the term “fast-track arbitration” is not quite consistent in arbitration practice,⁶ the definitions quoted in literature can be brought in line insofar as under this term, such arbitration proceedings are understood which aim to conduct arbitration proceedings reducing all other usual deadlines for the formation of an arbitral tribunal, the commencement of the arbitration proceedings and the exchange of briefs.⁷ As with “normal” arbitration proceedings, the legal dispute will be finally decided upon by the arbitral tribunal without recourse to courts of law—just within a shorter period of time, shortening individual procedural steps to a required minimum.⁸ In literature, further differentiations are in part still made⁹ and under fast-track arbitration, these are understood to be expedited

procedures, whereby the parties select a subset of disputes from the total potential disputes and agree that if a dispute in this category arises, it will be resolved within a non-extendable time limit. Such arbitration may occur under the general provisions of an arbitral institution or within the framework of ad hoc arbitration.¹⁰ Generally, the selection of a subset of claims and the determination of the time limits occurs upon conclusion of the contract, but in any event prior to the emergence of any dispute. Thus, an essential characteristic of fast-track arbitration is the segmentation of possible conflict potential into cases which are suitable and unsuitable for expedited dispute settlement, whereby suitable cases will thus far be included in a comprehensive body of legislation for expedited settlement.

However, how can speed be achieved in the context of arbitral proceedings? The answer to this question first requires a clarification of numerous individual questions, such as for instance: Can the duration of the entire proceedings be absolutely limited? Does it make sense to provide a deadline for the proceedings that cannot be extended? Can deadlines for legal briefs be shortened to a minimum? Is it sufficient to allow the proceedings to be conducted by a sole arbitrator? Can the selection of the arbitrator be simplified? Should set-offs and cross-actions be permissible?

Individual arbitral institutions have already answered these questions and prepared rules of procedure based on the experiences they have gathered. They have incorporated these rules into their arbitration rules¹¹ or set them down in the independent rules of arbitration for expedited procedures.¹² The German Institution for Arbitration e.V. (DIS) recently introduced its new

(1991) II *The American Review of International Arbitration* 138, 139; for a case history on fast-track proceedings from recent times see also Fiebinger and Gregorich, “Arbitration on Acid: Fast Track Arbitration in Austria from a Practical Perspective” (2008) *Austrian Arbitration Yearbook* 237–254.

5. ICC case No.10211/AER; see also Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (2004), paras 6–43 *et seq.*

6. See Freyer, “Getting to ‘fast-track’ arbitration: pre-dispute agreements and post-dispute techniques” in *Liber amicorum Gaudet* (1998), p.104; M. Philippe, *Are specific fast-track arbitration rules necessary? Arbitration in air, space and telecommunications law* (Peace Palace Papers, 2001), p.253.

7. *cf.* Raeschke-Kessler and Berger, *Recht und Praxis des Schiedsverfahrens*, 3rd edn (1999), para.89; *cf.* also Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, para.6–43; Freyer, “Getting to ‘fast-track’ arbitration” in *Liber amicorum Gaudet*, p.104.

8. *cf.* Rovine, “International Fast Track Arbitration: An Overview” (1994) 57 *W.A.M.R.* 166; Scherer (2005) *SchiedsVZ* 229, 235.

9. *cf.* Davis, Lagacé Glain and Volkovitsch, “When Doctrines Meet—Fast-Track Arbitration and the ICC Experience” (1993) 10 *J. Int. Arb.* 69, 70, fn.2, divided into three classifications and distinguished between two further forms of accelerated arbitration, i.e. on the one hand, the so-called expedited arbitration and, on the other hand, a group referred to as accelerated arbitration. Expedited arbitration is where the parties agree to have disputes under a contract resolved pursuant to the set of arbitration rules of an institution. Accelerated arbitration is where the parties have a general arbitration clause and, once the dispute has arisen, it is of such urgency that the arbitration

proceeds at an “accelerated” pace; in contrast, Freyer, “Getting to ‘fast-track’ arbitration: pre-dispute agreements and post-dispute techniques” in *Liber amicorum Gaudet*, p.104, subdivides into two classifications: “expedited arbitration” and “modified arbitration”, where the parties waive certain arbitral phases or requirements.

10. In ad hoc arbitration, the parties conclude an arbitration agreement which does not refer to the arbitration rules of an arbitral institution. Since it can thus not take recourse to any institutional arbitration rules, the procedural rules in an ad hoc arbitration shall be determined by the parties or the arbitral tribunal.

11. International Arbitration Rules of the Swiss Chamber of Commerce (hereinafter referred to as Swiss Rules) Art.42, retrievable at http://www.swissarbitration.ch/pdf/SRIA_english.pdf [Accessed July 7, 2008]; CIETAC (China International Economic and Trade Arbitration Commission) Arbitration Rules Arts 50 *et seq.*, retrievable at <http://www.cietac.org.cn/english/rules/rules.htm> [Accessed July 7, 2008]; CACNIQ (Centre canadien d'arbitrage commercial) Expedited Arbitral Proceedings as a supplement to General Commercial Arbitration Rules, retrievable at <http://www.cacniq.org/PDF/ProcAccelArbEN.pdf> [Accessed July 7, 2008].

12. SCC (Stockholm Chamber of Commerce) Rules for Expedited Arbitration, retrievable at <http://www.sccinstitute.com/uk/Rules/> [Accessed July 7, 2008]; WIPO (World Intellectual Property Organization) Expedited Arbitration Rules, retrievable at <http://www.wipo.int/amc/en/arbitration/expedited-rules/index.html> [Accessed July 7, 2008].

“Supplementary Rules for Expedited Proceedings”.¹³ As far such rules do not exist, upon request the competent offices recommend standardised modification alternatives to the conventional rules of procedure to their users.¹⁴ An essential characteristic of these special rules of procedure, respectively reflected in different forms, is first the shortening of the process to constitute the arbitral tribunal which traditionally takes several months,¹⁵ whereby for further expedition the arbitral tribunal sometimes consists of only one arbitrator and is appointed by the arbitral institution.¹⁶ Moreover, the total duration of the proceedings¹⁷ as well as the rounds and deadlines for briefs are limited.¹⁸ In individual cases, the application of the rules for expedited proceedings is even binding for particular groups of cases,¹⁹ although expedited proceedings are open to all parties which agree to apply these special rules.²⁰ However, it is also possible to expedite proceedings in cases without special rules for expedited proceedings: as a rule, it is possible to shorten deadlines when agreed upon by the parties.

Consideration of the individual rules of arbitration reveals at the same time a different understanding of swiftness. The Swiss Rules, for instance, assume that an arbitral award shall be issued within a period of six months after sending the files to the arbitral tribunal, the rules of the Stockholm Chamber of Commerce (SCC) provide for a period of three months. This demonstrates that

speed in relation to fast-track arbitration is a relative term and depends in a single case on the context.²¹ However, the parties are free to determine such a period of time which they consider to be appropriate for the arbitration proceedings.

Since the individual arbitral institutions have already developed clauses for expedited proceedings and thus already resolved numerous questions raised above, we shall refrain from further addressing their answers and the general formation of fast-track arbitration agreements in the following.²² In the following, we shall instead focus on the one question of to what extent fast-track proceedings are applicable to M&A disputes. If, after this consideration, it should turn out that individual M&A cases are applicable, these could either be conducted according to the special fast-track rules of an arbitral institution, or the parties could at least take these as an example in formulating their own fast-track arbitration agreement.

Fast-track arbitration and merger and acquisition?

The question is whether fast-track arbitration is really suitable in M&A disputes or whether the use of this dispute resolution instrument is out of the question from the outset due to the complexity of M&A cases. As far as can be seen, practice hardly provides any precedents which could serve as examples.²³ Information on this is hard to obtain because arbitral proceedings are generally subject to confidentiality²⁴; for this reason, fast-track proceedings rarely become known. According to the experience of individual arbitral institutions, however, the sectors in which expedited procedures are applied are extremely diverse; in particular, they are used in relation to company share-purchase agreements²⁵—at least an

13. Retrievable at <http://www.dis-arb.de>; introduction thereto, Berger, “Die Ergänzenden Regeln für Beschleunigte Verfahren der Deutschen Institution für Schiedsgerichtsbarkeit” (2008) *SchiedsVZ* 105 *et seq.*; Broichmann, “Die neuen ‘Ergänzenden Regeln für Beschleunigte Verfahren’ der Deutschen Institution für Schiedsgerichtsbarkeit”, beck-fachdienst Mergers & Acquisitions (online), 14/2008, retrievable at <http://www.beck-online.de> [Accessed July 8, 2008].

14. Upon inquiry, the London Court of International Arbitration (LCIA) provides information on standardised ways of how to expedite procedures on the basis of general arbitration rules.

15. *cf.* Art.70 CACNIQ Expedited Arbitral Proceedings: the arbitrator will be determined by submitting a list of five arbitrators to the parties, from which each party may delete two names within three days; Art.52 CIETAC Arbitration Rules; Art.14 b WIPO Expedited Arbitration Rules. Should the parties fail to determine an arbitrator within 15 days, the arbitrator will be determined by the WIPO Arbitration Center.

16. CIETAC Arbitration Rules Art.52.

17. Swiss Rules Art.42.1(d): the arbitral award shall be issued within six months after sending the files from the Chamber to the arbitral tribunal; Art.75 CACNIQ Expedited Arbitral Proceedings: 60 days.

18. Swiss Rules Art.42.1(b): the parties are, as a rule, only entitled to file one statement of claim and one statement of defence and, if applicable, one further cross-action and one reply to a cross-action.

19. *cf.* Art.42.2 Swiss Rules, pursuant to which all disputes with a value of up to CHF 1 million (about €600,000) shall be arbitrated in an expedited procedure; Art.50 I CIETAC Arbitration Rules 2005 sets this limit at RMB 500,000 (about €48,000); Art.3 CACNIQ Expedited Arbitral Proceedings sets the limit at CAD 50,000 (about €34,400).

20. *cf.* Art.50 I CIETAC Arbitration Rules; Art.42 I Swiss Rules.

21. *cf.* Davis, Lagacé Glain and Volkovitsch, “When Doctrines Meet” (1993) 10 *J. Int. Arb.* 69, 72, 89.

22. See Freyer, “Getting to ‘fast-track’ arbitration” in *Liber amicorum Gaudet*, pp.104 *et seq.* on drafting a fast-track arbitration agreement.

23. The decision of the European Commission on the reconcilability of the integration with Council Regulation 4064/89 and the common market in the case of *Vodafone Airtouch Plc/Mannesmann AG* (COMP/M.1795, CELEX No.32000M1795) is only indirectly connected with an M&A transaction. In this case, Vodafone Airtouch Plc has undertaken a formal obligation due to a requirement by the European Commission, according to which fast-track proceedings pursuant to LCIA arbitration rules will be conducted in particular cases with third parties, whereby independent rules were laid down to constitute an arbitral tribunal and to distribute the burden of proof.

24. Critical regarding further legal education in case of arbitral proceedings: Duve and Keller, “Privatisierung der Justiz—bleibt die Rechtsfortbildung auf der Strecke?” (2005) *SchiedsVZ* 170 *et seq.*

25. The expedited arbitrations under the Expedited Rules of the SCC concerned a wide variety of contracts, such as agency, distribution, co-operation, leasing and share purchase, whereby the values of claims reach seven-digit amounts, see (2000) 1 *Stockholm Arbitration Newsletter* 1; the fields in which the parties chose expedited procedures

indication of a practical need for such rules in the M&A sector.

Chances

As a matter of fact, there are numerous reasons why promptness is also good for M&A disputes: disputes bind financial and personnel resources of the seller, the purchaser and the target company. The facts need to be examined, strategies need to be discussed and opposing views need to be verified. This affects the operational business of all parties involved. With an increasing lapse of time, the risk increases that important documents may get lost and witnesses may no longer be available. The risk of key persons leaving the company will rise. The longer a legal dispute lasts, the more it may finally become an independent end in itself.²⁶ It is also in the interest of arbitrators to proceed quickly. Less because speedy conclusion of the proceedings will leave more time for other business and thus increase turnover, but rather as conflicts of interests within law firms will have less of an impact if the arbitrations handled by firm members as arbitrators go quickly and the mandate as arbitrator must not be protected against numerous potential conflicts of interest any longer.²⁷ With regard to man's capacity for memory, it may be better to condense the conclusion of a single case, as opposed to supervising it parallel to many other cases over a long period of time.²⁸

Risks

However, the expediting of proceedings is also connected with undeniable risks: at the time a transaction is concluded, the decision to conduct a legal dispute by shortening any deadlines is mainly risky because the allocation of the roles of claimant and defendant, as well as the subject and value of the dispute and the evidence situation are still uncertain, more than ever with such a complex matter as M&A. Parties critical of arbitration because there is no second instance, sometimes even regard the agreement on an expedited procedure as a double waiver of legal protection. Human memory being what it is, it is often better to concentrate one's efforts on a small number of cases which go fast rather than to spread oneself over a large number of lingering arbitrations which

one tends to have forgotten when one comes back to them. Shorter proceedings do not necessarily mean lower costs: whether the arbitrators and counsel devote a total of X hours to a case over a period of 18 months or 6 months, in the end, the total time spent remains the same.²⁹ When any deadlines are shortened, it will be further questionable whether sufficient time will remain in order to reject an arbitrator due to lacking independence and impartiality or to present the case. By nature, the parties require more time for the latter just in case of complex disputes.³⁰ As a result, expediting arbitral proceedings increases the risk that the arbitral award may be rescinded due to inadequate granting of the legal right to be heard³¹ and that the party which wins the case does not obtain an enforceable award, putting the proceedings themselves into question.³² Finally, it may be difficult to enlist the desired arbitrator most suitable for a concrete mandate because of his special expert knowledge, especially if he must be almost exclusively available for this single arbitral proceeding on relatively short notice.

Assessment

In view of the chances fundamentally related to fast-track arbitration, it seems inappropriate to reject this conflict solution instrument from the outset, thereby stating that it is inapplicable in general due to the complexity of M&A cases and the lack of predictability of the concrete case at the time of conclusion of the share-purchase agreement. On the other hand, with a view of the possible risks it would be daring as well to subject *all* disputes in connection with a sale of a company in general to a fast-track regime, particularly because a fast-track proceeding can only adequately address a limited range of claims during its lifetime.³³ This applies all the more, as experience has shown that fast-track arbitration only makes sense in very few cases and a fast-track arbitration clause should remain the exception, not the rule.³⁴

Therefore, the starting point of the following considerations shall be the hypothesis that fast-track arbitration is only suitable for particular M&A cases. Within the meaning of the differentiated definition of fast-track arbitration stated at the beginning,³⁵ from the entirety of

under the Swiss Rules included personal service contracts, employment contracts, construction contracts (for smaller projects), real-estate brokerage, sales contracts and share-purchase agreements, see Geisinger in Kaufmann-Kohler and Stucki (eds), *The Swiss Rules of International Arbitration* (ASA Special Series No.22, 2004), pp.67, 69; see also the reference to a fast-track arbitration clause in a share-purchase agreement in Davis, Lagacé Glain and Volkovitsch, "When Doctrines Meet" (1993) 10 J. Int. Arb. 69, 97 *et seq.*

26. "A task will expand with the time that is allocated to it": *cf.* insofar the reference to a maxim of the drafters of Art.42 Swiss Rules in Geisinger in Kaufmann-Kohler and Stucki (eds), *The Swiss Rules of International Arbitration*, p.68.

27. *cf.* Karrer, "Why Speed is good for arbitrators" in *Liber Amicorum Gaudet* (1998), p.135.

28. *cf.* Karrer, "Why Speed is good for arbitrators" in *Liber Amicorum Gaudet*, p.135.

29. Thus an object expressed in connection with the draft of the Swiss Rules, *cf.* Geisinger in Kaufmann-Kohler and Stucki (eds), *The Swiss Rules of International Arbitration*, p.68.

30. *cf.* Scherer, "Acceleration of Arbitration Proceedings—The Swiss Way: The Expedited Procedure under the Swiss Rules of International Arbitration" (2005) *SchiedsVZ* 229, 230.

31. *cf.* for German law Bayerisches Oberstes Landesgericht, February 24, 1999 (4Z Sch 14/98); (2000) N.J.W.-R.R. 807, 808.

32. Critical insofar also Davis, Lagacé Glain and Volkovitsch, "When Doctrines Meet" (1993) 10 J. Int. Arb. 69, 82; Scherer (2005) *SchiedsVZ* 229, 230.

33. See also Davis, Lagacé Glain and Volkovitsch, "When Doctrines Meet" (1993) 10 J. Int. Arb. 69, 83.

34. *cf.* Freyer, "Getting to 'fast-track' arbitration" in *Liber Amicorum Gaudet*, p.111.

35. Freyer, "Getting to 'fast-track' arbitration" in *Liber Amicorum Gaudet*, p.111.

potential M&A disputes possible fast-track cases should be identified and categorised.

Criteria for selecting merger and acquisition cases suitable for fast-track arbitration

An arbitration agreement is in practice often concluded under extreme time-pressure and plays only a secondary role for the parties within the context of a large deal. In this situation, it is much more difficult to decide whether a potential case will be suitable for a fast-track proceeding. However, various criteria may be at least helpful for the selection of M&A cases suitable for fast-track arbitration.

For instance, disputes can be differentiated by determining in which stage of a transaction they occur, and the question can be raised whether it is necessary to obtain an arbitral award quickly in this phase in order to ensure a smooth transaction and avoid putting the target company at risk.

In addition, the cases can be selected by determining whether the matter in dispute itself would be appropriate for a fast-track proceeding. Naturally, complex circumstances are less suitable than a clear situation requiring only a few clarifications, a situation in which the parties have probably determined the formal means of evidence in advance. In selecting cases according to the matter in dispute, particular attention should be paid to the fact that the subset of claims to be addressed in the fast-track proceeding has to be identified with sufficient clarity. Otherwise a tremendous amount of precious time and energy is “wasted” on defining the scope of the fast-track clause.³⁶ In the above-mentioned ICC’s first fast-track case³⁷ the fast-track clause provided little guidance as to the scope of the term “redetermination” to indicate whether issues of interest or retroactivity of the price-redetermination decision could be addressed in the fast track. Also, in case of complex legal questions, it can make sense to bring about a speedy decision in advance only on anticipated legal questions.

Moreover, one may also differentiate by determining whether the desired legal consequence demands a rapid decision. It makes a difference whether the purchaser of a company claims compensation for or the rescission of a sale, because a company as a living entity cannot be restituted offhand. We will refer to this again later. If various legal consequences are tied to a breach of the law due to the identity of the underlying circumstance—in case of a warranty infringement, for instance, a claim to supplementary performance, compensation and/or right to withdraw from contract—it makes less sense to only arrange for fast-track proceedings in relation to a legal consequence³⁸ because the plaintiff will thus be forced

36. *cf.* Davis, Lagacé Glain and Volkovitsch, “When Doctrines Meet” (1993) 10 J. Int. Arb. 69, 83.

37. Davis, Lagacé Glain and Volkovitsch, “When Doctrines Meet” (1993) 10 J. Int. Arb. 69, 83.

38. See also the case study in Davis, Lagacé Glain and Volkovitsch, “When Doctrines Meet” (1993) 10 J. Int. Arb. 69, 83.

to commence additional “normal” arbitral proceedings parallel to the fast-track proceedings.

Selection criteria which can be easily manipulated by the parties in order to delay the proceedings, such as, e.g. the value in dispute, are similarly problematic. It might be possible to select disputes to be subjected to a fast-track regime according to the value and then to treat them in an expedited procedure if the value in dispute is below a particular amount.³⁹ However, it would be very easy in such a case to sabotage the proceedings: a recalcitrant party needs only to object to the value in dispute or increase its claim or counterclaim in order to exceed the agreed upon limit. If in such a case the arbitration agreement does not establish whether consequential damages, attorneys’ fees and other expenses of the arbitral proceedings should be included in the calculation, the situation will become even more problematic.⁴⁰ If thereby general considerations already militate against the value in dispute as a selection criterion, it should—at least in most of the cases in which the acquirer asserts guarantee claims from a share-purchase agreement—be dispensable due to an entirely different reason: most share-purchase agreements include so-called *de minimis* clauses,⁴¹ tying the enforcement of claims due to breach of warranties for the protection of the company to the attainment of a minimum amount. For lesser amounts, the seller would have to make unreasonable efforts by way of inquiries within the company (disturbing the company).⁴² If the parties have thus already excluded petty claims, the determination of another value limit for the fast-track proceedings appears to be indiscriminate. Moreover, there is the double risk that the parties dispute value limits which, with already shortened deadlines in the fast-track proceedings, implies a dispensable conflict potential.

According to experience, an expedited procedure will work only if all parties are prepared to cooperate to the extent necessary in order to comply with ambitious schedules.⁴³ Therefore, one of the most important criteria is the parties’ interest in rapid arbitral proceedings, whereby this interest should exist not only at the time of concluding the arbitral agreement but should particularly continue to exist when the dispute commences. Otherwise, there is a high risk that one of the parties may torpedo the fast-track procedure. Therefore, if there is little incentive to move rapidly, disputes that are capable of being decided rapidly but for which there is

39. That is approximately the way how it is provided for by the Swiss Rules in their expedited procedure. This is automatically applicable up to a value of CHF 1,000,000; *cf.* Art.42 para.2 Swiss Rules, whereas the sum of the claim and the counterclaim shall be added in order to determine the value of claim.

40. See also the criteria in Davis, Lagacé Glain and Volkovitsch, “When Doctrines Meet” (1993) 10 J. Int. Arb. 69, 82.

41. *cf.* Hilgard, “Bagatell—und Cap-Kauseln beim Unternehmenskauf” (2004) B.B. 1233.

42. Pöllath and Partners (ed.), *Unternehmensfortführung*, para.1134.

43. In addition, the arbitral tribunal must be ready to co-operate, *cf.* Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, para.6–43.

no real need for the parties to secure an urgent decision, should not be placed on a fast track.⁴⁴

Objective factors of the parties can also militate against an expedited procedure: if the parties to a share-purchase agreement originate from a jurisdiction, the laws of which permit an award to be set aside or have refused enforcement for violation of the time limits contained in the arbitration clause and/or due process,⁴⁵ an expedited procedure will be particularly risky. When conducting procedures, it should also be considered whether the party concerned is required to obtain board consent—possibly even unanimous consent—which cannot be obtained within the shortened terms of the arbitral proceedings. If there is a majority of parties—as is often the case with share-purchase agreements—on the side of the seller or the purchaser, the additional time factor required for consonance among the parties themselves should be taken into consideration. After all, agreement on fast-track proceedings must not come into conflict with the principle of equal treatment as one of the supporting principles of arbitration law because, for instance, one party or majority of parties is far superior to the opposing side with regard to its material and financial resources especially when time is short. Under these circumstances, companies with a rapid decision-making culture, having top management with access to armadas of in-house and external counsel together with extensive documentation and research materials ready at hand, may be privileged compared to their opposing parties, again raising concern with regard to respect of due process.⁴⁶

Suitability of fast-track in individual merger and acquisition cases

Taking the aforementioned criteria into consideration, typical M&A cases shall be examined in the following with regard to their fast-track suitability, namely in the order of their appearance in the individual stages of a company's transaction. Accordingly, reference shall first be made to disputes before closing of a company takeover, so-called pre-closing disputes.⁴⁷ Subsequently, disputes occurring after closing of takeover, so called post-closing disputes,⁴⁸ will be discussed.⁴⁹

44. cf. Davis, Lagacé Glain and Volkovitsch, "When Doctrines Meet" (1993) 10 J. Int. Arb. 69, 75.

45. In detail, Freyer, "Getting to 'fast-track' arbitration" in *Liber amicorum Gaudet*, p.106; Davis, Lagacé Glain and Volkovitsch, "When Doctrines Meet" (1993) 10 J. Int. Arb. 69, 92.

46. Critical Davis, Lagacé Glain and Volkovitsch, "When Doctrines Meet" (1993) 10 J. Int. Arb. 69, 92.

47. Below "Disputes before Signing".

48. cf. regarding this differentiation Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge—unter besonderer Berücksichtigung kartellrechtlicher Aspekte" (2004) *SchiedsVZ* 123, 125 *et seq.*; Schellenberg Wittmer, *Dispute Resolution in M&A Transactions*, pp.1 *et seq.*; Ehle, "Arbitration as Dispute Resolution Mechanism in Mergers and Acquisitions" (2005) *Comparative Law Yearbook of International Business* 287, 291 *et seq.*

49. cf. Wittmer, *Dispute Resolution in M&A Transactions*, p.1.

Disputes before closing takeover

With regard to pre-closing disputes, we can again differentiate between disputes arising before signing of the share-purchase agreement and such disputes arising between signing and closing of the transaction.

Disputes before signing

Typically, these disputes relate to breaches of the letter of intent and its legal binding effect, as well as to the breach of confidentiality or exclusive rights agreement. Often one of the parties alleges that the other party abandoned the negotiations in bad faith and then caused damage.⁵⁰ The claimant regularly desires compensation for damage or claims payment of the penalty agreed upon for cases of such breach. In legal respects, such disputes are relatively simple. The underlying facts are also comparatively clear for the most part. However, it will be much more difficult for the claimant to produce evidence, if upon alleging abandonment of the negotiations in bad faith, he has to prove that the opposing party has only pretended its willingness to conclude the agreement from the beginning or has disavowed its willingness in the course of negotiations.⁵¹ Therefore, a simplification of the proceedings for the introduction of evidence implies risks for the defendant. Both parties will have an interest in preventing broken-deal costs from increasing unnecessarily due to the costs of protracted arbitral proceedings. On the other hand, however, with regard to the failure of transaction, a true incentive is lacking for both parties to expedite the procedure.

Another point militates against the agreement on fast-track proceedings in this stage: advance agreements like a letter of intent often do not provide for an arbitration agreement.⁵² This may be due to the fact that the parties do not want to consider the possible failure of the transaction at this early stage. Therefore, discussion of a fast-track regulation would not only excessively strain a possible arbitration agreement but in particular the relation between the parties.

Disputes between signing and closing

Between signing and closing dissent can arise between the parties regarding the occurrence of conditions required for closing the company transfer, for instance on the issue of whether the approval of the cartel office was carried out within the meaning of the agreement, whether other regulatory approvals or those required pursuant to the partnership agreement are available or whether documents to be exchanged on the closing deadline, such as statements of guarantee to be handed over by the purchaser, comply with the agreements made between the parties. Moreover, conflict potential may

50. Wittmer, *Dispute Resolution in M&A Transactions*, p.1.

51. cf. e.g. Oberlandesgericht Stuttgart, April 2, 2007 (5 U 177/06) with comment Broichmann in *Fachdienst mergers & acquisitions* (2007), retrievable at <http://www.beck-online.de> [Accessed July 7, 2008].

52. However, it is recommended in particular for the purpose of secrecy, if the seller wants to avoid having his intention to sell become known in a proceeding before public courts after the transaction has failed.

result from so-called “Material Adverse Change clauses” (MAC clauses) which release the purchaser from the duty to close the agreement and pay the purchase price upon the occurrence of essentially adverse changes. Unless the occurrence of individual conditions cannot be dispensed with,⁵³ either indemnity claims or the right of the purchaser or seller not to close the agreement or—as far as it has already been closed—to withdraw from the agreement will be tied to their non-occurrence, depending on the conditions and contractual arrangement.⁵⁴

Disputes on closing are particularly critical in terms of time, because every delay of the conclusion of an agreement implies an imperilment of companies and company transfer. In the meantime, much can happen, also many things which should be irrelevant according to the agreement, but do have an effect in reality, e.g. “purchaser’s regret”, changes in the financial or delivery and performance markets, etc.⁵⁵ If the seller intends to carry out the transaction against the will of the purchaser and initiates legal proceedings against the purchaser to carry out closing, it is probable that the transaction will be pending for several years and the value of the target company will decrease.⁵⁶ Therefore, considering the imminent imperilment, both parties are interested in a rapid decision, as long as it is uncertain to whom the company will finally be awarded. Psychologically, even the prospect of a swift arbitral award will act as motivation for a transaction that became stuck and finally lead to success, which is in the interest of both parties. Last but not least, a fast decision serves the protection of the target itself. In this situation, fast-track proceedings would be suitable,⁵⁷ because they provide legal security quickly.⁵⁸

53. Except for the requirement of approval of the cartel office, almost all closing conditions can be rendered dispensable because they are not subject to binding law, cf. Kästle and Oberbracht, *Unternehmenskauf—Share Purchase Agreement* (2005), B.III.6., p.110.

54. Depending on whether execution still depends on the occurrence of several conditions, a party may only be interested in determining the (non)occurrence of an individual condition.

55. Pöllath and Partners (ed.), *Unternehmensfortführung*, para.979.

56. cf. Kästle and Oberbracht, *Unternehmenskauf*, p.104.

57. For details on fast-track arbitration proceedings in connection with (MAC) clauses see Borris, “Streiterledigung bei (MAC-) Klauseln in Unternehmenskaufverträgen: ein Fall für “Fast-Track”-Schiedsverfahren” (2008) B.B. 294, which considers agreements on fast-track arbitration proceedings as the only alternative for this sort of dispute; in particular in relation to MAC/MAE (Material Adverse Event) Kästle and Oberbracht, *Unternehmenskauf*, p.104, alludes to a MAC/MAE determination procedure which was occasionally agreed upon, at least in the case of major transactions; for fast-track arbitration in disputes before closing, see Elsing, “Probleme bei M&A-Schiedsverfahren” in *Festschrift für Hans-Jochem Lüer zum 70. Geburtstag*, (2008), pp.517, 520.

58. See Wittmer, *Dispute Resolution in M&A Transactions*, pp.1, 3; Kästle and Oberbracht, *Unternehmenskauf*, p.104, with concurrent reference to the opportunity of engaging an arbitrator in such cases; for fast-track proceedings instead of an expert clause: Sachs, in Böckstiegel, Berger and Bredow, *Schiedsgutachten versus Schiedsgerichtsbarkeit, Schriftenreihe der Deutschen Institution für Schiedsgerichtsbarkeit* (2007), Vol.21, pp.15, 18.

The same holds true if the agreement has already been closed. The rescission of a sale will also be difficult at any rate, because the company as a living entity has changed in the meantime and can only rarely be rescinded in the transferred form. The shorter the lapse of time between transfer and rescission, the more easily problems which have arisen can be solved.⁵⁹

In particular, an arbitral tribunal may already be appointed before a dispute arises, for example, at the signing of the arbitration clause or within a certain period afterwards.⁶⁰ To bring forward the appointment procedure in this way saves time if a dispute arises. However, it might also only lead to unnecessary costs. The parties are free to agree that the arbitrators will receive certain information right after their appointment. This would allow the arbitrators to familiarise themselves with the situation.⁶¹ Finally, it will be a question of the scope of closing conditions and the configuration of the closing mechanism, which determines whether all disputes in relation to the occurrence of closing conditions will be subject to fast-track proceedings or whether these will be limited to individual conditions and the determination of their (non)occurrence.

Disputes after conclusion of transaction

After conclusion of the sale, disputes may arise in many areas.⁶² In the phase after closing, disputes will mainly arise in connection with purchase price adjustment clauses, as well as with warranties and guarantees.

Purchase-price adjustment

Clauses on subsequent purchase-price adjustments, as for instance debt-free/cash-free clauses⁶³ or earn-out clauses,⁶⁴ are especially susceptible to dispute. As a rule, legal and valuation questions are closely interwoven. A clarification of such questions often takes much time and makes the enforcement of variable purchase price claims difficult. However, purchase price formulas as the principal item of a share-purchase agreement are as diverse as the target company itself and the motives for its acquisition.⁶⁵ Therefore, its suitability for a fast-track regime cannot be determined in general, but is best determined for every single case separately, whereas with

59. Pöllath and Partners (ed.), *Unternehmensfortführung*, para.1177; see also Fikentscher and Heinemann, *Schuldrecht*, 10th edn (2006), s.72 III, para.926.

60. So-called “standing arbitrators” or “dispute boards”, which are still seldom found in M&A agreements, but are common in cases of major construction projects, cf. Wittmer, *Dispute Resolution in M&A Transactions*, pp.1, 3.

61. Wittmer, *Dispute Resolution in M&A Transactions*, pp. 1, 3.

62. cf. Borris, “Streiterledigung beim Unternehmenskauf” in Briner *et al.*, *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Böckstiegel, 2001), pp.75 *et seq.*

63. See for this Bruski, “Kaufpreisbemessung und Kaufpreis-anpassung im Unternehmenskaufvertrag” (2005) *BB-Special* 7, Heft 30, 19, 24 *et seq.*

64. cf. regarding earn-out von Drygalski and Graßl, *German Commercial Law Firms* (2007), pp.273–274.

65. Kästle and Oberbracht, *Unternehmenskauf*, pp.49, 50.

respect to the complexity of most of the purchase price clauses, a rather reserved approach would be necessary.

In the following, a common feature of the various purchase-price adjustment mechanisms shall be singled out and its interaction with possible arbitral proceedings examined for opportunities to expedite procedures, namely the expert determination proceedings provided for in many purchase price mechanisms which precede possible arbitral proceedings.⁶⁶ In expert determination proceedings, only individual elements of a legal dispute will be bindingly determined, such as equity capital or the earn-out as reference figures for the final purchase price.⁶⁷ The binding determinations of the expert can then be used in proceedings before the arbitral tribunal.⁶⁸ Unless a particular procedure has been laid down in the agreement for this purpose, the expert is not bound to procedural rules; rather he can decide on procedural questions at his sole discretion and, as a rule, may act without witness statements.⁶⁹ In comparison with arbitration, expert determination proceedings normally have the advantage of greater speed and flexibility.⁷⁰ In case facts relevant to the issue have been clarified in advance by an expert, this can again significantly expedite subsequent arbitral proceedings because extensive hearing of evidence becomes dispensable.⁷¹

However, the interaction between expert determination proceedings and arbitral proceedings is particularly susceptible to procedural delays. Thus it can even happen in expert determination proceedings—and this is indeed

one of the central issues with M&A arbitral proceedings on purchase-price adjustment disputes—that a party hinders the expert from continuing the expert determination proceedings in order to first have preliminary legal questions (for example on interpretation and effectiveness of the agreement, applicable law or valuation and accounting principles) clarified in arbitral proceedings.⁷² In such cases, an arbitral tribunal will be constituted which decides on anticipated legal questions before the expert or—as the case may be—an expert appointed by the arbitral tribunal can make a determination of his own. In turn, as long as the agreed opinion of the expert has not yet been concluded, as a rule, the recourse to the arbitral tribunal is blocked and a prematurely filed claim is to be basically rejected as “presently unsubstantiated” according to meanwhile unanimous opinion.⁷³ Altogether, the sequence of individual procedural steps for the final purchase price determination, that is:

- (1) commencement of the expert determination proceedings,
- (2) arbitral proceedings on preliminary legal question(s),
- (3) continuation of expert determination proceedings,
- (4) arbitral proceedings on final purchase price determination,

may already extremely protract a purchase-price dispute. This leads to the question of whether individual procedural steps can be replaced by fast-track proceedings or even be combined with such proceedings.

A direct requirement for speedy handling of a purchase price dispute most likely exists at the stage of the arbitral proceedings on preliminary legal questions, because as long as this has not been concluded, the entire expert determination proceedings and subsequent arbitral proceedings will be blocked as a matter of principle. It is undisputed in German law that an expert may decide on preliminary legal questions, if they are necessary for the transferred factual determinations.⁷⁴ However, the parties may—which seldom occurs in practice—commit the decision on individual preliminary legal questions explicitly to the hands of an arbitral tribunal, in order to prevent demarcation problems and unnecessary dissent on the scope of the expert’s power to make decisions.⁷⁵ Once the relevant preliminary questions are insofar identified and their scope is clear, at the same time it would be suitable to verify these with regard to their fast-track suitability and to conclude an adequate fast-track arbitration agreement.⁷⁶ A legal preliminary question is

66. Comprehensively regarding the relationship between expert determination proceedings and arbitration proceedings see Böckstiegel, Berger and Bredow, *Schiedsgutachten versus Schiedsgerichtsbarkeit, Schriftenreihe der Deutschen Institution für Schiedsgerichtsbarkeit* (2007), Vol.21.

67. Whether the involvement of a third party to clarify disputable valuation issues constitutes an arbitration clause or an expert determination agreement shall be defined under German Law according to whether the third party only has to determine individual elements of a legal relationship (in this case an expert determination agreement should exist), or whether it is finally authorised to decide (in this case an arbitration clause should be adopted), cf. Witte and Mehrbrey, “Variable Kaufpreisregelungen in Unternehmenskaufverträgen im Geflecht von Schiedsgutachtervereinbarungen und Schiedsgerichts-klauseln” (2006) N.Z.G. 241 with further references; Bundesgerichtshof, June 25, 1952 (II ZR 104/51, 6 BGHZ 335, 338 *et seq.*); comparative law analysis of the regulation in France, see Sachs in *Festschrift für Peter Schlosser* (2005), pp.805, 814 *et seq.*; comparative law analysis of the regulation in Switzerland see Schöll, “Réflexions sur l’Expertise-Arbitrage en Droit Suisse” (2006) 24 *ASA Bulletin* 4 621–646.

68. Kreindler, Schäfer and Wolff, *Schiedsgerichtsbarkeit—Kompendium für die Praxis* (2006), para.60.

69. See also Kantenwein and Kröck, *Juve Handbuch* (2006/2007), p.216, on possibilities of a reasonable limitation of discretion.

70. cf. Sessler and Leimert, “The Role of Expert Determination in Mergers and Acquisitions under German Law” in *Arbitration International* (2004), pp.151 *et seq.*

71. Kreindler, Schäfer and Wolff, *Schiedsgerichtsbarkeit*, para.60.

72. cf. Peter, “Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes” in *Arbitration International* (2003), pp.491, 502.

73. June 8, 1988, Bundesgerichtshof (VIII ZR 105/87, (1988) BGH N.J.W.-R.R. 1405); see in detail Witte and Mehrbrey (2006) N.Z.G. 241 with further references.

74. See in detail Sachs in Böckstiegel, Berger and Bredow, *Schiedsgutachten*, pp.20 *et seq.* with further references.

75. For such a classification see Sessler and Leimert, *Role of Expert Determination*, p.159; Sessler in Böckstiegel, Berger and Bredow, *Schiedsgutachten versus Schiedsgerichtsbarkeit, Schriftenreihe der Deutschen Institution für Schiedsgerichtsbarkeit* (2007), Vol.21, pp.97, 110; Sachs in *Festschrift für Peter Schlosser*, p.812.

76. Likewise Sachs in Böckstiegel, Berger and Bredow, *Schiedsgutachten*, pp.20 *et seq.*

more likely to be suitable for an expedited procedure, if the legal issue to which it is related is clearer and if there are fewer consequences of the decision made on it for the purchase price determination as a whole and the overall transaction.

With view to its greater complexity, the subsequent steps shall be taken with greater reservation as far as the implementation of an expedited procedure is concerned. The question of whether the expert determination proceedings should be substituted by fast-track arbitration proceedings for the purpose of acceleration inevitably results in the fundamental decision between the combination of expert determination and arbitral proceedings on the one hand and the integration of these two procedural steps in fast-track arbitral proceedings on the other hand. As far as the question of gaining time is concerned, in most cases this decision will turn out to be in favour of the combination of expert determination proceedings and arbitral proceedings.⁷⁷ As already mentioned, the expert determination proceedings are more flexible, allowing more rapid identification of individual facts than arbitral proceedings. Whether the arbitral proceedings following the expert determination proceedings will finally be expedited depends essentially on the complexity of the purchase price formula and the legal questions related to it.

Claims from warranties and guarantees

Disputes on warranties and guarantees granted by the seller, mostly in comprehensive catalogues, vary significantly from case to case. Apart from legal problems, such disputes also focus on valuation issues and branch-specific special questions. In most cases, the purchaser claims compensation from the seller for breaches of warranty. A particular item of dispute is then the calculation of the amount of losses.⁷⁸ For the purchaser, it is more advantageous to extrapolate a deficit within the scope of a seller guarantee by a multiplier to the damages to the company value (capitalised earnings value and the like),⁷⁹ which is naturally not so easily accepted by the seller. All in all, the type and extent of warranty disputes can thus hardly be anticipated when concluding a share-purchase agreement. Already for this reason, it is hardly recommendable to deal with all or only individual warranties and guarantees in one fast-track arbitral proceeding. Limiting a fast-track procedure to individual guarantees runs the risk that, in case of concurring claims, the purchaser will be forced to commence fast-track arbitral proceedings and normal arbitral proceedings at the same time. Corresponding complications will arise if a fast-track arbitration agreement does not provide provisions for cases in which the purchaser accuses the seller of malice and asserts claims due to default prior to or during conclusion of the agreement,⁸⁰ because without special provisions in the fast-track arbitration

agreement it is up to the purchaser to effect normal arbitral proceedings at the same time by claiming malice. On the other hand, the decision on whether malice is involved possibly requires extensive taking of evidence, which can get in the way of the rapid progress of fast-track arbitral proceedings.

However, the implementation of fast-track proceedings in relation to warranties and guarantees could be taken into consideration if, as an exception, the seller has the right to repudiation of the agreement as legal remedy and if there is the risk of rescission of the sale of the company, because also in this case, the abeyance caused by protracted arbitral proceedings would—similar to disputes on the execution of transaction between signing and closing—pose a risk for the company. Therefore, the above-mentioned considerations⁸¹ could be transferred to a large extent to withdrawals in case of claims from warranties and guarantees. Differences can thereby arise if a purchaser verifies in detail the correctness of the guarantees granted by the seller after transfer of the company and therefore has reason to accuse the seller of malice. This fact should in turn be taken into account in fast-track arbitral proceedings.

Disputes on guarantees and warranties are sometimes also the subject matter of expert opinions, such as for instance disputes on guarantees of particular balance sheet items, e.g. in relation to net equity capital or liability issues in connection with environmental contamination.⁸² In such cases, it could be taken into consideration whether anticipated legal questions can be clarified in a fast-track procedure, as in the use of expert determinations on purchase price disputes.

Right of indemnity

The right of indemnity is particularly applied in M&A contract law, in particular to shift risks in the fields of environmental contamination, product liability, taxes (s.75 para.1 of the General Fiscal Code), continuation of a firm name (s.25 para.1 sentence 1 of the German Commercial Code) as well as pension liabilities. Furthermore, indemnity regulations are used in cases of denied consent to takeover agreements by third parties (*cf.* s.415 para.3 of the German Civil Code), for target date limitations, as well as for other risks that cannot be accepted by the purchaser in individual cases.⁸³ Unlike warranty claims of the purchaser, the right of indemnity relates to *identified* impairments or potential impairments. Indemnity does not refer in general to all possible unknown events, but only to those which have been described in the exemption and only to the extent described therein.⁸⁴ The fact that impairments or potential impairments have already been identified when drafting a share-purchase agreement, ideally enables a

77. *cf.* regarding the issues suitable for an expert opinion Sessler in Böckstiegel, Berger and Bredow, *Schiedsgutachten*, p.108.

78. *cf.* Hilgard (2004) B.B. 1233.

79. Pöllath and Partners (ed.), *Unternehmensfortführung*, para.1012.

80. Under German law, claims pursuant to binding law, in particular in case of malice of the seller, cannot be excluded by the parties in the share-purchase agreement;

cf. Pöllath and Partners (ed.), *Unternehmensfortführung*, para.1124.

81. See Pöllath and Partners (ed.), *Unternehmensfortführung*, para.1124.

82. *cf.* Sessler in Böckstiegel, Berger and Bredow, *Schiedsgutachten*, pp.98, 102.

83. *cf.* Liekefett, "Die Verjährung von Freistellungsansprüchen in M&A-Vertragswerken" (2005) D.B. 2398.

84. *cf.* Pöllath and Partners (ed.), *Unternehmensfortführung*, paras 1077 *et seq.*

more precise formulation of the indemnity obligation and makes it less susceptible to later disputes as compared to warranties and guarantees. At the same time, the extent of disputes which nevertheless arise can better be estimated in advance. Thus, a dispute will focus rather on the fact of whether the right of indemnity exists on its own merits and less on the fact of in what amount this is entitled. With regard to better predictability, disputes on rights of indemnity should be suitable rather for expedited arbitral proceedings than claims from warranties and guarantees. Thus, one could consider having the entitlement of a claim determined in an expedited procedure. However, as a rule, asserting rights of indemnity lacks a particular incentive for both parties to expedite the procedure which justifies fast-track proceedings. Therefore, an agreement on fast-track regimes should be carefully deliberated.

Secondary buy-out

Secondary buy-outs, i.e. a resale of the company to the next financial investor, tend to be like buying a share at the stock exchange. There, one would also not receive reps and warranties.⁸⁵ Warranties and guarantees are granted by the seller to a very limited extent at best.⁸⁶ However, intensified attempts by the seller to enforce so-called locked-box drafting were recently observed in relation to secondary buy-outs.⁸⁷ These are mainly characterised by an agreement on a fixed purchase-price, as well as by the attempt on the side of the seller to have liability for guarantees and indemnities already terminated upon closing. Therefore, as far as possible, the seller already attempts to restrict the catalogue of guarantees on the side of the legal ground. The side of legal consequence is characterised by the motive of the seller to conclude the transaction as quickly as possible and to avoid any risk of continuing liability. Insofar drafts of the seller subject to the extended locked-box model include the stipulation that the only legal consequence in case of breach of guarantee is the option of the purchaser to withdraw between signing and closing. Furthermore, in relation to a breach of guarantee, a material adverse change concept will also partly be suggested. Accordingly, a breach of guarantee is only relevant if this permanently has a material negative influence on the company's profit or a singular severe case of damage or loss has occurred. In case of the extended locked-box model, possible claims by the purchaser become time-barred upon closing of the purchase agreement.⁸⁸

In any case, from the seller's point of view, a fast-track regime would only be consistent in the described case of the locked-box model, because a rapid arbitral award quickly creates clarity for the seller on what amounts he can distribute to his fund investors. Even if the purchaser is left with a withdrawal as the only consequence of a

breach of guarantee, it would only be consistent to decide on this in an expedited procedure due to the reasons developed above. Finally, it would also be conceivable that an arbitral tribunal would be able to determine within a relatively short period of time whether a case of damage or loss is "material" within the meaning of the material adverse change concept. However, whether a purchaser will be willing to co-operate as necessary for fast-track arbitral proceedings in the light of the already strong position of the seller, and will further accept the shortening of the procedure mainly in case of a dispute, seems doubtful since the arbitral proceedings will be the only chance to counter the strong position of the seller in the agreement on a locked-box concept.

Summary

The aforementioned considerations have shown that an agreement on a fast-track regime can also make sense in connection with M&A disputes. Practical fields of application can be disputes on the execution of a share-purchase agreement between signing and closing. Further, fast-track arbitral proceedings can be applied in relation to expert determination proceedings in order to first clarify anticipated legal questions. This can be conducive to shortening disputes on purchase price adjustment claims or warranty and guarantee claims, in the scope of which expert determination proceedings are applied.

Possible applications must, however, not hide the fact that fast-track arbitration is not an all-purpose tool for disposing of protracted arbitral proceedings. Numerous specifics of a single case have to be taken into consideration in order to make fast-track arbitration possible. The basic principles of arbitration law such as the opportunity of being heard and equal treatment of the parties shall always be given priority, because if their violation leads to the rescission of arbitral award and therefore no enforceable instrument can be obtained, the prevailing party has only gained a pyrrhic victory in the dispute in the fast lane. To make fast-track proceedings work, the willingness of the parties to cooperate is also essential. This willingness may indeed be given when concluding the arbitration agreement—as shown in the example of secondary buy-outs—but may no longer remain when a dispute commences. Therefore, in the euphoria of concluding a transaction, an expedited procedure should not be hastily agreed upon.

Altogether, fast-track clauses still have to withstand the test of practice. Therefore, it will be eagerly observed whether, in the case of one or another transaction, this mechanism of settling disputes will come out on top.

85. *cf.* von Drygalski, *Euromoney Handbook* (2005), pp.5, 8.

86. *cf.* regarding the comprehensiveness of the guarantee catalogue von Drygalski, *Euromoney Handbook*, pp.5, 8.

87. In detail see Thiäner and Hörmann, *Private Equity—Neue Tendenzen bei der Vertragsgestaltung, Juve Handbuch* (2007/2008), p.222.

88. *cf.* Thiäner and Hörmann, *Private Equity*.