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Post-M&A Arbitration and Joinder: Process and Drafting Considerations for M&A Transactions

Arbitration is widely used in M&A. In some jurisdictions, close to 100 % of negotiated transactions feature an arbitration clause. Following completion of a transaction, the target may become engaged in disputes with third parties. These disputes may end up in court or before an arbitral tribunal. They may give rise to disputes between the parties to the M&A transaction for breach of representations and warranties. This article summarises the legal issues that expose the buyer to the risk of inconsistent decisions in the proceedings between the target and third parties and in parallel or subsequent arbitral proceedings between the buyer and the seller. It then sets out a number of proposals aiming at eliminating or at least reducing the risk.

Schiedsklauseln sind im M&A-Geschäft weit verbreitet. In manchen Jurisdiktionen liegt die Quote bei nahezu 100 % der privat ausgehandelten Transaktionen. Nach Vollzug einer Transaktion kann es zu rechtlichen Auseinandersetzungen zwischen der Zielgesellschaft und Dritten vor staatlichen oder Schiedsgerichten kommen, die ihrerseits Kontroversen zwischen den Parteien der M&A-Transaktion wegen möglicher Verletzung von Gewährleistungen auslösen. Dieser Artikel illustriert die rechtlichen Rahmenbedingungen, aus denen sich für den Käufer das Risiko ergibt, dass in Verfahren zwischen der Zielgesellschaft und Dritten einerseits und in parallel oder anschließend geführten Schiedsverfahren zwischen dem Käufer und dem Verkäufer andererseits einander widersprechende Entscheidungen ergehen. Alsdann werden einige Handlungs- und Gestaltungsoptionen aufgezeigt, die darauf abzielen, dieses Risiko auszuschließen oder jedenfalls zu reduzieren.

I. Introduction

Following a fantastic, record-breaking year 2015, global M&A activity underwent a certain slowdown in 2016 in a climate of great political uncertainty (massive migration to Europe, Brexit vote, US presidential elections). This notwithstanding, the total value of reported transactions stood at 3.2tn USD – the second highest level ever since the last pre-crisis year 2007.[1] In terms of value, the US continue to have the biggest share in global M&A activity with 47.5 %, followed by Europe with 24.6 %.[2] The number of transactions globally totalled approximately 17,400.[3] A significant portion of transactions is cross-border in nature. In fact, transactions representing a total value of 1.3tn USD had cross-border elements.[4]

While the megadeals involving publicly listed players (targets or merger parties) make it to the front page, privately negotiated deals represent the vast majority. Share or asset purchase agreements will typically contain a more or less extensive set of representations and warranties – including representations and warranties in relation to the acquired business.[5] Over the past two to three decades, disputes resulting from negotiated transactions for breach of such representations and warranties have become more and more frequent. With the advent of a great number of highly sophisticated financial buyers and the first boom of leveraged buy-outs in the 1980s,[6] competition for the best targets became fierce and purchase prices started rocketing. In parallel, stronger sensitivity for good corporate governance developed. Even though this is not yet standard practice,[7] any buyer's management will be well advised to (i) put in place immediately following completion of a transaction appropriate mechanisms allowing timely identification of issues that might give rise to claims under a purchase agreement, and (ii) responsibly weigh the pros and cons of pursuing these claims. It seems fair to say that both these factors, competitive pressure and professionalization of post-transaction management, have contributed to the increase in post-M&A disputes.

Based on my personal experience and some limited (and by no means representative) research among partners at leading law firms,[8] it is quite likely that an arbitral tribunal rather than a state court will eventually resolve any unsettled post-M&A dispute. In fact, in

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1) MergerMarket – Global and Regional M&A: Q1 – Q4 2016, 2. In Q1 2017, global M&A activity was on the rise again. Transactions with a total value of 678.5bn USD were reported, an increase of 8.9 % vs. Q1 2016 (MergerMarket – Global and Regional M&A: Q1 2017, 2).

2) MergerMarket – Global and Regional M&A: Q1 – Q4 2016, 2.

3) MergerMarket – Global and Regional M&A: Q1 – Q4 2016, 3.

4) MergerMarket – Global and Regional M&A: Q1 – Q4 2016, 2.

5) For obvious reasons, however, financial investors acting as sellers will not normally accept providing representations and warranties beyond the absolute minimum (i. e., legal capacity and unencumbered title to shares). In lieu of the financial investors, the target's managers – being closer to the business and "encouraged" by some long-term incentive plan – will often make and give business related representations and warranties. Management's liability for breach of any of the representations and warranties will, however, be capped at relatively low levels (from a buyer's perspective). Additional comfort may be gained through warranty and indemnity insurance.

6) *KKR*'s acquisition of *RJR Nabisco* for 31.1bn USD in 1988 was just the stellar example that placed private equity on everyone's minds globally.

7) See pages 13 *et seqq*. of the Post-M&A Dispute Study conducted in 2014 by the German offices of *Alvarez* & *Marsal* and *Baker* & *McKenzie*. A copy of the study can be ordered under the following link http://www.bakermckenzie.com/-/media/files/locations/germany/germanypublicationsorderform.pdf?la=en (last accessed on 5.7.2017).

8) The author obtained responses from a total of 38 seasoned corporate/M&A partners working at 17 different law firms (both global powerhouses and local champions) spread across the following jurisdictions: Austria, Belgium, Brazil, China, Denmark, Egypt, France, Germany, Israel, Italy, Malaysia, Mexico, Morocco, Netherlands, Poland, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, UK and USA. The questionnaire used in the research was very straightforward and contained the following questions:

(i) In your market, is arbitration the standard dispute resolution mechanism in the context of negotiated M&A transactions?

(ii) Can you indicate a percentage of transactions where arbitration as opposed to litigation in the state courts is used? Are there differences depending on whether we talk about a purely domestic or a cross-border transaction?

(iii) Do the arbitration clauses you customarily see refer to the rules of one of the leading arbitration institutions (AAA/ICDR, DIS, ICC, LCIA, Swiss Chambers, etc.), or do they contemplate *ad hoc* arbitration?

(iv) When representing a buyer, to what extent do you involve your dispute resolution team? Just to review the target's pending litigation/arbitration or for some other purposes as well?

(v) Do you normally experience substantial negotiations on the arbitration clause in the SPA? If yes, what are the issues typically addressed in these negotiations?

some markets it is standard practice to include an arbitration clause in the transaction documentation. Estimates indicate levels of use at or in excess of 85 %. This holds true for Brazil,[9] China,[10] Denmark,[11] Russia,[12] Spain,[13] South Africa,[14] Sweden,[15] Thailand[16] and Turkey.[17] In several other Asian/continental European jurisdictions[18] and in the US,[19] the percentages of deals which have arbitration as dispute resolution mechanism are quite high as well and in any event (way) above 50 %. The London market appears to be different. While practitioners observe an increasing use of arbitration clauses,[20] it has not developed into a market standard. Actually, the standard drafts as used by several leading firms in the London market contain a normal English law/submission to the jurisdiction of the English courts clause, which may be replaced by an arbitration clause on a case-by-case basis in the course of the negotiations. Similarly, arbitration is the exception rather than the rule in the French and Israeli markets.[21] Almost all respondents reported higher percentages for the use of arbitration clauses in cross-border transactions as opposed to purely domestic deals.[22] The higher the transaction volume, the higher the percentages of deals featuring an arbitration clause.[23]

Notwithstanding the significant differences between various markets, there cannot be any doubt about the very substantial use of arbitration for the resolution of post-M&A disputes. Access to arbitrators who are experienced M&A practitioners with relevant language skills is driving this.[24] Other considerations such as perceived neutrality of an arbitral tribunal (as opposed to the state courts in the home country of one of the parties), enforceability of an award, and confidentiality play an equally important role. In jurisdictions with exorbitantly lengthy court proceedings, users will perceive arbitral proceedings as relatively speedy.[25]

This article is about one potentially highly relevant issue associated with post-M&A arbitration: where the outcome of a dispute between the target and one or more third parties ("Primary Dispute") may trigger claims for breach of representations and warranties, are there ways to safeguard the buyer from divergent decisions in the Primary Dispute and in any subsequent post-M&A arbitration? The focus is on the acquisition of 100 % of the shares or interests in a corporate entity or partnership. Asset deals and/or the acquisition of less than 100 % may warrant different considerations.

II. The Relevant Scenarios

There is no point in providing a comprehensive list of conceivable representations and warranties relating to a target's business. It should suffice to indicate *some* areas that are frequently covered by representations and warranties and most relevant for the topic of this article:

(i) material agreements with important business partners (customers, suppliers, service providers, dealers, licensors or licensees, toll manufacturers, etc.) – legal validity and enforceability, no material breach, no (grounds for) notice of termination;
(ii) owned IP – unencumbered title and ownership, no licenses granted other than as disclosed, proper maintenance (e. g., due fees timely paid);
(iii) third party IP – no infringement of third party IP;
(iv) employee inventors – rights of employee inventors fully honoured, no compensation payable except as disclosed;
(v) product liability – absence of defects in products manufactured through to completion that may trigger product liability.[26]

There is no question about the seller making and giving the representations and warranties relating to the business as of the signing of the share purchase agreement (SPA). It then differs significantly from market to market and from transaction to transaction whether the seller must repeat business related representations and warranties as of completion.[27] Where the seller does not repeat business related representations and warranties as of completion, the buyer will have to rely on protection through a number of covenants. These will oblige the seller (subject to limitations that may be dictated by corporate governance rules and/or applicable competition laws) to procure that the target will maintain intact its assets and busi-

9) Sources say that on international transactions there is virtually no escaping arbitration. It is on purely domestic transactions between "unsophisticated" parties that you will exceptionally encounter dispute resolution by the state courts.

10) More or less the default mechanism for cross-border transactions in China.

11) 100 % or very close to it.

12) Close to 100 % for sizeable cross-border transactions.

13) 95 %.

14) At least 95 %.

15) 90 % – 100 %.

16) 90 % or more on cross-border deals.

17) Close to 100 %.

18) Sources indicate 75 % – 90 % for Austria, 70 % for Belgium (deals > 100 m EUR), 80 % – 85 % for Egypt, 60 % – 90 % for Germany, 70 % – 90 % for Italy, 70 % for Mexico (on cross-border transactions), 70 % for Malaysia, 50 % for the Netherlands (with somewhat higher percentages for big-ticket deals), 70 % for Poland, 50 % for Singapore (with an upward trend for large-scale negotiated transactions) and 80 % or more for Switzerland in the context of cross-border deals.

19) Sources indicate that arbitration is used more than 50 % of the time. Depending on the size and nature (cross-border versus domestic) of the deal, the percentage may go up to 75 %. The ABA's 2015 Private Target Mergers & Acquisitions Deal Points Study indicates a much lower level (15 %). This is arguably due to the choices made by the authors of the study resulting in a relatively small segment of the market actually covered (only private targets acquired by public companies; transaction value not in excess of 500 m USD; (mostly?) domestic deals).

20) An estimate of 20 % was provided.

21) While pursuant to the European M&A Study 2016 published by *CMS* no French *CMS* deal in 2015 featured an arbitration clause (p. 39), other players reported in response to the author's enquiry some 30 % of French deals having arbitration clauses. The *CMS* Study can be retrieved under the following link https://cms.law/en/INT/Publication/CMS-European-M-A-Study-2016 (last accessed on 5.7.2017). Israel reported 15 % to max. 20 % of cross-border transactions coming with an arbitration clause.

22) In Switzerland and Morocco, the differences are extreme. While in the context of domestic transactions, only some 20 % (Morocco) or even fewer (Switzerland close to zero) deals will come with an arbitration clause, the percentages go up to approximately 80 % for both jurisdictions in the context of cross-border transactions.

23) The CMS European M&A Study 2016 confirms this (p. 40).

24) See pages 27 *et seq.* of the Post-M&A Dispute Study by *Alvarez* & *Marsal* and *Baker* & *McKenzie*.

25) For a comprehensive summary of the reasons to arbitrate, see *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, paras. 1.94 – 1.134

26) The author has not listed customary warranties on the target's compliance with law (e. g., FCPA, UK Bribery Act, competition laws, OHS, etc.). These pose yet another series of problems given the public law nature of the potential issues. Tax and environmental matters will frequently be addressed through indemnities.

27) Where the seller is supposed to repeat representations and warranties as of completion, it will typically be afforded with the opportunity to disclose new matters arising between signing and completion against the business related representations and warranties.

ness relationships and otherwise conduct its business between signing and completion within the ordinary course in accordance with past practice.

Against this backdrop, it is easy to imagine the scenarios, which can unfold subsequent to completion of a transaction:

(i) An important customer terminates its agreement with the target alleging material breaches by the target committed prior to completion (be that before or after signing). An employee raises claims for compensation of an alleged employee invention. Third parties pop up contending infringements of their IP (specifically in situations where big corporates with deep pockets acquire small or medium-sized businesses). Or one or more persons might be (severely) injured or even killed for reasons associated with defects of the target's products manufactured and marketed prior to completion.

(ii) Where the resulting Primary Disputes cannot be settled amicably, state courts will have jurisdiction for some of them (specifically the IP infringement and product liability cases). Considering that arbitration is a widely spread dispute resolution mechanism not only in the context of M&A transactions but for international commercial business transactions generally, other disputes may lead to arbitration. Unless the target had a very strict and rigorously implemented dispute resolution policy, different (categories of) contracts may feature different arbitration clauses, and different sets of rules may become applicable.

(iii) Where – in any of the above instances – the seller does not acknowledge its liability for breach of representations and warranties under the SPA, the buyer is likely to commence arbitration against the seller under the arbitration clause contained in the SPA. Such arbitration could be governed by yet another set of rules.

So, we are talking about scenarios presenting (i) a Primary Dispute, to be resolved either in front of the state courts or by resorting to arbitration under certain rules, and (ii) a second dispute between the buyer and the seller, to be resolved by arbitration under the rules referenced in the SPA.

The situation here is different from other commercial transactions involving multiple parties. Let us take a typical example from the constructions sector with an employer, a main contractor and a subcontractor. Agreements between the various parties relate to one and the same project, will be concluded one shortly after the other and (ideally) tie neatly into each other. Where the employer brings a claim against the main contractor in relation to matters that the main contractor believes to be within the subcontractor's responsibility, the main contractor can have recourse against the subcontractor based on the agreement concluded between these two parties. Leaving aside for now the intricacies of consolidating proceedings or joining third parties to pending proceedings where – as is likely to be the case in the constructions industry[28] – arbitration has been agreed, the respondent (main contractor) in the first proceedings has, of its own right, a potential recourse claim against the respondent (subcontractor) in any parallel or subsequent proceedings. The technical and legal skills required in the different proceedings will be largely the same. By contrast, the target in an M&A transaction will not itself be a party to the SPA and will not have any claims against the seller. The target's commercial agreements or other matters that have become contentious are unrelated to the M&A transaction, and their causes may be rooted in the distant past. The skill set required to resolve the Primary Dispute will likely be different from the skills sought after in post-M&A arbitration.[29]

At first glance, there seems to be no way of tying the different disputes together and of guaranteeing that the arbitral tribunal called to resolve the post-M&A dispute will assess issues of fact or law in the same manner as the arbitral tribunal or state courts seized of the Primary Dispute.

In the following, I set out what seems to be common transactional practice for the use of arbitration clauses and the handling of third-party claims in an M&A context, assess whether this appropriately addresses and solves the issues at hand and then submit a number of proposals. I will largely refrain from commenting on the views expressed by various legal authorities on the many complex issues that the relevant scenarios bring about. I will rather describe the issues as they are. Only occasionally, I will express my personal opinion. The main purpose of this article is to provide some guidance to M&A counsels that will help them to find, or at least to pave the way to, pragmatic solutions.[30]

III. The Transactional Practice

Two instruments come to mind that could – in theory – be helpful in addressing the issues: a tailor-made

28) Pursuant to the International Arbitration Survey (Corporate Choices in International Arbitration – Industry Perspectives) 2013 published by the School of International Arbitration at Queen Mary University of London in partnership with *PwC*, for 68 % of the respondents from the constructions sector arbitration is the most preferred mechanism of dispute resolution (p. 7 of the survey).

29) This holds true even in the context of post-M&A arbitration limited to purported breaches of representations and warranties. Some representations and warranties may have built-in materiality tests. Others may be qualified by the seller's knowledge, which in turn may be limited to actual knowledge or extend to the (constructive) knowledge the seller could have had after due and careful enquiry. In this context, questions as to the attribution to management of knowledge existing within the organisation may come up. Unless a specific indemnity has been agreed, liability for matters disclosed against the representations and warranties will be excluded. Will fair disclosure in a disclosure letter be sufficient, or is specific disclosure against the individual representations and warranties required. If it is fair disclosure, what did the parties mean by "fair" disclosure? And then, will the seller's liability be excluded for disclosed matters only or also for matters the buyer had or could have had knowledge of? Again, questions of the attribution of knowledge will be of relevance. In any event, the seller's liability for breach of representations and warranties will be subject to a number of limitations: *de minimis*, basket and cap. In this context and in the context of materiality tests, depending on the geographical reach of the target (and its subsidiaries), exchange rates of multiple currencies fluctuating over time to the transaction currency may become of relevance. SPA provisions dealing with all these matters are more often than not the result of compromises reached after protracted negotiations with many overnight sessions and may, therefore, be inconsistent or leave room for interpretation. Solving these issues requires (at least) some pertinent experience. For an overview of issues arisen in the practice of an experienced German arbitrator, see *Sachs*, Schiedsgerichtsverfahren über Unternehmenskäufe – unter besonderer Berücksichtigung kartellrechtlicher Aspekte, SchiedsVZ 2004, 123 (125).

30) This article draws inspiration from *Welser*, M&A Post Closing Issues: Arbitration and Third Party Joinder, in Klausegger *et al.* (eds), Austrian Yearbook on International Arbitration, 2011, 3. It is an attempt to take her thinking one step further and to develop the pragmatic solutions she called for.

arbitration clause/arbitration agreement or detailed claims handling provisions. Now, let us take a look at what seems to be transactional practice.

1. Typical arbitration clauses

Arbitration clauses contained in SPAs will normally refer to the rules of one of the leading arbitration institutions (AAA/ICDR, DIS, HKIAC, ICC, LCIA, SCC, SIAC, Swiss Chambers, VIAC, etc.) and reflect the wording of the model clauses respectively recommended by them.[31] There will hardly ever be any meaningful negotiations on details of an arbitration clause. Discussions are typically rather black and white – arbitration yes or no.[32] If the answer is yes, further discussions are likely to be limited, usually focusing on the appropriate arbitration institution and the seat of arbitration. Where there are a US and a non-US party involved in the transaction, the extent to which there shall be discovery (if any at all) may be another topic for discussion. Some of the people I consulted also mentioned occasional discussions on whether or not rules on fast-track arbitration (for example in relation to the determination of a MAC) and/or an emergency arbitrator should apply. A panel of three arbitrators will be the rule, and the language of arbitration will not be an issue in most cases. Dispute resolution teams will not normally be involved in these "negotiations". Their role is typically limited to reviewing pending litigation/arbitration of the target or to opine on unusual clauses in commercial agreements concluded by the target, all in the course of due diligence. Where there are multiple parties to an M&A transaction across different contracts, the dispute resolution teams will be called to draft a multi-party arbitration agreement. Such multi-party arbitration agreements will generally focus on the procedural rules applicable as between the parties to the agreement (constitution of the arbitral tribunal, joinder and consolidation). Not a single participant in my little study mentioned any efforts to tweak arbitration clauses in a manner such that they will ensure – to the extent possible – consistency of decisions in a Primary Dispute and post M&A arbitration between the parties to a transaction.

2. Customary claims handling provisions

In the context of Primary Disputes, more often than not the interests of the target, the buyer and the seller will be conflicting. If a claim is brought under a commercial agreement between the target and one of its business partners (customers, suppliers, service providers, etc.), the target might wish to settle quickly on terms not really warranted by the specifics of the individual case with a view to maintaining the overall (profitable) relationship. In other instances such as product liability cases or cases of IP infringement, the protection of the target's reputation may again suggest a speedy and confidential settlement. By contrast, the seller will have an interest that the claim be defended to the bitter end, unless there is a very clear cut case leaving no room for doubts about the target's liability. The buyer is caught in between a rock and a hard place. The buyer owns the target and has no desire to damage its business relations and/or reputation. On the other hand, by not properly defending, or having the target defend, the third-party claim, the buyer severely jeopardises potential recourse claims against the seller under the SPA.

Against the backdrop of these conflicting interests, the vast majority of SPAs will contain provisions for the handling of claims brought by third parties against the target (or any of its subsidiaries). Here is a real-life example of several years ago:

> *"The Purchaser shall, within [•] Business Days, give notice to the Seller of any claim, suit, action or proceeding brought or threatened by a third party in respect of which the Purchaser may raise claims for Breach*[33] *against the Seller hereunder (a "Third-Party Claim").*
> *In each case of a Third-Party Claim the Purchaser shall (i) make available to the Seller a copy of the documents substantiating the Third-Party Claim and of all documents relating to the Third-Party Claim, (ii) ensure that Seller be provided with all materials, information and assistance it deems relevant in relation to the Third-Party Claim, (iii) be given reasonable opportunity to comment or discuss with the Purchaser, the Company and/or the relevant subsidiary of the Company any measures that are necessary or appropriate to take or omit in connection with a Third-Party Claim, (iv) fully cooperate with the Seller, (vi) provide the Sellers and its advisors with reasonable access during normal business hours and permit the Seller and its advisors to consult with the directors, employees, representatives and advisors of the Purchaser, the Company and the relevant subsidiary of the Company.*
> *Any admission of liability made by or on behalf of the Purchaser, the Company or a subsidiary of the Company in relation to the Third-Party Claim or any compromise or settlement, made without the prior written consent of the Seller, shall not be binding on the Seller as to the legal situation or the underlying facts.*
> *The failure of the Purchaser to comply with its obligations under this Section [•] shall release the Seller from its liability for Breach for reason of the Third-Party Claim, if and to the extent that the Purchaser's failure to comply with the obligations has actually prejudiced the Seller in any material respect with respect to such Third-Party Claim.*
> *If a Breach occurred, any and all costs and expenses incurred by the Seller in defending such Third-Party Claim shall be borne by the Seller. If a Breach did not occur, any and all costs and expenses incurred by the Seller in connection with the defence (including reasonable advisor's fees) shall be borne by the Purchaser."*

Here is another, more recent, real-life example with a different twist:

> *"The Purchaser shall notify the Seller in writing of any third-party claim asserted against any Group Company or the Purchaser for which the Purchaser wants to hold the Seller liable under this Agreement, and in case of litigation or other proceedings the Purchaser shall defend such claim upon request and according to the instructions of the Seller and at the Seller's cost or, if legally permitted, shall give the Seller the opportunity to defend such claims at the Seller's discretion; provided, however, that the selection of Seller's counsel shall be reasonably satisfactory to the Purchaser. The Seller shall not settle any such litigation or proceedings without the written consent of the Purchaser, which consent shall not be unreasonably withheld. The Purchaser shall be kept fully informed of, and consulted*

31) Virtually all participants in the author's study provided this answer in response to question (iii) (cf. *supra* at note 8). Israel and Poland were the only exceptions with *ad hoc* arbitration being the rule. However, at least in Poland no experiments as well. Arbitration clauses will reference the UNCITRAL Rules and mirror the UNCITRAL model clause. In Israel, probably due to the far more limited use of arbitration in that jurisdiction, the picture is more colourful.

32) All participants in the author's study provided this answer in response to question (v) (*supra* at n 8).

33) This includes claims for breach of representations and warranties.

with about, such litigation or proceeding. It is understood and agreed that the Seller shall be excluded with the argument that the third-party claim was not justified, if (i) the Seller elects to defend and is actually afforded the opportunity to defend the third-party claim in accordance with the foregoing or (ii) the relevant Group Company conducts the defence of the claim pursuant to Seller's instructions and directions."

This second set of provisions features one element that clearly differentiates it from the first. It stipulates that where the seller elects to defend the third-party claim, it must acknowledge being bound to the outcome of the third party proceedings. While there is no real market standard (in the sense of uniform wording) as regards claims handling provisions, the notion that the outcome of the third party proceedings shall hit the seller if the seller elects to take control over the defence of the third-party claim is increasingly accepted these days. This may of course vary from market to market.[34]

IV. The Issues

The interplay of a standard arbitration clause on the one side and a set of customary claims handling provisions on the other will not be sufficient to overcome the complex issues at hand. There are two quite obvious obstacles: (i) the buyer and the seller are alien to any Primary Dispute because the target is not party to the SPA and, therefore, does not have any recourse claim against the seller; and (ii) typically, the seller has no *obligation* to assume control over the defence of the third-party claim – it just has the *option* to do so. The first hurdle could be overcome by the buyer (contributing and) assigning its relevant claim against the seller to the target.[35] However, parties to an SPA frequently exclude the assignability both of the SPA as a whole and of individual rights and claims thereunder. This could be addressed by carving out assignments by the buyer to any of its affiliates, including – subsequent to completion – the target and its subsidiaries. The second hurdle is far more challenging to tackle. What happens if the seller elects to stand by and to watch the buyer/target handle the Primary Dispute? Would that affect the seller's position negatively? Would it make any difference if the buyer fully and timely complied with its duties under the relevant claims handling provisions affording the seller with the opportunity to defend the third-party claim? Could the buyer then argue that the seller is acting *contra factum proprium* if it later denies liability under the SPA for the third-party claim? It is my view that the principles of *venire contra factum proprium* would not apply under the circumstances. This is based on the following considerations: (i) different from what holds true in the context of an outright indemnity (e. g., environmental indemnity or tax indemnity), the seller has *no* obligation to hold the target free and harmless from the third-party claim (potentially) triggering a claim for breach of representations and warranties;[36] (ii) claims handling provisions *never* expressly oblige the seller to take control over the defence of the third-party claim, but rather provide the seller with an *option* to do so; (iii) just as there is a general onus on the *buyer* to (procure that the target will) mitigate damages, it is within the buyer's responsibility to (have the target) defend the third-party claim; and (iv) most SPAs will contain a "no waiver" provision along the following lines which would apply at least *per analogiam*:

"Any failure to exercise or any delay in exercising a right or remedy provided by this Agreement or by Law does not impair, or constitute a waiver of, that right or remedy or of any other rights or remedies."

So, where the seller does not exercise its option to take control, it may still argue in any subsequent proceedings that the third-party claim was unfounded – be that for issues of fact or issues of law.

Will the situation be different where the seller elects, and is effectively afforded the opportunity,[37] to take full control? Will the outcome of the Primary Dispute be binding upon the seller? It depends. If the SPA contains language along the lines of the second set of sample claims handling provisions quoted above, then the answer is yes. Where the SPA does not contain any such wording, the answer will likely be no. The sheer fact that there is no uniform transactional practice militates against any implied acknowledgment of liability if the seller assumes control. Again, there would be no *venire contra factum proprium*. It is one thing to put all efforts in the defence of the third-party claim, and it is another to accept the outcome of the Primary Dispute to be binding.

In short, depending on the specific wording set forth in the individual SPA, the choices made by the seller and its effective ability to defend the third-party claim, there is a risk of divergent decisions in the first and second proceedings. Unless the parties to an M&A transaction take further precautions by, *inter alia*, beefing up the arbitration clause in the SPA (and ancillary documents),[38] it is impossible to prevent the risk from materialising. To illustrate this, it is opportune to deal separately with different types of Primary Disputes – court proceedings and arbitral proceedings.

Before diving into the detail, one clarification is warranted: if the buyer is not entitled to assign its warranty claims under the SPA to the target, most of the following considerations will be of no relevance. Therefore, I assume that the buyer may and – if needed – will assign its warranty claim or claims against the seller to the target (or the relevant subsidiary of the target). As a result, the target will likely be bound by, and entitled under, the arbitration clause in the SPA. Pursuant to the laws of several jurisdictions, the rights

34) According to the ABA's Private Target Mergers & Acquisitions Deal Points Study 2015, only 38 % of the contracts allowing the seller to take control over the defence of a third-party claim required the seller to acknowledge liability first. Based on the author's personal experience, the percentage will be much higher in European deals.

35) Any such (contribution and) assignment may of course entail a number of difficult legal and – more importantly – tax implications which cannot be addressed here.

36) In this context, one must bear in mind that the target is not even a party to the SPA. Unless the SPA parties expressly stipulate that any damage suffered by the target as a result of a breach of representation or warranty shall be deemed to constitute a damage suffered and collectible by the buyer, the damage suffered by the buyer would have to be calculated as the amount of the negative impact of the third-party claim on the target's value. Such impact will not necessarily be equal to the amount of the third-party claim. This is obvious if the purchaser acquires less than 100 % in the target. However even in a 100 % scenario one might face arguments about the issue.

37) Affording the seller with an effective opportunity to take full control over the defence of the third-party claim may prove to be difficult in an arbitration context for the reasons outlined below at IV.2.a).

38) See below at V. for suggestions.

and obligations under the arbitration clause constitute so to speak qualities of the assigned claim and are transferred to the assignee together with the claim.[39] In the following, I take it that the target as assignee of a warranty claim will be bound by the arbitration clause.

1. Primary Disputes conducted as court proceedings

With ordinary court proceedings, the assumption of full control over the defence of the third-party claim by the seller should not constitute a major problem. While it will likely not be possible for the seller to formally replace the target as the respondent party in the court proceedings, there will be no concerns of confidentiality that might restrict the free flow of information from the target (via the buyer) to the seller. Proceedings in the ordinary courts are public, and, as the former owner of the target, the seller is familiar with the documents relevant for the Primary Dispute anyway. In preparation for the transaction, the seller will have compiled a (virtual) data room or even conducted a vendor due diligence. The documents and other information presented to the buyer in the course of the due diligence exercise will be recorded on a DVD in the seller's possession.[40]

It follows that the target can appoint counsel satisfactory to the seller. Within the limits of good corporate governance and *bonos mores,* it may follow the directions of the seller. As mentioned, under the more recent transactional trends, the seller will first have to acknowledge that it will be bound by the outcome of the proceedings. Where, however, the seller does not elect to assume control over the defence of the third-party claim, the situation becomes tricky.

a) Third-party notice (Streitverkündung), vouching in, third-party practice (impleader) and other instruments under statutory procedural rules

The statutory provisions of some civil law countries will allow the respondent[41] in ordinary court proceedings to call upon a third person for support in these proceedings if the respondent believes that it can take recourse against the third person or has an indemnification claim against it (third-party notice, *Streitverkündung*).[42] The third person so called by the respondent will *not* become a party in the proceedings, and no judgement will be rendered against it. Therefore, it is *not* necessary for the court of the first proceedings to have jurisdiction over the recourse or indemnification claim against the third person.[43] The third person may join the respondent in the defence of the claim that is the subject matter of the first proceedings. If the third-party notice is duly and timely served in a manner such that the third person can effectively participate in the defence of that claim, the outcome of the proceedings will be binding on the third person irrespective of whether it makes actual use of the possibility to participate. In any subsequent proceedings between it and the respondent of the first proceedings, the third person may not question the essential findings on issues of fact and/or law as reflected in the judgement in the first proceedings.[44] In the US, the instrument of vouching in a third person brings about very similar results. Vouching in is a common-law procedural device allowing a respondent in court proceedings to bind a third person to the outcome of an action brought against the respondent upon notice to the third person and opportunity for the third person to defend. The third person will *not* become a party in the pending proceedings.[45]

The so-called "third-party practice" (impleader) in the US is different. Here, the respondent in the first proceedings may serve a summons and complaint on a non-party who is or may be liable to it for all or part of the claim against it.[46] The third person becomes a party to the proceedings, and the court may render a judgement against it.[47] This is similar to the UK where a respondent in court proceedings can bring an additional claim against any person (whether or not already a party) for contribution or indemnity or some other remedy. That person will become a party in the proceedings[48] The procedural laws of various civil law countries[49] offer the same instrument, and the (recast) Brussels I Regulation provides a *forum* for it.[50]

b) Effects of the agreement to arbitrate on the availability of statutory instruments

Once the buyer has assigned to the target its pertinent warranty claim against the seller, the question arises whether or not the target could then avail itself of the

39) See German Federal Court of Justice (*Bundesgerichtshof*, BGH) 18.12.1975 – III ZR 103/73, NJW 1976, 852; 2.10.1997 – III ZR 2/96, NJW 1998; 3.5.2000 – XII ZR 42/98, NJW 2000, 2346; 8.5.2014 – III ZR 371/12, SchiedsVZ 2014, 151 (153); French *Cour de Cassation* 27.3. 2007, J. D. I. 2007, 968; *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2005] EWHC 454 (Comm); *MS "EMJA" Braack Schiffahrts KG v. Wärtsilä Diesel Aktiebolag*, Supreme Court of Sweden 15.10.1997 – Ö 3174/95, Rev. arb. 1998, 431 (433); *Trittmann/Hanefeld* in Böckstiegel/Kröll/Nacimiento, Arbitration in Germany – The Model Law in Practice, 2nd ed. 2015, § 1029 para. 37; *Geimer* in Zöller, ZPO, 31st ed. 2016, § 1029 para. 63; *Müller/Keilmann*, Beteiligung am Schiedsverfahren wider Willen?, SchiedsVZ 2007, 113 (115); *Schütze*, Kollisionsrechtliche Probleme der Schiedsvereinbarung, insbesondere der Erstreckung ihrer Bindungswirkung auf Dritte, SchiedsVZ 2014, 274 (276); *Hanotiau*, Consent to Arbitration: Do We Share a Common Vision?, Arb. Int. 2011 Vol. 27/4, 539 (542); for an overview on New York law, see *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, para. 2.55; for a historically interesting, but somewhat outdated, overview across several jurisdictions, see *Girsberger/Hausmaninger*, Assignment of Rights and Agreement to Arbitrate, Arb. Int. 1992 Vol. 8/2, 121; fundamentally sceptical: *Schwab/Walter*, Schiedsgerichtsbarkeit, 7th ed. 2005, 63.

40) The buyer will have a copy of that DVD as well. Alternatively, a trustee may store the DVD for the parties.

41) Note that it is not only the respondent that may serve a third-party notice. The claimant has this option as well, if the prerequisites (claim against the third party dependent on the outcome of the first proceedings) are met. In fact, the target may just as well be the claimant in a Primary Dispute.

42) See § 21 Austrian Code of Civil Procedure, § 72 German Code of Civil Procedure, Art. 78 Swiss Code of Civil Procedure.

43) *Schütze/Geimer*, Europäisches Zivilverfahrensrecht, 3rd ed. 2010, A.1-23, 196; *Mansel*, Streitverkündung (vouching in) und Drittklage (third party complaint) im US-Zivilprozess und die Urteilsanerkennung in Deutschland, in Heldrich/Kono (eds.), Herausforderungen des Internationalen Zivilverfahrensrechts, 1994, 63 (66).

44) BGH 27.1.2015 – VI ZR 467/13, NJW 2015, 1824 (1825); *Vollkommer* in Zöller, ZPO, 31st ed. 2016, § 68 para. 9; *Hartmann* in Baumbach/Lauterbach/Albers/Hartmann (eds.), ZPO, 75th ed. 2017, § 68 para. 6; *Hüßtege et al.* in Thomas/Putzo (eds.), ZPO, 37th ed. 2016, § 68 para. 5.

45) For a good overview, see *Ware*, Vouching: In or Out?, Wash. & Lee L. Rev. 1985, 121 and *Mansel* in Heldrich/Kono (eds.), Herausforderungen des Internationalen Zivilverfahrensrechts, 1994, 63 *et seqq*.

46) Federal Rules of Civil Procedure, Rule 14.

47) *Mansel* in Heldrich/Kono (eds.), Herausforderungen des Internationalen Zivilverfahrensrechts, 1994, 66 (67).

48) Civil Procedure Rules: Part 20 – Counterclaims and Other Additional Claims, Rule 20.10.

49) Italy: *Intervento su istanza di parte (Chiamata in causa del terzo)*, Art. 106 and 107 *Codice di Procedura Civile*; France: *Intervention forcée*, Art. 333-338 *Nouveau Code de Procedure Civile*; *Mansel* in Wieczorek/Schütze (eds.), ZPO, 3rd ed. 1994, § 68, para. 30.

50) Regulation (EU) no. 1215/2012, Art. 8(2).

various statutory instruments that many jurisdictions hold on stock to call the seller into action. This prompts the following considerations:

aa) Third-party notice, vouching in

Does the fact that the target is bound by the arbitration clause (see above) prevent it from serving a third-party notice upon, or vouching in, the seller in the context of court proceedings? And if not, what will be the effects on any subsequent arbitration between the target and the seller?

As to the first question, there is no *communis opinio* among legal authorities. Some take the view that the seller can indeed invoke the arbitration agreement just as it could if the target brought an action against it in the ordinary courts.[51] Others differentiate between the admissibility of the third-party notice as such and its effects on any subsequent arbitration. Service of a third-party notice entails the suspension of applicable limitation periods. If the instrument were not available for use in relation to a third person protected by an arbitration agreement, separate arbitral proceedings would have to be initiated to achieve the same result. Therefore, in the opinion of these authorities, an agreement to arbitrate does not amount to an implied waiver by any of the parties of its rights to submit a third-party notice against the respective other party, and serving a third-party notice will be possible notwithstanding an agreement to arbitrate.[52]

There are differing views on the second question as well, i. e. the effects of the third-party notice in court proceedings on any subsequent arbitration. According to some, the third-party notice in court proceedings should have prejudicial effect in the sense that the essential findings on issues of fact and law as reflected in the court's judgement shall be binding in a subsequent arbitration. Considerations of procedural economy and legal certainty, in particular the avoidance of divergent decisions, would militate in favour of this position. The quest for the avoidance of conflicting decisions even forms part of public policy as these authorities argue.[53] Others vigorously advocate the opposite position. A judgement rendered in the court proceedings shall have *no* prejudicial effect on any parallel or subsequent arbitration. The parties in court proceedings are at liberty to choose whether they wish to serve a third-party notice on the third person. Furthermore, the scope of the prejudicial effects of a third-party notice can form the subject of contractual arrangements.[54] Therefore, it cannot be a matter of public policy, whether there should be prejudicial effects or not. By submitting to arbitration, the parties accept the risk of divergent decisions and are not entitled to protection. Finally, the parties' mutual intent to have disputes arising between them decided by private arbitration rather than by the ordinary courts of any given State would be thwarted if, through the instrument of third-party notice, important elements of a dispute could be decided with prejudicial effect by the state courts.[55]

Then there is further argument about the question whether a third person shall be deemed to have accepted the prejudicial effects of the first proceedings and to that extent waived its rights under the arbitration agreement if, following the service of a third-party notice, the third party effectively joins in the defence.[56]

bb) Third-party practice (impleader), CPR Part 20 claims, Chiamata in causa del terzo, Intervention forcée

The situation with third-party practice (impleader) and analogous instruments under English law and the laws of various continental European jurisdictions is very straightforward. As mentioned, the third person becomes a party to the proceedings, and the court may render a judgement against it. From the third person's perspective, it does not make any difference whether, for example, a respondent in pending proceedings brings a Part 20 Claim under the UK Civil Procedure Rules against it or sues it in separate proceedings. In all these scenarios, the seller, therefore, could invoke the arbitration clause.[57]

c) Summary of findings

In short, in the context of a simple third-party notice/vouching in it is highly controversial whether a judgement in the court proceedings will have any prejudicial effect on subsequent arbitral proceedings. Views on the (potential) prejudicial effect may vary significantly from one jurisdiction to another. Is the consent of the third person protected by an arbitration agreement required, yes or no? What is the stance taken by the law chosen by the parties to govern their arbitration clause or agreement? What will be the views of the *lex arbitri*? What about the law in the jurisdictions where enforcement of an award rendered in the subsequent arbitral proceedings might be sought? Is there a risk of the award being set aside or refused enforcement in view of the arbitral tribunal erroneously acknowledging or denying prejudicial effects of the first proceedings? There is no satisfactory answer to any of these questions where the parties to an M&A transaction have not addressed them and rather contented themselves with a boilerplate arbitration clause and customary claims handling provisions.

In the context of third-party practice (impleader) and similar instruments, it will not be possible to call the seller into play. It may invoke the arbitration agreement and file a motion to stay the court proceedings.

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51) *Münch* in MüKoZPO, 4th ed. 2013, § 1032, para. 13; *Lachmann*, Handbuch für die Schiedsgerichtspraxis, 3rd ed. 2008, para. 46.

52) See *Elsing*, Streitverkündung und Schiedsverfahren, SchiedsVZ 2004, 88 (89); *Stretz*, Die Streitverkündung im staatlichen Gerichtsverfahren und ihre Interventionswirkung im anschließenden Schiedsverfahren, SchiedsVZ 2013, 193 (195); *Voit* in Musielak/Voit, ZPO, 14th ed. 2017, § 1032 para. 5 and § 1042 para. 11.

53) *Bartels*, Bedeutung der Streitverkündung vor dem staatlichen Gericht für das nachfolgende Schiedsverfahren, BB 2001 (Supplement 7), 20 (21); *Kraft/Looks* BB 2002, 1171 (1171). *Voit* in Musielak/Voit, ZPO, 14th ed. 2017, § 1042 para. 11, adopts a somewhat less rigid approach. While he seems to be supportive of the binding effect of a third-party notice on subsequent arbitral proceedings in principle, he accepts that the parties to an arbitration agreement, expressly or implicitly, may take the risk of divergent decisions.

54) *Mansel*, Gerichtsstandsvereinbarung und Ausschluß der Streitverkündung durch Prozeßvertrag, ZZP 1996, 61 (64 *et seq.*).

55) *Stretz* SchiedsVZ 2013, 193 (196 *et seq.*); *Elsing* SchiedsVZ 2004, 88 (90).

56) Pro: *Elsing* SchiedsVZ 2004, 88 (90). Contra: *Stretz* SchiedsVZ 2013, 193 (199 *et seq.*).

57) *Corte di Cassazione Sezioni Unite Civili* 5.1.2007, n. 35, Foro it., 2007, I, 2173; *Cour de Cassation* 8.11.1982, Rev. arb. 1983, 177. Similarly, the Paris Court of Appeal ruled in 1983 that an arbitration clause can be invoked against Art. 42 *Nouveau Code de Procedure Civile*, which allows a claimant – at its own choice – to bring an action against multiple respondents in a court having jurisdiction over any one of them (*Cour d'appel de Paris* 13.5.1983, Rev. arb. 1984, 115, note *Bazex*).

2. Primary Disputes conducted as arbitral proceedings

Primary Disputes conducted as arbitral proceedings bring about even more complex issues. There are three reasons for this: (i) the confidentiality of arbitration; (ii) the consensual nature of arbitration; and (iii) the overarching principle of equality of treatment of the parties in an arbitration.

a) Confidentiality issues

Much has been said and written about the confidentiality of arbitral proceedings. Confidentiality has traditionally been considered one of the key advantages of arbitration.[58] Across a number of different jurisdictions, an implied duty of confidentiality in every agreement to arbitrate used to be widely accepted.[59] The United States is a prominent exception. There is no provision of US law requiring the parties or the arbitrators to keep the arbitration proceedings confidential, and US courts have rejected the notion of an implied obligation.[60] Similar observations apply to Sweden and Norway.[61] However, pursuant to the rules of many well established arbitral institutions, the parties have an obligation to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain.[62] So, different from what holds true in ordinary court proceedings, confidentiality obligations arising under the arbitration agreement or the rules of the relevant arbitral institution may prevent the free flow of information from the target (via the buyer) to the seller in most cases. This may sound strange considering that the seller as the previous owner of the target will have knowledge of the matters forming the subject of the arbitration anyway.[63] However, the seller will not be familiar with the briefs submitted by the parties in the arbitration nor the procedural orders issued by the tribunal, and the target must not share them with the seller.[64] These limitations will normally prevent the seller from taking control over the defence of the third-party claim, and the seller would not be well advised if it accepted being bound by the outcome of the arbitration of the third-party claim nevertheless.

The confidentiality issues must not be taken lightheartedly. A breach of the confidentiality obligations might entitle the other party to terminate the arbitration agreement.[65] However, the issues may be overcome by joining – one way or another – the seller to the third party arbitration.[66]

b) Consensual nature of arbitration

An agreement to arbitrate is an indispensable prerequisite for any arbitration. Where there is no consent to arbitration, it lacks legitimacy. As others have put it, the agreement to arbitrate is the foundation stone of international arbitration.[67] There is of course an agreement to arbitrate between the buyer or, subsequent to an assignment, the target on the one side and the seller on the other side. However, this will be of no great help in the context at hand. The parties to the M&A transaction agree on a specific set of rules. As a rule of thumb, these will either be the ICC rules, the rules of the leading arbitration institution in the home jurisdiction of one of the parties, or the rules of the leading arbitration institution in the jurisdiction the substantive laws of which govern the SPA.[68] Looking at the big picture, *ad hoc* arbitration is the exception.[69] Furthermore, the SPA parties will typically agree on a tribunal of three, specify both the seat and the language of arbitration. The agreement between the SPA parties to submit their disputes under the SPA to arbitration governed by certain rules does not imply, but rather excludes, an agreement to arbitrate if the procedural rules were changed. In fact, failure to conduct the arbitral proceedings in conformity with the rules agreed between the parties is one of the reasons to refuse recognition and enforcement of an arbitral award.[70]

This is where it becomes really complicated. The arbitration to resolve the Primary Dispute may or may not be governed by the same set of rules as will be applicable to a potential post-M&A arbitration. There are dozens of arbitral institutions worldwide with varying degrees of recognition by the global business community – all having their own sets of rules. Then there is *ad hoc* arbitration that may be governed by the UNCITRAL rules or rules tailor-made to the needs of the parties. Depending on its own acquisitive history as well as the number of jurisdictions in which it and its subsidiaries conduct business, the arbitration clauses contained in the potentially huge number of commercial agreements of a target in an M&A transaction will cover a broad spectrum of options with

58) *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, paras. 1.105 and 2.161; UNCITRAL Notes on Organizing Arbitral Proceedings, para. 55; *Schütze*, Schiedsgericht und Schiedsverfahren, 5th ed. 2012, para. 411; *Öhlberger*, How Confidential is Arbitration in Austria? A Comparative Analysis, in Austrian Yearbook on International Arbitration 2011, 65.

59) *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, para. 2.165; *Collins*, Privacy and Confidentiality in Arbitration Proceedings, Arb. Int. 1995 Vol. 11/3, 321 (327 *et seqq.*); *Schütze*, Schiedsgericht und Schiedsverfahren, 5th ed. 2012, para. 411; *Münch* in MüKoZPO, 4th ed. 2013, § 1029 para. 117; dissenting: *Voit* in Musielak/Voit, ZPO, 14th ed. 2017, § 1029 para. 27; *Lachmann*, Handbuch für die Schiedsgerichtspraxis, 3rd ed. 2008, paras. 146 *et seqq.*

60) *United States v. Panhandle Eastern Corporation*, 118 FRD 346 (D. Del. 1988); *Cont'ship Containerlines, Ltd. v. PPG Industries, Inc.*, No. 00 Civ. 0194 RCCH BP, 2003 WL 1948807 (S. D. N. Y. 23.4.2003).

61) *AI Trade Finance Inc v. Bulgarian Foreign Trade Bank Ltd*, Supreme Court of Sweden 27.10.2000, Mealey's Int. Arb. Rep. 2000 Vol. 15, A1; Norwegian Arbitration Act 2004, Section 5(1).

62) See DIS Rules, Section 43; HKIAC Rules, Art. 42; LCIA Rules, Art. 30; NAI Rules, Art. 6; SIAC Rules, Rule 39; Swiss Rules, Art. 44. The picture is not uniform though. Other rules impose a duty to maintain confidentiality only on the institution and the arbitral tribunal (e. g., SCC Rules and Vienna Rules). There is no general confidentiality obligation under the ICC Rules. However, upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information (ICC Rules, Art. 22(3)).

63) See above at IV.1.a).

64) See, for example, *Theune* in Schüzte (ed), Institutional Arbitration, 2013, DIS Rules para. 361.

65) In fact, a termination of an arbitration agreement for breach of an alleged implied confidentiality obligation was at the center of the decision of the Supreme Court of Sweden of 27.10.2000, Mealey's Int. Arb. Rep. 2000 Vol. 15, A1.

66) See below at IV.2.b.

67) *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, paras. 1.40 and 2.01.

68) This was the almost unanimous feedback to question (iii) of the author's questionnaire (see at note 8). Poland, where *ad hoc* arbitration under the UNCITRAL Rules is the norm, is the only exception.

69) It is, however, widely used in Poland with reference to the UNCITRAL Rules.

70) New York Convention, Art. VI(1)(d).

varying seats and languages of arbitration, many different sets of applicable rules, a sole arbitrator contemplated in certain cases and a panel of three arbitrators in others. Some of the rules agreed by the target in its many commercial agreements may be compatible with the arbitration clause in the SPA, others not. Chances are that a great number of arbitration clauses or agreements binding the target will *not* be compatible with the arbitration clause in the SPA. It follows that in most cases the seller cannot be forced to join arbitration for the resolution of a Primary Dispute without its consent – at least where this arbitration is supposed to produce any prejudicial effects on a subsequent arbitration between the target and the seller.

Indeed, the UNCITRAL Rules,[71] the ICC Rules,[72] and the rules of several other leading arbitral institutions[73] require a third person's consent for it to be joined to an arbitration conducted under these rules. It is a common feature of all these rules that they only contemplate the joinder of third persons as an additional *party* (claimant or respondent) to the arbitration, but *not* in any other capacity.

The Swiss Rules and the Vienna Rules take a different and more flexible approach. Article 4(2) of the Swiss Rules stipulates:

> *"Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances."*

Pretty much in the same vein, Article 14(1) of the Vienna Rules provides as follows:

> *"The joinder of a third party in an arbitration, as well as the manner of such joinder, shall be decided by the arbitral tribunal upon the request of a party or a third party after hearing all parties and the third party to be joined as well as after considering all relevant circumstances."*

Both the Swiss Rules and the Vienna Rules allow the joinder of third persons not only as additional parties (claimant or respondent) to a pending arbitration, but also in various other capacities. For example, the Swiss Rules and the Vienna Rules empower the arbitral tribunal to join third persons in the very same manner as a court could join them to court proceedings following a third-party notice or a vouching in.[74] In these instances, the Swiss Rules and the Vienna Rules even seem to dispense with the requirement of the consent of the third person. This would be in line with the thinking of some authorities who contend that a party involved in an arbitration may vouch in a third party just as in ordinary court proceedings[75] – and with the same prejudicial effect.[76] The latter has been criticised by most other authorities as blatantly incompatible with the consensual nature of arbitration.[77] The Swiss Rules and the Vienna Rules are actually silent on the effects that the arbitration shall have on the third person joined to the proceedings after having been vouched in by one of the parties. In my view, it will be highly recommendable (if not indispensable) for the reasons stated above[78] to obtain the consent of the third person at least where the arbitral award is supposed to have prejudicial effect on any subsequent (arbitration or court) proceedings.

It is an entirely different question whether the express consent of *all* original parties to the arbitration is also required. Arguing both the confidentiality/privacy of arbitral proceedings and the consensual nature of arbitration, some authorities contend that this is indeed the case.[79] In my view, an implied consent may well be argued depending on the respectively applicable rules and/or the specific circumstances of the case. In fact, the rules of some institutions allow for the joinder of a third party *without* stipulating that *all* original parties to the pending arbitration must consent.[80] Some view the sheer fact of the parties having referenced any of these sets of rules as being tantamount to an implied consent to the joinder.[81] Others are more cautious. They differentiate between (i) multiple parties to one contract/arbitration agreement and (ii) multiple parties to multiple contracts/arbitration agreements. If the original parties in the arbitration and the third person or persons to be joined are all bound by one and the same contract/arbitration agreement, then there is no problem and implied consent of all original parties may be assumed.[82] If there are

71) UNCITRAL Rules, Art. 17(5) requiring the third party to be joined to be a signatory of the arbitration agreement between the original parties.

72) ICC Rules, Art. 7(2)(c).

73) HKIAC Rules, Art. 27.1; ICDR Rules, Art. 7(2); LCIA Rules, Art. 22.1(viii); SCC Rules, Art. 13(2); SIAC Rules, Art. 7.1.

74) See *Bärtsch/Petti* in Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration, 2nd ed. 2013, Art. 4 paras. 40 and 55 *et seq.*; *Oberhammer/Koller* in VIAC (ed.), Handbook Vienna Rules – A Practitioner's Guide, Art. 14 paras. 8 *et seq.*; *Baier*, Die neue Schiedsordnung des Internationalen Schiedsgerichts der WKÖ, ecolex 2013, 697 (698).

75) Reichsgericht 15.5.1903 – Rep. II. 504/02, RGZ 55, 14 (15 *et seq.*); Higher Regional Court (OLG) Hamburg 2.2.1950 – 2 U 226/49, MDR 1950, 295 *et seq.*; BGH 22.10.1964 – VII ZR 69/63, ZZP 1966, 121 (122); *Hartmann* in Baumbach/Lauterbach/Albers/Hartmann (eds.), ZPO, 75th ed. 2017, § 1042 para. 14; *Wais* in Schütze/Tscherning/Wais, Handbuch des Schiedsverfahrens, 2nd ed. 1990, para. 363; *Markfort*, Mehrparteien-Schiedsgerichtsbarkeit im deutschen und ausländischen Recht, 1994, 76; *Schwab/Walter*, Schiedsgerichtsbarkeit, 7th ed. 2005, 140.

76) *Markfort*, Mehrparteien-Schiedsgerichtsbarkeit im deutschen und ausländischen Recht, 1994, 76.

77) *Elsing* SchiedsVZ 2004, 88 (91 *et seq.*); *Lachmann*, Handbuch für die Schiedsgerichtspraxis, 3rd ed. 2008, para. 2830 *et seqq.*; *Mansel* in Wieczorek/Schütze (eds.), ZPO, 3rd ed. 1994, § 66 para. 16 and § 72 para. 7.

78) At IV.1.c).

79) Express consent required: *Wais* in Schütze/Tscherning/Wais, Handbuch des Schiedsverfahrens, 2nd ed. 1990, para. 364.

80) ICC Rules, Art. 7 (if the request for joinder is made before the appointment of any arbitrator); ICDR Rules, Art. 7 (if the request for joinder is made before the appointment of any arbitrator); LCIA Rules, Art. 22.1(viii); SCC Rules, Art. 13.

81) *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, para. 2.59; *Platte*, When Should an Arbitrator Join Cases?, Arb. Int. 2002 Vol. 18/1, 67 (69); *Turner/Mohtashami*, A Guide to the LCIA Arbitration Rules, 2009, paras. 6.44 and 6.48 *et seq.*; *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, para. 16.44; *Steingruber*, Consent in International Arbitration, 2012, para. 10.13; *Gómez Carríon*, Joinder of Third Parties: New Institutional Developments, Arb. Int. 2015 Vol. 31/3, 479 (487); *Wehrli/Stacher*, Arbitration under the Swiss Rules, in Cordero-Moss (ed.), International Commercial Arbitration: Different Forms and their Features, 2013, 345 (367).

82) *Oberhammer/Koller* in VIAC (ed.), Handbook Vienna Rules – A Practitioner's Guide, Art. 14 para. 18; *Bärtsch/Petti* in Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration, 2nd ed. 2013, Art. 4 para. 47. For an overview of circumstances, which – in the absence of rules allowing for the joinder without consent of all parties – are relevant for ascertaining implied consent, *Platte*, When Should an Arbitrator Join Cases?, Arb. Int. 2002 Vol. 18/1, 67 (68 *et seqq.*).

multiple contracts containing arbitration clauses, it becomes more difficult. First of all, it will be necessary for any joinder to be even conceivable that the arbitration clauses in all contracts refer to the same set of rules and are compatible in all other respects as well: composition and constitution of arbitral tribunal, seat and language of arbitration, rules on the taking of evidence – to name just a few. In addition, there must be, as these more cautious authorities hold, some sort of nexus or interdependency between the various contracts or relationships. If these prerequisites are met, it will be possible to assume an implied consent.[83] It follows that the consent of the requesting party and of the third person will then be sufficient for purposes of effecting the joinder. To this extent and provided that there are no confidentiality concerns surrounding the documents and other evidence relevant for the case,[84] the specific provisions on the joinder of third persons overrule the confidentiality obligations as may be contained in the same rules.

It is true that the contracts underlying any Primary Dispute on the one hand and the SPA on the other (i) are between unrelated parties,[85] (ii) do not concern the same project or transaction, and (iii) may have been concluded one long before the other. However, there is, subsequent to the assignment of warranty claims from the buyer to the target, a close legal and economic nexus between the two. If the Primary Dispute potentially qualifies as a breach of representation and/or warranty and all other prerequisites under the SPA (*de minimis*, basket, time limits, etc.) are met, the warranty claim will stand and fall with the claim being the subject matter of the Primary Dispute. If the joinder is in the form of third-party notice/vouching in, no issues of fact or law must be addressed other than those relevant in the Primary Dispute. There should not be any real confidentiality concerns. As the former owner of the target, the seller as person to be joined will be familiar with the relevant facts and documents anyway.

Now, coming back to various sets of institutional rules, both the Swiss Rules and the Vienna Rules (i) offer maximum flexibility as to the form of joinder and (ii) do not stipulate the requirement for the consent of *all* original parties. Considering the above (close relationship; no confidentiality concerns), it is my position that both under the Swiss Rules and the Vienna Rules, the target as respondent in a pending arbitration governed by these rules can serve a third-party notice to, or vouch in, the seller without the consent of the claimant being required. I take the view that implied consent can be assumed.

As mentioned, the rules of most other leading arbitral institutions do not deal with the joinder of third persons in any capacity other than as additional party.[86] Amongst these, there are some that allow the joinder of third persons as additional party without the consent of all original parties.[87] I doubt, however, that it would be possible, based on these rules, to join third persons similarly to a joinder under the Swiss Rules or the Vienna Rules in response to a third-party notice or a vouching in without all original parties to the arbitration consenting.[88] An argument *a maiore ad minus* would not be convincing. Joining third persons in a capacity other than as additional party is not a *minus* to what is permissible under the relevant rules. It is an *aliud*. Lawyers from many jurisdictions will not even be familiar with the instruments of third-party notice or vouching in. However, it should be possible to make use of these instruments at the request of any party in an arbitration with the (informed) consent of the other original party or parties under any applicable rules.The *parties* determine the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.[89]

c) Equality of treatment

Parties to an arbitration must be treated with equality. This is one of the overarching principles of arbitration. Both the UNCITRAL Model Law[90] and the rules of many leading arbitral institutions are outspoken about this.[91] The principle of equal treatment of the parties is of fundamental nature such that it is part of public policy, and its violation constitutes ground for refusing an arbitral award recognition and enforcement.[92] According to the decision of the French *Cour de Cassation* (Supreme Court) in the famous *Dutco* case,[93] this overarching principle of equality entails that the parties must be treated equally in the context of the constitution of the arbitral tribunal. If, in a multi-party arbitration with a panel of three arbitrators, one side (multiple claimants and/or multiple respondents) cannot agree on "their" arbitrator, the relevant arbitral institution or court shall appoint *all* arbitrators rather than just the arbitrator of the defaulting side. In response to the decision, several arbitral institutions have adapted their rules. In *Dutco* scenarios, some now *require* the appointment by the respective institution of all arbitrators[94] or of at least two arbitrators who will then appoint the third arbitrator.[95] Other rules are more flexible in as they stipulate that the institution

83) *Oberhammer/Koller* in VIAC (ed.), Handbook Vienna Rules – A Practitioner's Guide, Art. 14 para. 18; not entirely clear: *Bärtsch/Petti* in Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration, 2nd ed. 2013, Art. 4 para. 47.

84) These are rightfully stressed by *Platte*, When Should an Arbitrator Join Cases?, Arb. Int. 2002 Vol. 18/1, 67 (79).

85) Except for the ownership of the shares in the target first of the seller and then of the buyer.

86) See ICC Rules, Art. 7(2)(c); HKIAC Rules, Art. 27.1; ICDR Rules, Art. 7(2); LCIA Rules, Art. 22.1(viii); SCC Rules, Art. 13(2); SIAC Rules, Art. 7.1.

87) E.g., LCIA Rules, Art 22.1(viii); *Gómez Carríon* Arb. Int. 2015 Vol. 31/3, 479 (487).

88) *Voser*, Multi-party Disputes and Joinder of Third Parties, in van den Berg (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series 2009 Vol. 14, 343 (381 *et seq*.).

89) UNCITRAL Model Law, Art. 19(1).

90) UNCITRAL Model Law, Art. 18.

91) DIS Rules, Section 26.1; HKIAC Rules, Art. 13.1; ICDR Rules, Art. 20(1); SCC Rules, Art. 23(2); Swiss Rules, Art. 15(1); the ICC Rules, Art. 22(4), and the LCIA Rules, Art. 14.4(i), speak of "impartiality" instead.

92) New York Convention, Art. V(1)(b); *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, paras. 6.10 and 11.73; *Schwab/Walter*, Schiedsgerichtsbarkeit, 7th ed. 2005, 119 *et seq*.; *Hartmann* in Baumbach/Lauterbach/Albers/Hartmann (eds.), ZPO, 75th ed. 2017, § 1042 para. 3.

93) *BKMI and Siemens v. Dutco*, French *Cour de Cassation* 7.1.1992, J. D. I. 1992, 707 (712 *et seqq*.).

94) LCIA Rules, Art. 8(1).

95) This is the approach taken by the DIS Rules: Multiple Claimants must jointly nominate one arbitrator (Section 13.1). Where multiple respondents fail to jointly appoint one arbitrator, the DIS Appointing Committee will nominate two arbitrators who will then appoint the third (Section 13.2).

may appoint all arbitrators.[96] Under the Vienna Rules, the Board will normally appoint the arbitrator for the defaulting side only. In exceptional cases, after granting the parties the opportunity to comment, the Board may revoke appointments already made and appoint new co-arbitrators or all arbitrators.[97] In a decision of November 2005, the Higher Regional Court (*Oberlandesgericht*, OLG) Frankfurt took a similar stance. Multiple claimants had been forced to jointly appoint one arbitrator. The court looked closely at the specifics of the case, which presented a number of characteristics differentiating it from the *Dutco* scenario. The court found that the interests of the multiple claimants were not conflicting and, therefore, dismissed a motion to set aside the arbitral award founded on an alleged violation of the principle of procedural equality in the context of the constitution of the three-member arbitral tribunal. The court further argued that even a standard arbitration clause implies an acknowledgment and acceptance of the peculiarities of multi-party arbitration if the relevant parties are legally experienced persons familiar with multi-party situations and it is clear from the outset that multiple parties on one side will have to agree on one joint arbitrator.[98]

d) Form of joinder

One of the principle reasons for choosing arbitration is access to experienced arbitrators with the specific technical skills likely to be of relevance in a dispute that may arise between the parties to a contract. Arbitration offers a "judge made to measure".[99] The Primary Dispute potentially triggering a claim for breach of warranty under the SPA will more often than not require skill sets quite different from those needed in any post-M&A arbitration. Neither the buyer (target) nor the seller would want the arbitral tribunal seized of the Primary Dispute to have jurisdiction over their post-M&A dispute. Therefore, rather than joining the seller as additional party, the joinder should be in the form of participation in response to a third-party notice or vouching in. Under the Swiss Rules and the Vienna Rules, this will not cause any problems at all. Under the rules of most other arbitral institutions, the (informed) consent of the other original party in the arbitration will be necessary.

e) Summary of findings

Issues of confidentiality prohibit the free flow of information from the target (via the buyer) to the seller in relation to any arbitration of the target. It follows that customary claims handling provisions as contained in most SPAs will not work. Joining the seller to the arbitration solves the problem. This requires the seller's consent. Joinder should be in the form of participation in response to a third-party notice or vouching in. Under the Swiss Rules and the Vienna Rules, it will be sufficient if the target requests, and the seller has consented to, such joinder. Under the rules of most other arbitral institutions, the consent of the other original party in the pending arbitration will also be necessary irrespective of whether or not the respectively relevant rules allow for a joinder of third persons without the consent of all original parties. This is because the rules of most arbitral institutions only contemplate the joinder of third persons as additional parties (claimant or respondent) and not in some other capacity.

V. Conclusions and Proposals

Currently prevailing transactional practice does not adequately protect the buyer in an M&A transaction against the risk of divergent decisions in the Primary Dispute and in post-M&A arbitration for breach of representations and warranties triggered by the Primary Dispute.

Customary claims handling provisions *can* be helpful if the Primary Dispute is resolved through litigation in the state courts. However, they will not bring about the desired result (acknowledgment of prejudicial effect) if the seller does not assume control over the Primary Dispute. Unless the buyer assigns its warranty claims under the SPA to the target, there is no way of binding the seller to the outcome of the Primary Dispute. But even if the buyer does assign its claims to the target, this would in all likelihood not change a thing. The target could not avail itself of the third-party practice (impleader) that many jurisdictions offer. The seller could invoke the arbitration clause in the SPA. While service of a third-party notice/vouching in as contemplated by some other jurisdictions might be admissible as such, it will probably not have any binding effect on the seller, unless the seller consents.

If an arbitral tribunal is seized of the Primary Dispute, matters become even worse. Customary claims handling provisions in the SPA will not work in most cases. The target will be subject to comprehensive confidentiality obligations and must not share information relating to the arbitration with the seller. As a result, the seller will not be able to assume control over the Primary Dispute and will not acknowledge any liability in relation thereto. An assignment of the buyer's warranty claims to the target will not improve as of itself the situation. This is due to the consensual nature of arbitration and – to a lesser degree – the principle of equal treatment of the parties in an arbitration.

On the other hand, there is much leeway for possible solutions. The parties can allow for the assignment of warranty claims to the target. They can agree on carve-outs from their arbitration agreement in relation to certain procedural instruments. Moreover, they can agree on the effects these procedural instruments shall have as between them. This, in my view, prompts the following suggestions:

(i) It may make sense to involve more closely the dispute resolution team of the law firm acting for the buyer in the pre-signing phase of M&A trans-

96) ICC Rules, Art. 12(8); ICDR Rules, Art. 12(5); SCC Rules, Art. 17(5); Swiss Rules, Art. 8(5). For an overview of the criteria relevant for the exercise of the institutions' discretion, see *Voser* in van den Berg (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series 2009 Vol. 14, 343 (364).

97) Vienna Rules, Art. 18(4).

98) OLG Frankfurt 24.11.2005 – 26 Sch 13/05, SchiedsVZ 2006, 219 (221 *et seq.*). In a decision of 1996, the German Federal Court of Justice (*Bundesgerichtshof, BGH*) acknowledged the *Dutco* decision as one possible way of addressing issues arising in the context of the constitution of the arbitral tribunal in multi-party arbitration; see BGH 29.3.1996 – II ZR 124/95, BGHZ 132, 278 (288 *et seq.*).

99) *Carnelutti*, Diritto e processo, 1958, 77: "*L'arbitro, in confronto con il giudice professionale, si potrebbe chiamare un giudice* ***su misura*** [emphasis added]" ("*Compared with a professional judge, one could call an arbitrator a judge* ***made to measure***").

actions. It can thus draw up a landscape of the dispute resolution mechanisms that the target has in place under its material commercial agreements. This will enable the team to draft tailor-made arbitration clauses for the SPA, to engage, together with the corporate teams, in meaningful discussions about them, and to advise on the best choices of law.

(ii) As mentioned, many SPAs exclude the assignability of the contract as a whole and of individual rights and claims thereunder. In order to open the door for at least a partial solution of the issues addressed in this article, any SPA should carve out from this general restriction the assignment of the buyer's rights and claims to any of its affiliates, including – subsequent to completion – the target and its subsidiaries.

(iii) The SPA may further clarify that upon assignment of rights and claims under the SPA the assignee (target or any of its subsidiaries) shall have the rights and obligations under the arbitration clause as though it was an original party to the SPA.

(iv) When it comes to the arbitration clause itself, it seems advisable for the buyer to request that the seller (1) grants its unconditional and irrevocable advance consent to the target serving a third-party notice upon, or vouching in, the seller in case the target becomes engaged in any court or arbitral proceedings for the resolution of a Primary Dispute (the "Primary Proceedings") potentially triggering claims against the seller for breach of representations and warranties or under an indemnity; (2) accepts to be bound by the terms of the arbitration clause or arbitration agreement entered into by the target with the respective third party, including the rules of the respectively relevant arbitral institution referenced therein; (3) accepts the composition of the arbitral tribunal in the Primary Proceedings if the sole arbitrator or, in case of a panel of three, the arbitrator to be appointed by the target (rather than the entire panel)[100] is appointed with the seller's consent or, absent such consent, by the respectively relevant appointing authority (arbitral institution or, in the case of *ad hoc* arbitration, other relevant court/body); and (4) commits to confirm its consent in the appropriate form following commencement of the Primary Proceedings (if conducted as arbitration) if so required under the applicable rules.

(v) Building in the requirement of either the seller's consent to the appointment of the relevant arbitrator or of the appointment of the relevant arbitrator by the appointing authority, should alleviate, if not take away altogether, any concerns of the seller that the relevant arbitrator might not be independent and/or impartial. In the context of a third-party notice or vouching in, the interests of the target and the seller are not in conflict any more.[101] Questions as to whether or not the third-party claim gives rise to any recourse against the seller for breach of representations and warranties under the SPA will not be at issue in the Primary Proceedings and rather be the subject of subsequent arbitration between the target and the seller. The arbitral tribunal in the Primary Proceedings will not render any award for or against the seller. The desired prejudicial effect of an award rendered in the Primary Proceedings concerns the relationship between the target and the seller only. As between them, there will be equal treatment. "Their" arbitrator or, as the case may be, the sole arbitrator will be appointed either consensually or by the appointing authority.

(vi) The arbitration clause may spell out that, if the seller was called, and effectively afforded the opportunity, to participate in the Primary Proceedings and, where the Primary Proceedings are conducted as arbitration, the provisions on the appointment of the arbitrator have been complied with, any decision in the Primary Proceedings shall have a prejudicial effect on any subsequent arbitration between the target and the seller as follows: (1) irrespective of whether or not the seller actually participates in the Primary Proceedings, it may not contend in any subsequent arbitration with the target that any of the essential findings on issues of fact and/or law as reflected in the judgement or award in the Primary Proceedings is incorrect; and (2) the seller may contend that the target has pursued the Primary Proceedings inadequately *only* (a) insofar as (A) the status of the Primary Proceedings at the time of the seller being called, and effectively afforded the opportunity, to participate, or (B) declarations made and actions taken by the target, prevented the seller from lodging means of challenge or defence, or (b) insofar as means of challenge or defence of which the seller was unaware were not lodged by the target, either intentionally or through its grossly negligent fault.[102]

(vii) Furthermore, the parties may make an express choice of the law applicable to the arbitration clause. This may or may not be the same law as the law governing the SPA. If the parties have not made any express or implied[103] choice of the law applicable to the arbitration clause, the law at the

100) Otherwise, it would be difficult to impossible to obtain consent from the respective third party where such consent is required under the respectively applicable rules.

101) It is true that the target might want to settle at terms not satisfactory to the seller. However, the target will still be free to settle at any time and at its own risk. It will then lose the benefit of the prejudicial effect of the Primary Proceedings. Otherwise, the interests of the target and the seller are perfectly aligned once the Primary Dispute has acerbated and turned into Primary Proceedings.

102) This wording takes inspiration from the English translation of § 68 of the German Code of Civil Procedure as published by the German Federal Ministry of Justice under the following link https://www.gesetze-im-internet.de/englisch_zpo/index.html#gl_p0016. It may make sense to expressly reference in the arbitration clause the respectively relevant statutory provisions to ensure that any interpretation of the clause will take into account available precedents and legal commentary on these provisions. Furthermore, the wording of the clause should trace the wording of the respectively relevant statutory provisions as closely as possible.

103) The choice of law for the SPA might be construed as making an implied choice of law for the arbitration clause as well. See *Trittmann/Hanefeld* in Böckstiegel/Kröll/Nacimiento, Arbitration in Germany – The Model Law in Practice, 2nd ed. 2015, § 1029 para. 11. Contra: *Geimer* in Zöller, ZPO, 31st ed. 2016, § 1029 para. 118.

seat of arbitration will apply.[104] In this context, it is important to note that the law applicable to the arbitration clause will determine whether (1) the target will have rights and obligations under the arbitration clause subsequent to an assignment of warranty claims from the buyer to the target,[105] and (2) the seller can validly grant advance consent to the mechanics for the appointment of the arbitral tribunal in the Primary Proceedings.[106] The dispute resolution teams should assess whether the chosen law produces the desired effects.

(viii) The buyer may consider putting into place appropriate post transaction management immediately following completion, including to provide the target's general counsel (and others as appropriate) with a copy of the SPA. This will allow (1) compliance with the claims handling provisions under the SPA and (2) for sufficient time to (a) arrange for an assignment of claims from the buyer to the target and (b) seek consent from the relevant third party for vouching in the seller to any arbitration between the target and the third party where such consent is required under the respectively applicable rules.

It is true that these proposals do not solve all problems, but they may help in many instances. Vouching in or the service of a third-party notice in court proceedings with prejudicial effect on the seller will not be an issue any longer. This holds true also for Primary Disputes resolved through arbitration where vouching in or the service of a third-party notice do not require any further consent from the other original party (because consent is deemed to have been granted under the applicable rules). Even where such consent should be required, the above proposals contribute to a solution of the issues at hand. Once the dispute has arisen, it will likely be much easier to obtain just the consent of the respective third party rather than the consent of both the third party *and* the seller. It is of course impossible to predict any third party's willingness to grant its consent. However, consenting to a vouching in will be less troublesome than consenting to a joinder of the seller as party. The Primary Proceedings will *not* be burdened with issues unrelated to the Primary Dispute. Therefore, the additional expense in terms of time and cost will be much less compared to what would have to be expected in case of joining the seller as additional party. Confidentiality should not be a real issue. As mentioned, the seller will likely be familiar with the relevant documents anyway.

One may raise the question whether there is any chance of the parties to an M&A transaction ever engaging in serious negotiations on the issues at hand and embracing any of the above proposals. Based on my personal transactional experience, it is actually quite likely that they will, unless the issues are tabled at the very last minute. There are obvious reasons for this. The prospect of inconsistent decisions on identical issues will strike any lawyer as "most undesirable".[107] A study published in 2006 revealed – not surprisingly – that the lack of a third party mechanism was a widely recognised concern amongst the (would-be) users of arbitration.[108] Any proposal to – at least in part – remedy this deficiency will, therefore, be normally well received if made in due time by buyer's counsel.

If the procedural rules of the state court seized of the Primary Dispute do not hold on stock third-party notices and/or vouching in, but rather offer only third-party practice (impleader) as a tool to involve third parties, then there is no solution to the issues at hand. The seller will be able to invoke the arbitration clause in the SPA. The same will apply to a Primary Dispute conducted as arbitral proceeding if the applicable rules, as the rules of most leading institutions actually do, only contemplate the joinder of third persons as an additional party (claimant or respondent). I hold, however, that with the consent of all original parties joinder of the seller in another capacity would still be possible. After all, party autonomy rules in arbitration.[109]

Pushing during negotiations for a right to join the seller as an additional *party* to any Primary Proceedings (be they conducted as court or arbitral proceedings) would be an uphill battle – and make no sense. The arbitration clause in the SPA would become pointless in many cases. Issues genuinely relating to the M&A transaction would end up in the state courts or in front of an arbitral tribunal that is not "made to measure". This is not a particularly appealing prospect.

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104) *Trittmann/Hanefeld* in Böckstiegel/Kröll/Nacimiento, Arbitration in Germany – The Model Law in Practice, 2nd ed. 2015, § 1029 para 11; *Geimer* in Zöller, ZPO, 31st ed. 2016, § 1029 para. 110; *Blackaby et al.*, Redfern and Hunter on International Arbitration, 6th ed. 2015, paras. 3.15-3.36, provide an excellent overview on the approaches to this question taken by various jurisdictions.

105) BGH 8.5.2014 – III ZR 371/12, SchiedsVZ 2014, 151 (153); *Schütze* SchiedsVZ 2014, 274 (276).

106) *Geimer* in Zöller, ZPO, 31st ed. 2016, § 1029 para. 108.

107) *Lord Denning* in *Abu Dhabi Gas Liquefaction Co. Ltd v. Eastern Bechtel Corporation* [1982] 2 Lloyd's Rep 425 (CA) at 427.

108) See the Study "International arbitration: Corporate attitudes and practices" published in 2006 by the School of International Arbitration at Queen Mary University of London in partnership with *PwC*.

109) UNCITRAL, Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, UN Doc. A/CN.9/207 (UN, 1981), para. 17: "*Probably the most important principle on which the Model Law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations.*"