

Arbitration of International M&A Disputes



Bernd Ehle



Matthias Scherer

This article focuses on international arbitration in M&A disputes, its advantages, its effects and its procedural particularities

Bernd Ehle

LALIVE
Geneva, Switzerland
Email: behle@lalive.ch

Matthias Scherer

LALIVE
Geneva, Switzerland
Email: mscherer@lalive.ch

Introduction

Mergers and acquisitions ('M&A') are complex business transactions, in particular when they take place cross-border. They typically involve numerous corporate entities and lengthy, multifaceted agreements. As there is a multitude of specific problems and complications related to M&A transactions, it is inevitable that some deals result in disputes; all the more so since there is usually a considerable amount of money at stake.¹

Arbitration has indeed emerged as the preferred method to resolve M&A related disputes, and today M&A is one of the fields of international business law with the highest proportion of arbitration agreements.²

Advantages of Arbitration in M&A Disputes

Practice has shown that today, parties almost invariably agree on arbitration for the resolution of their disputes arising out of M&A.³ Besides the more general arguments that speak in favor of arbitration (such as flexibility and finality of the arbitral award), there are a number of advantages which are of particular importance in the M&A context, especially when compared to state court litigation:

1 The parties have the right to choose their own

arbitrators. Dealing with M&A disputes often means dealing with complicated valuation and accounting issues. The persons who decide the dispute must be knowledgeable about the industry and economic matters. State court judges may not always be qualified in this respect.⁴

- 2 Parties to an M&A deal usually strive to keep the fact of their dispute discreet and thus avoid publicity. They are also anxious to safeguard any confidential information *vis-à-vis* competitors.⁵ Before state courts, confidentiality is not assured.
- 3 In disputes arising out of international transactions, it is important that the parties are free to choose the language of the proceedings. Court proceedings will invariably require the use of local language, whereas arbitration leaves room for the parties' discretion.⁶
- 4 Arbitrations often take place in a more amicable and business-like manner than litigation before state courts. Moreover, because economic aspects play a more central role, they frequently result in settlements.⁷

Arbitration at Various Stages of M&A Transactions

The following section gives an overview, as well as a few practical examples, of the stages in mergers and acquisitions at which disputes may and do occur.

The Negotiation Stage: Pre-closing Disputes

M&A transactions usually begin with initial exploratory talks, an information memorandum, the signing of preliminary agreements and a negotiation phase which include due diligence investigations and discussions about the framework for the transaction.

Memorandum of Understanding or Letter of Intent
Once the parties agree on the essential terms of the transaction, they typically wish to draw up and sign a Memorandum of Understanding ('MOU') or a Letter of Intent in which they outline the envisaged deal structure. Such 'pre-contracts' are often identified expressly as non-binding, but may create a quasi legal relationship which imposes certain obligations upon the parties, namely the duty to negotiate and act in good faith. Non-compliance with such duty may give rise to a dispute,⁸ and may cause the deal-makers to consult their lawyers in particular on the binding nature of their 'agreement' and on how to enforce any obligation of the other party at that stage of the negotiations.

In order for such disputes to be resolved by means of arbitration, the MOU or the Letter of Intent needs to contain an arbitration agreement, which is not invariably the case. Alternatively, the parties may agree to submit the dispute to arbitration after it has arisen.

Confidentiality and exclusivity agreements
MOU and Letter of Intent typically comprise agreements on a period of exclusive negotiations between the parties and on confidentiality regarding both the fact of the negotiations and the information that is being exchanged, in particular during the due diligence and in particular if the potential buyer is a competitor. Such clauses are often linked to contractual penalties and, typically, disputes will revolve around the aggrieved party's right to ask for damages or rapid injunctive relief.

Due diligence

The outcome of any due diligence is critical to the parties' further negotiations and generally has far-reaching consequences for the deal. The due diligence process therefore frequently gives rise to disputes. The most common area of controversy is the scope of the pre-contractual duties of disclosure of the seller. Questions that may arise concern the completeness of the information provided by the seller in the data room and the obligation of the seller to disclose certain sensitive information or difficulties at that early stage, without having been expressly asked to do so by the buyer.

The Post-Closing Stage: Disputes Arising from Merger/Purchase Agreements

Most M&A disputes arise after closing, *ie*, after the parties have signed the merger or purchase agreement and transferred the assets.⁹

Representations and warranties

Post-M&A arbitrations frequently result from claims of the buyer based on contractual representations and warranties. Many of the seller's representations about the target company

concern the correctness of its financial statements, the absence of liabilities other than those reflected in its latest balance sheet, the seller's title to the assets and compliance with applicable laws.¹⁰

An important source of disputes are ambiguous or incomplete representations and warranties which allow the buyer to easily claim that the seller is liable for breach of contract or misrepresentation. On the other hand, the seller may ask that certain claims be excluded by reference to independent assessments made by the purchaser or its knowledge gained in the due diligence process. If representations and warranties turn out to be inaccurate, *eg* certain assets on the balance sheet are inexistent or over-valued, the purchaser will claim damages or an adjustment of the price.¹¹ Disputes may also arise over representations as to pending or threatened litigation.¹²

Earn-out clauses—Price adjustment

Purchase agreements often provide for a provisional price combined with an 'open-ended' adjustment mechanism. The most common post-M&A disputes, by far, relate to earn-out provisions and purchase price adjustment calculations.

Earn-out clauses provide for an additional purchase price that the seller will receive, based upon the future earnings of the target over a stipulated period (earn-out period). Unsurprisingly, such clauses frequently end up being a bone of contention between the parties when the future performance does not meet the buyer's expectation.

Purchase price adjustment clauses may provide for an adjustment mechanism based upon a change in a specified benchmark, such as the net asset value of the target company, between the date of the financial statements that were used to negotiate the purchase price and the closing balance sheet upon which the purchase price is ultimately determined.¹³ The following recent example demonstrates the kind of complications that can originate from purchase price adjustment clauses.

In an international arbitration administered by the Zurich Chamber of Commerce under a contract subject to German law, the claimant company had sold its shares in the defendant company to the defendant and its holding company. The defendant then changed its articles of association and increased its share capital by issuing new shares to a third company. The arbitral tribunal was required to interpret the price increase clause included in the share purchase agreement. It ruled that, although the clause did not expressly cover the increase of share capital, such increase nevertheless constituted a betterment that came under the scope of application of the price increase clause. Consequently, the arbitral tribunal ordered the defendants to pay additional amounts on the purchase price plus interest to the claimant. The defendants' motion to set the award aside was

denied by the Swiss Federal Tribunal.¹⁴

Valuation—Expert determinations

Most sale and purchase agreements contain valuation¹⁵ or purchase price adjustment clauses providing for a two-stage dispute resolution mechanism, expert determination followed by arbitration.

At the expert determination stage, if the parties cannot agree upon a valuation or adjustment, an independent third party (forensic) accountant will be retained to determine the resolution of certain specific questions that are well circumscribed and generally facts-based.¹⁶ However, the parties should ensure that the contract contains an effective appointment mechanism, failing which, the expert procedure might not be operative. On the other hand, clauses that name the expert may also be dangerous.

Both points were well illustrated in a recent case arising from a share purchase agreement between US and French parties which provided for a two-prong dispute resolution mechanism: expert determination followed by arbitration in Geneva. The contract listed a number of large audit firms from which the expert should be selected. By the time the dispute came about, however, all of the eligible firms had disappeared or merged, or were conflicted. The defendant refused to nominate its member on the panel of experts. The claimant turned to the Geneva courts to obtain an appointment by default, as provided in the contract. The Geneva court, in a decision of July 5, 2004, denied the application.¹⁷ It considered that the arbitration law empowered the courts at the place of arbitration to appoint an arbitrator in case the other party was to default, but that these provisions did not apply to the nomination of experts. The applicable Code of Civil Procedure was no help either. It listed exhaustively the cases where a party may apply to the court for an expert appointment, but the list did not include cases where a party seeks the unilateral appointment of an expert to establish facts that are contentious among the parties.

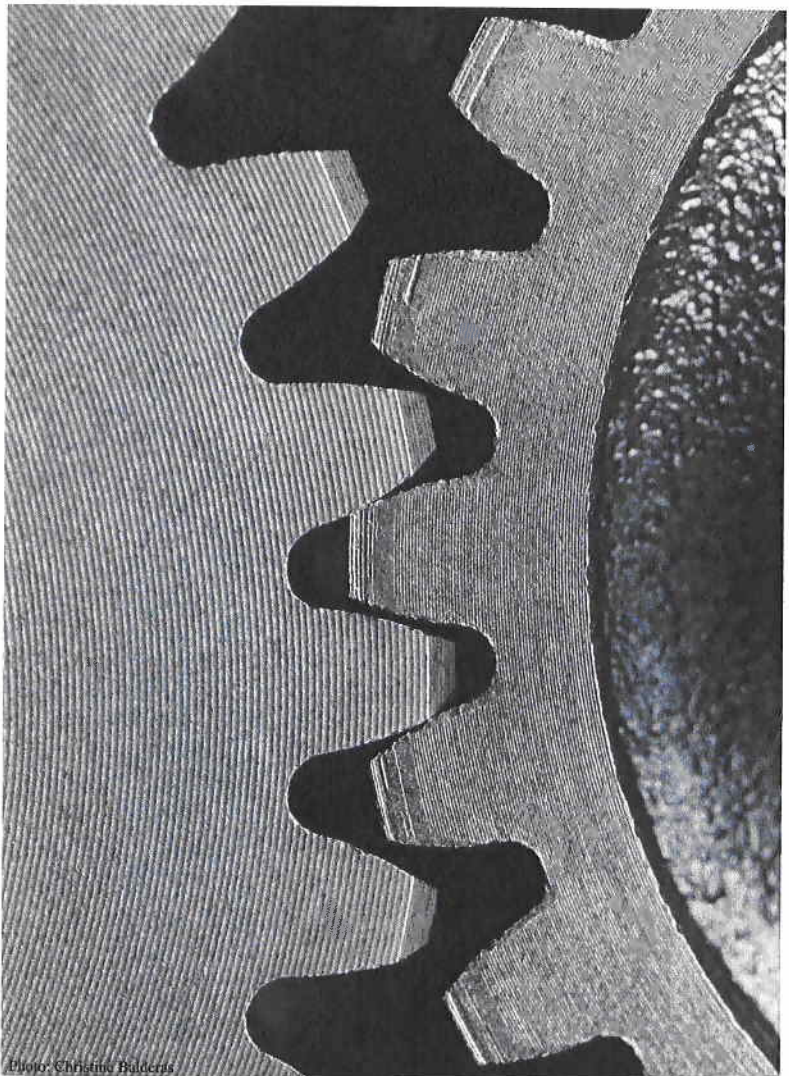
During the expert determination process, the accountant-expert acts as an expert, not as an arbitrator, *ie* he or she neither tries to achieve a resolution of the dispute as a whole nor renders an award that could be enforced against an uncooperative party.¹⁸ However, the parties can provide that the expert's determination of a specific factual issue will bind the arbitral tribunal dealing with a subsequent larger dispute. In general, expert determinations prove to be quick and cost-efficient procedures for resolving certain types of disputes.¹⁹

If and when the dispute moves to the second level (arbitration), the dispute is resolved as a whole, and results in a binding legal determination.

It is however not wholly independent from the expert determination stage. First, as noted above, the facts established by the expert may bind the arbitrator. In addition, the arbitrator may have to intervene prior to the expert, for instance in order to decide whether a dispute is subject to arbitration or should be deferred to the expert. The arbitrators might also be asked to determine the content of a given balance sheet item impacting upon an evaluation. The expert will then establish the correctness of a financial statement.²⁰

The interface between such two (or parallel) dispute resolution mechanisms is a source of frequent disputes. The following 2002 case from the US is a good example of the problems that may arise if the dispute resolution clause is not sufficiently clear.

The parties had entered into a share purchase agreement which provided that the 'Final Share Price' for the sale was to be determined by the buyer's accountants and which specified that such determination '*shall be final and binding on Seller and Buyer and shall not be subject to any appeal, arbitration, proceeding, adjustment or review of any*



nature whatsoever. The agreement also provided that all disputes arising under it were to be resolved by arbitration. Following the accountants' submission of a valuation substantially lower than that expected by seller, the seller initiated arbitration proceedings seeking to invalidate the accountants' determination. The buyer, in turn, sought to rescind the agreement and recover money already paid to the seller. The arbitral tribunal assumed jurisdiction and overturned the accountants' determination as flawed. The buyer brought a suit before the US District Court for the Southern District of New York, seeking approval of the arbitral award in his favor. The court instead vacated the panel's decision to overturn the accountant's determination. It held that the parties had committed the review of the valuation determination to the accountant under the purchase agreement and that the panel had exceeded its authority in reviewing that determination. The US Court of Appeals for the Second Circuit affirmed that decision.²¹

Put and sales options

Another area that is fertile for post-transaction disputes is put and sales options. Disputes generally revolve around the issue of whether or not an option has been triggered. The following two cases underline the practical importance of arbitration in this respect.

In the first case, the Dutch retailer Ahold announced that it had received a decision from an arbitration tribunal sitting in Sweden regarding the premium which was part of the price of a put option exercised by the Norwegian entity Canica AS for its 20 per cent stake in the Scandinavian joint venture ICA AB. According to the shareholders' agreement among Ahold, Canica and the third joint venture partner, ICA Förbundet Invest AB, Ahold was obliged to buy the shares offered by Canica. The arbitration tribunal rejected the challenge made by Canica to the premium rate and established such rate at 49.56 per cent, which corresponded to the outcome of the valuation made earlier by the valuation expert engaged by the partners in ICA AB.²²

In a series of arbitrations in Switzerland and Sweden, panels of arbitrators recently had to decide a dispute regarding the control over one of Russia's largest mobile telephone companies, OAO MegaFon IPOC International Growth Fund Ltd (Bermuda) and LV Finance Group Ltd (British Virgin Islands) fought over stock option agreements and over the transfer of OAO MegaFon shares to IPOC. In the first arbitration, the ICC arbitrators in Geneva found that IPOC had validly exercised and paid for its option and ordered LV Finance to transfer the shares.²³ In August 2006, however, the award was quashed by the Swiss Federal Tribunal and remanded to the arbitrators

for reconsideration in view of certain pieces of new evidence.²⁴ In the parallel *ad hoc* arbitration case in Zurich, the panel held that the option agreement was unenforceable due to illegality and dismissed the claim.²⁵

Procedural Particularities of M&A Arbitration

A number of procedural problems are typical in the context of M&A arbitration.

Multi-party and Multi-contract Disputes

M&A arbitrations often arise out of multi-party situations, or multi-contract structures, especially on the purchaser's side.²⁶ This creates problems regarding the constitution of the arbitral tribunal, namely in view of the principle of equal participation, *ie* each party's right to appoint its 'own' arbitrator. The rules of most modern arbitration institutions, such as the Singapore International Arbitration Centre ('SIAC'),²⁷ the International Court of Arbitration of the ICC,²⁸ the London Court of International Arbitration ('LCIA'),²⁹ the China International Economic and Trade Arbitration Commission ('CIETAC'),³⁰ and the Swiss Rules of International Arbitration³¹ today provide for adequate solutions to solve this practical problem, consistent with the principle of equal treatment of the parties.³² In transactions involving several parties and/or multiple contracts, it may therefore be sufficient to insert model clauses of such institutions into the agreements.

Extension of Arbitration Agreements to Third Parties

Lawyers dealing with M&A arbitrations are frequently confronted with the issue of extension of the proceedings to third parties who have not signed the arbitration agreement. This is in particular an issue with group of companies' structures and series of transactions.³³ As there is a multitude of possible situations, the rules of national and international arbitration institutions—unlike in the case of multi-party disputes—rarely provide for any guidance.³⁴ On the one hand, an extension to non-signatories may take place by virtue of a number of legal theories under the applicable law, such as legal succession or alter ego and piercing the corporate veil. However, as many arbitral tribunals are reluctant to extend the arbitration to third parties on these grounds, it is advisable to provide clearly which parties are bound by the arbitration agreement and to ensure that they all sign.

Without their consent, third parties cannot be joined, nor can parallel arbitration proceedings involving distinct parties be consolidated. A noteworthy exception are the 2004 Swiss Rules of International Arbitration which admit, in appropriate circumstances, the joinder of a third party or the consolidation of arbitration proceedings even if the parties are not identical.³⁵

Production of Documents

Given the factual complexity in most M&A arbitrations on M&A transactions, extensive disclosure of documentary evidence may be required.³⁶ Since it is common for much of such information to be 'sensitive', document requests may raise confidentiality issues and require specific procedures, such as production of documents in camera, in particular when the parties involved are competitors.³⁷

The scope of discovery in international arbitration depends not so much upon the rules of the chosen arbitral institution and the domestic procedural rules of the place of the arbitration or—in case of *ad hoc* arbitrations—on the provisions of the arbitration agreements as written by the parties, but largely upon the legal culture of the parties, their counsel and the arbitral tribunal. In recent years, the gap between the civil and common law approach have narrowed down considerably in the sense that international arbitration practitioners now tend to agree on the use of targeted document disclosure whilst usually rejecting the use of common law style 'full blown' discovery.

Remedies Awarded

In M&A disputes more than in other areas, arbitrators might be called upon not only to decide on the amount of a price adjustment or to award damages to the prevailing party, but also to tailor the award in order to meet the needs of the particular situation.³⁸ This may include awards for specific performance or awards shaping new arrangements between the parties, such as buy/sell options, if so requested and if permissible under the applicable substantive law.³⁹

Conclusion: Drafting Arbitration Agreements in the M&A Context

In view of the high likelihood of post-closing disputes as discussed above, a 'watertight' arbitration agreement that ensures an efficient dispute resolution must be a crucial feature of any M&A contract. Unfortunately, but maybe understandably, dispute resolution clauses do not always get the attention they deserve. Transaction lawyers who prepare M&A agreements are often under tremendous time pressure, and may not always be sufficiently familiar with arbitration law to appreciate the importance of the arbitration clause and the careful drafting required. This is particularly so in the case of proposed multi-tier dispute resolution mechanisms providing for mediation, expert determination and other forms of ADR.

The model clauses of the reputable arbitration institutions have made their proof in many cases. In case of doubt, it is thus advisable to opt for a tested model clause rather than modify them or provide for an *ad hoc* mechanism. In any case,

dispute resolution clauses should be drafted in close cooperation between the transactional and the arbitration lawyers to ensure that the result fits the specificities of the deal. Of particular importance is the clear delimitation between expert determination and arbitration, and the provisions allowing for multi-party disputes.

Notes:

- ¹ Christian Borris, 'Streiterledigung beim Unternehmenskauf', in *Law of International Business and Dispute Settlement in the 21st Century*, Liber Amicorum Karl-Heinz Böckstiegel, 2001, p 75; Axel Baum, 'Drafting of Arbitration Clauses and Organization of the Arbitral Procedure in the Area of M&A', in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24/25 April 2001, Dresden, DIS-Materialien Bd VIII/01, p 77.
- ² Klaus Sachs, 'Schiedsgerichtsverfahren über Unternehmenskaufverträge – unter besonderer Berücksichtigung kartellrechtlicher Aspekte', *SchiedsVZ* 2004, p 123; Bernd Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions', in *The Comparative Law Yearbook of International Business*, Campbell (ed), The Hague, Kluwer Law International, 2005, pp 287-311.
- ³ Christian Borris, *op cit*, p 80; Klaus Sachs, *op cit*, *SchiedsVZ* 2004, p 123: '[n]owadays, arbitration agreements in international and national M&A transactions are rather the rule than the exception.'
- ⁴ Wolfgang Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes', *Arbitration International*, Volume 19, Number 4, 2003, p 503.
- ⁵ Eugen Salpius, 'Einige Gedanken zur Gestaltung von Schiedsklauseln in Mergers & Acquisitions-Verträgen', in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24/25 April 2001, Dresden, DIS-Materialien Bd VIII/01, at p 74; Christian Borris, *op cit*, p 76.
- ⁶ Klaus Günther, 'Die Bedeutung von Schiedsvereinbarungen im M&A Bereich', in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24/25 April 2001, Dresden, DIS-Materialien Bd VIII/01, p 12.
- ⁷ Eugen Salpius, *op cit*, pp 72, 73.
- ⁸ Klaus Sachs, *op cit*, *SchiedsVZ* 2004, p 125.
- ⁹ Klaus Sachs, *op cit*, *SchiedsVZ* 2004, p 125.
- ¹⁰ Wolfgang Peter, *op cit*, pp 492-493.
- ¹¹ See for example *C and K v S Compagnie SA*,

- Geneva Court of Justice, decision of 15 October 1999, *ASA Bulletin* 2000, at pp 793-802 and Swiss Federal Tribunal, decision of 27 October 1995, *ASA Bulletin* 1996, pp 277-283, resulting from arbitration proceedings.
- ¹² See Award in ICC Case Number 9617, in: *Les cahiers de l'arbitrage* 1/2006, p 39.
- ¹³ Wolfgang Peter, *op cit*, pp 491, 492; Christian Borris, *op cit*, p 75.
- ¹⁴ Swiss Federal Tribunal, decision of 16 March 2004, 4P.14/2004, *ASA Bulletin* 4/2004, pp 770-781.
- ¹⁵ With respect to the valuation of shares, see *Partial Award* made by the Permanent Court of Arbitration, dated 22 November 2002, Case Number 2000-03, *Horst Reineccius (Claimant Number 1), First Eagle SoGen Funds, Inc (Claimant Number 2), Pierre Mathieu and La Société Hippique de la Châtre (Claimant Number 3) v Bank for International Settlement (respondent)*, *ASA Bulletin* 2004, pp 116-131; partial award, *inter alia*, on the applicable standards for valuation of shares, pp 120-122.
- ¹⁶ Anke Sessler and Corina Leimert, 'The Role of Expert Determination in Mergers and Acquisitions under German Law', *Arbitration International*, Volume 20, Number 2, 2004, pp 151-165; Wolfgang Peter, *op cit*, pp 501, 502; Fritz Nicklisch, 'Der Ingenieur als Schiedsgutachter und Quasi-Schiedsrichter bei internationalen Bau- und Anlagenprojekten', in *Festschrift für Walter J Habscheid*, 1989, pp 217-231.
- ¹⁷ Decision JTPI/9028/2004, in *ASA Bulletin* 4/2006, p 779, see also Article by Michael Schöll, *Réflexions sur l'expertise-arbitrage en droit suisse*, *ASA Bulletin* 4/2006, p 621.
- ¹⁸ Anke Sessler and Corina Leimert, *op cit*, p 152.
- ¹⁹ Christian Borris, *op cit*, p 80.
- ²⁰ Klaus Sachs, *op cit*, *SchiedsVZ* 2004, p 124.
- ²¹ See *Norman Katz v Herbert Feinberg*, United States Court of Appeals for the Second Circuit, decision of 26 April 2002, 167 F Supp2d 556, 565-66 (SDNY 2001), affirmed, 290 F3d 95 (2d Cir 2002).
- ²² *Neue Zürcher Zeitung (NZZ)* of 11 October 2004, p 23, 'Ahold bekommt Recht – Überhöhte Forderung für ICA-Kauf zurückgewiesen'.
- ²³ See *IPOC International Growth Fund Ltd (Bermuda) v LV Finance Group Ltd (British Virgin Islands)*, ICC Case Number 12875/MS, final award of 16 August 2004, Mealey's International Arbitration Report, Volume 19, Number 9, September 2004, at pp 6-8, A-1-A-17.
- ²⁴ Swiss Federal Tribunal, decision 4P.102/2006 of 29 August 2006, in *ASA Bulletin* 3/2007, p 550.
- ²⁵ IPOC's motion to set the award aside was rejected by the Swiss Federal Tribunal, decision 4P.168/2006 of 19 February 2007.
- ²⁶ Bernard Hanotiau, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues – An Analysis', *Journal of International Arbitration*, Volume 18, Number 3, 2001, pp 253-360; Konstadinos Massouras, *Dogmatische Strukturen der Mehrparteienschiedsgerichtsbarkeit*, 1998, p 7.
- ²⁷ Singapore International Arbitration Centre (SIAC), *Arbitration Rules* (3rd edition, 1 July 2007), Rule 8 ('Multi-party Appointment of Arbitrator(s)').
- ²⁸ International Court of Arbitration of the International Chamber of Commerce, *Rules of Arbitration*, Article 10 ('Multiple Parties').
- ²⁹ London Court of International Arbitration *Rules*, Article 8 ('Three or More Parties').
- ³⁰ China International Economic and Trade Arbitration Commission (CIETAC), *Arbitration Rules*, Article 24 ('Multi-Party').
- ³¹ Swiss Rules of International Arbitration (2004), Article 8 ('Appointment of Arbitrators in by-party or multi-party proceedings').
- ³² Klaus von Schlabrendorff, 'Schiedsgerichtsbarkeit bei M&A – Mehrparteiensituationen und Inter-Omnies Wirkung', in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24/25 April 2001, Dresden, DIS-Materialien Bd VIII/01, p 35.
- ³³ Jan-Michael Ahrens, *Die subjektive Reichweite internationaler Schiedsvereinbarungen und ihre Erstreckung in der Unternehmensgruppe*, Frankfurt 2001.
- ³⁴ Klaus Sachs, 'Erstreckung von Schiedsvereinbarungen auf Konzernunternehmen', in *Tagungsbeiträge zur DIS-Vortragsveranstaltung "Schiedsgerichtsbarkeit bei M&A"*, 24/25 April 2001, Dresden, DIS-Materialien Bd VIII/01, p 54.
- ³⁵ Article 4 of the Swiss Rules of International Arbitration (2004); see also Gilliéron/Pittet, in Zuberbuehler/Mueller/Habegger, *Swiss Rules of International Arbitration*, Zurich 2005, pp 36 and seq.
- ³⁶ Klaus Sachs, *op cit*, *SchiedsVZ* 2004, p 125.
- ³⁷ Axel Baum, *op cit*, pp 79, 81.
- ³⁸ Klaus G nther, *op cit*, p 13.
- ³⁹ Wolfgang Peter, *op cit*, p 505.

