M&A Post Closing Issues: Arbitration and Third Party Joinder*

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I. Reasons for Arbitration Clauses in M&A Contracts

While there are various kinds of M&A disputes, most of them share one thing in common: arbitration as a means of dispute resolution. Especially in the case of international M&A transactions, the advantages of arbitration are obvious: the parties are free to choose a "neutral" venue for the arbitral proceedings, as well as its language. Many share purchase agreements are drafted in English, so costly translations that might otherwise be needed for state court proceedings are not necessary.

Furthermore, there is no "home court advantage" for either party. Where a United States domiciled company is party to the M&A contract, the other party might be keen to avoid typical US litigation, especially if it is uncomfortable with its extensive document discovery procedures. Still, international arbitration proceedings are to a certain extent influenced by common law standards, so usually there will at least be some document production, mostly according to the IBA Rules on Taking Evidence. This makes them acceptable also for US or UK parties, who would otherwise not agree to civil law proceedings at all.

Arbitrators are often attorneys-at-law who – unlike state court judges – have a good knowledge of and experience in drafting M&A contracts themselves and generally also have a profound understanding of the underlying economic situation. Another advantage that cannot be stressed enough is the possibility of agreeing on the confidentiality of arbitral proceedings: in so doing, business secrets will actually be kept secret despite the fact that there are disputes stemming from the M&A transaction. Even if a certain structure had been chosen mainly for tax purposes, information will not be passed to "official" authorities who might be inclined to question the permissibility of such a structure. The award can – in many

* *This article was inspired by a panel discussion in which the author participated on May 13 and 14, 2010 in Warsaw, Poland. This conference on "Dispute resolution in M&A Contracts" was co-organized by the Lewiatan Court of Arbitration and by Beata Gessel – Kalinowska vel Kalisz. The author wishes to thank them as well as her co-panelists Karl Wach, Jesús Almoguera, Justin Michaelson and Tomasz Wardynski for their discussion and her colleague Susanne Wurzer for her support in preparing this article.*

jurisdictions – be more easily enforced under the New York Convention than by means of a national decision issued by a state court.

However, there are some procedural peculiarities which might render arbitrating M&A disputes complex[1]). This article will focus on typical procedural issues in post closing disputes connected to representations and warranties. These disputes arise after the parties have signed the transaction agreement (in most cases, a share purchase agreement), all conditions for the validity of the contract have been met and the shares have been transferred. Indemnification clauses[2]) which generally speaking can be considered an essential part of share purchase agreements, may cause problems because, typically, there are at least four parties involved: the seller, the purchaser, the target and the third party which raises claims against the target. Is arbitration fit to deal with such a situation? And, even more important: how many proceedings are needed to resolve this issue?

II. The Multi-Party Situation

Let us consider one example: the seller sells its 100% stake in the target to the purchaser. The target, for the sake of this example, is a car production company domiciled in Germany. After closing, when the target has become a 100% subsidiary of the purchaser, a third party seated in Poland, the target's customer, brings a warranty claim arising from deliveries made before signing. In the delivery contract, the target and its customer had agreed to VIAC arbitration in Vienna. In the share purchase agreement, the seller has guaranteed to hold the target free and harmless from any third party claims not stated in the balance sheet. However, the seller and purchaser agreed in this contract on ICC arbitration in Paris.

Now, as the ICC arbitration proceeds, there may be several variations of the case: firstly, the target can, in these warranty proceedings, act rather independently and pursue its own interests only. It may even choose not to inform its parent company (that is, the purchaser) of the arbitration, but instead try to settle the case amicably with a view to saving an existing business relationship and avoiding unnecessary publicity. Secondly, it may promptly inform its parent company (again: the purchaser) and act according to its instructions only. This will give the purchaser substantive arguments to build up its indemnification claim against the seller. Thirdly, it may, out of "old loyalty", decide to inform the seller (who was its former parent company) rather than the purchaser, possibly in the knowledge that seller may have promised to indemnify the purchaser in such cases. Such early information may again be vital for the seller to protect its own position.

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[1]) *See, e.g.,* Klaus Sachs, *Schiedsgerichtsverfahren bei Unternehmenskaufverträgen – unter besonderer Berücksichtigung kartellrechtlicher Aspekte,* SchiedsVZ 123, 124 (2004).

[2]) A typical indemnification clause might read: "*Seller shall indemnify and hold harmless the Purchaser from all liabilities, reasonable costs and expenses incurred by the Purchaser which arise out of a breach of any warranty, representation, covenant or indemnity of the Seller.*"

It goes without saying that such a situation is highly complex. Not only because the parties have very different economic interests: the target's managers should strive not to endanger the good business relationship with their customer, but on the other hand they will have to take into account the likelihood of a negative outcome of the warranty proceedings. Furthermore, they might take into account instructions issued by their parent company on how to proceed. In an ideal world, the target should not be influenced by the question of whether its conduct of the proceedings creates a liability for somebody else, namely for the seller due to the indemnification clause contained in the share purchase agreement. The seller, however, would be interested that the target is defending the claim in every possible way and goes through the whole arbitration to win the case at all costs, thus taking every chance to deny the existence of a third party claim that would trigger the duty to indemnify. The purchaser as the parent company of the target would typically be rather neutral, as it has the benefit of the indemnification clause anyway and may therefore prefer to sit back and await the outcome.

The underlying economic interests are one factor. The procedural side, however, is another: how many arbitrations do the parties need to finally clarify the seller's duty to indemnify? The "warranty" proceedings between the third party and the target (in our example, a Vienna Rules' arbitration) *and* the ICC arbitration on the basis of the share purchase agreement between the purchaser and the seller? Or would a common sense approach be more appropriate? Is there any possibility of avoiding duplicity and achieving the result that the existence of third party claims for which the seller is liable can be decided with binding effect on the seller in the warranty proceedings between the target and its customer? If so, are there any prerequisites that must be met to achieve such a result?

III. "Real Life" Share Purchase Agreement Clauses on Third Party Claims

Sometimes, share purchase agreements deal with such situations. Typical clauses[3]) might read:

> "*If Purchaser becomes aware of any claim by a third party, Purchaser shall allow Seller to take over the conduct of all proceedings in connection with the third party claim, if Seller elects so.*"

or

> "*Purchaser agrees to fully cooperate with Seller in defense of any third party claim and not to acknowledge or settle the third party claim without Seller's prior written consent that is not to be unreasonably withheld.*"

[3]) *See, e.g.*, Clemens Hasenauer & Lorenz Pracht, *Gewährleistung und Due Diligence, in* Handbuch Unternehmenskauf & Due Diligence Band i: Legal 109 (Althuber & Schopper eds., 2010).

At first glance, these clauses seem to solve the problem, but actually, they do not.

If we look at the first clause, the following observations have to be made: how does the purchaser "become aware of any claim by a third party"? Needless to say, by being notified by the target. What, however, if the target should fail to notify its parent company? From a legal point of view, there is no obligation to notify. Does the clause therefore stipulate a duty on the part of the purchaser to regularly investigate whether such claims have been made? What would the legal basis for such investigation be? And, even more to the point: how should the *purchaser,* who is not a party to the warranty arbitration, allow the seller to "take over the conduct of all proceedings"? Would this be allowed according to procedural rules? If we stick with our example and the applicability of the Vienna Rules, the situation is clear: the target and no one else is party to the arbitration agreement; there has not been any general or single succession in rights,[4]) so it may not even be thought of seller to step into that arbitration instead of target. Furthermore, according to Art 15 Vienna Rules, a claim against two or more Respondents shall be admissible only if the Centre has jurisdiction for all Respondents, and if the applicable law positively provides that the claim is to be directed against several persons, or if all Respondents are in legal accord by the applicable law or are bound by the same facts or are joint and severally bound, or if the admissibility of multiparty proceedings has been agreed upon, or if all Respondents submit to multiparty proceedings. None of these prerequisites is actually met.

Apart from these procedural remarks, it must be said that it might, from an economic point of view, be very harmful for the target if the seller – who is solely interested in defending the claim regardless of any loss – could simply take the place of the target in the arbitration proceedings, or, if we stay more realistic, could advise the target with binding effect on how to proceed. So, to sum it up, clause one would not help to solve the problem.

Clause two seems a little better. Cooperation between purchaser and seller to defend the third party claim does not mean a formal entry in the arbitration proceedings, but takes place in the "background" and is therefore admissible. The purchaser's duty to seek the seller's consent before entering into a settlement of claims on one hand and the promise that such consent shall not be unreasonably withheld are economically sensible. But even this clause does not solve the problem that the purchaser is not identical with the target and must therefore use its influence or convince the target to cooperate, provide all the necessary information and, finally, not to settle without the seller's consent.

Another clause on third party claims in a share purchase agreement might read:

> *"If the matter or circumstance that may give rise to a claim against the Seller is a result of or in connection with a claim by or liability to a third party*

[4]) *See, e.g.,* Franz Schwarz & Christian Konrad, The Vienna Rules, A Commentary on International Arbitration in Austria 15-84 *et seq.* (2009).

('Third Party Claim'), then, to the extent information is available to Purchaser and not to Seller, Purchaser shall notify Seller to give Seller the opportunity to fully inform Purchaser about the claim. If Seller becomes aware of any Third Party Claim against the Company, Seller shall in due course inform Purchaser."

Even this clause – that has been taken from a compromising "consultation draft" will not help to avoid duplicities as it stipulates only very basic duties to provide information and is very vague as regards the Parties' respective obligations. Still, it hints that the result achieved in the arbitration between target and the third party could be binding on the seller if all duties to provide information have been met.

The conclusion is that clauses found in share purchase agreements do not always offer satisfactory solutions to problems that occur in practice. They are often the result of negotiations and influenced by the negotiation power of the parties. Furthermore, M&A lawyers sometimes do not consult their arbitration colleagues in procedural questions.

IV. Practical Consequences: Multiplication of Proceedings with Different Outcome?

If we come back to our example from the beginning, the practical consequences of the problem can be highlighted easily. As a result of the warranty arbitration according to the Vienna Rules between the target and its Polish customer, the arbitral tribunal, after hearing 20 witnesses and analyzing 12 binders of documents on defective spare parts, orders the target to fulfill the customer's warranty claim. May the seller now, in the indemnification arbitration under the ICC Rules against the purchaser, argue that the decision of the liability panel was wrong, and may the seller insist the newly instituted arbitral tribunal to repeat the full evidence procedure, which may even lead to a conflicting decision?

When answering this question, one has to bear in mind that the target and its customer had not agreed to the same proceedings as the seller and the purchaser as a dispute resolution mechanism. And, as *Elsing*[5]) stated, if parties agree on an arbitration clause in the share purchase agreement, this implies that the arbitration tribunal shall have freedom of decision and shall not be bound by the decision in the warranty proceedings.

On the other hand, it may be argued that such a duplication does not lead to a reasonable result: it was the specific aim of the indemnification clause that the purchaser wanted to be held harmless for any depreciation of the target resulting from an unknown third party claim. Such a claim would in the end materialize in a negative award by the arbitral tribunal deciding on the warranty claim.

[5]) Siegfried H. Elsing, *Streitverkündung und Schiedsverfahren,* SchiedsVZ 88 (2004).

What would a reasonable solution for this problem be? Of course, that the target must lead the warranty proceedings and keep the purchaser informed, *and* in order to subrogate against the seller, the purchaser must involve the seller in the warranty proceedings, *i.e.* give the seller the possibility to assist the target. In the event of a dispute between the seller and the target regarding the strategy, the target must have the authority to decide on the cost of the purchaser potentially losing the recourse claim. On the other hand, if the seller participates actively in the warranty proceedings, it cannot subsequently bring new defenses in its proceedings against the purchaser which the seller did not present before, whether intentionally or due to its own negligence. Therefore, in the recourse proceedings, the seller is excluded from bringing defenses against the third party claim which the seller failed to raise in the warranty proceedings. If, however, the seller could not present these arguments in the warranty proceedings because the target disallowed them, or if the target did not present these arguments in the warranty proceedings and the seller only learnt of them after the arbitral award in these proceedings had been made, the seller shall of course be entitled to raise these arguments in the indemnification arbitration against the purchaser.

This "reasonable" solution, however, is not depicted in the applicable arbitration laws. Therefore, in order to reach such a result, it is the task of the lawyers to find a solution, possibly by agreement of all parties:

In order to avoid two different proceedings and the risk of diverging decisions of the competent arbitral tribunals, it will be in the purchaser's interest to consolidate the two different proceedings or find a solution which either binds the seller to the results of the "warranty proceedings" between the target and the third party or requires the seller to participate in these. The question therefore arises as to whether the arbitration clause contained in the delivery contract allows the arbitration proceedings to be extended in such a way as to encompass the seller as well, or possibly the seller and the purchaser. Or, to put it differently, whether it is possible to bind the seller to the results of the proceedings between the target and the third party. Such a result is, in normal court proceedings, achieved by what is referred to as "third party joinder".

V. Procedural Aspects

A. Third Party Joinder

1. Third Party Joinder in Court Proceedings

Many rules on civil procedure give parties to court proceedings the possibility of involving third parties in the proceedings and binding them to the results of these proceedings. In Austria, third party joinder *(Nebenintervention)* is provided for in Sec 17 *et seq.* of the Austrian Code of Civil Procedure (*Zivilprozessordnung* – ACCP). Pursuant to the Austrian regulations, a joining party may become in-

volved in the proceedings provided that this third party has a *recognized legal interest* in the outcome of the court proceedings which requires that the decision in these proceedings has a (beneficial or adverse) effect on the rights or legal relationships of this party.[6]) This prerequisite already seems problematic in the example set out above: often, a simple "economic interest" is insufficient. In the case of a mere "economic interest", the judge would have to dismiss the third party joinder *ex officio* and *in limine*[7]). A "recognized legal interest" is, for example, affirmed if a negative decision in one proceeding automatically creates a liability of a third party to indemnify.

At first glance, this seems to be no problem in our warranty case: is it not clear that, as soon as the arbitration panel in Vienna has affirmed a warranty claim against the target that has not been stated in the balance sheet, the seller's duty to indemnify the purchaser according to the share purchase agreement is triggered? If we look into the case in more detail, we will, however, discover that this is not the case: if the target is ordered to fulfill its customer's warranty claim, it will be clear that the target's value is diminished because of the additional liability that was not included on the balance sheet. On the other hand, such depreciation in value does not automatically mean that its parent company, the purchaser, is under an obligation to inject money into the company to make up for this loss. Therefore, the purchaser is only affected indirectly, and there is a Supreme Court decision in Austria[8]) which shows that such a depreciation of share value does not constitute a reimbursable damage *per se.* Therefore, the purchaser can only claim damages from the seller on the basis of the existing indemnification clause. There is no direct liability on the part of the seller vis-à-vis the target, as there is no direct contractual relationship between them. As a consequence, there is no recognized *legal* interest on the part of the seller in the target winning its case, but only an *economic* one. This would not be sufficient for a state court in Austria to allow for the seller's joinder in warranty proceedings between the target and its customer.

If, for the sake of argument, we leave this important restriction out of consideration for a moment, the effect of joinder in "normal" court proceedings according to Austrian law would be as follows: the joining party is bound to the decision in the proceedings insofar as it cannot raise any objections in later proceedings which would contradict essential elements of the original decision. Moreover, pursuant to Sec 21 ACCP, each party has the right to notify a third party of the ongoing proceedings and request the third party to join the proceedings *(Streitverkündigung)*. While the third party is under no obligation to join the proceedings, it usually is well advised to do so, as third parties who were notified of the proceedings but did not intervene are also covered by the binding effect de-

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[6]) Robert Fucik, *Sec 17, in* ZPO-Kommentar item 2 (Rechberger ed., 3rd ed. 2006).

[7]) Wolfgang Jelinek, *Bemerkungen zur Streitverkündung und zur einfachen Nebenintervention in der privaten Schiedsgerichtsbarkeit, in* Festschrift W. Schwarz 512 (Martinek et al. eds., 1991).

[8]) OGH, Dec 22, 1994, docket no. 2 Ob 591/94, *in* ecolex 901 (1995) or *in* RdW 262 (1995) (Austria) or *available at* www.ris.bka.gv.at/Jus/ (last visited July 21, 2010).

scribed above. As a consequence of such notification, the third party is therefore bound to the court proceedings and cannot introduce new arguments in later court proceedings (in particular, against the party which asked the third party to join the original proceedings). Similar regulations apply in other jurisdictions, *e.g.* in Germany Sec 68 *et seq.* of the German Code of Civil Procedure (*Zivilprozessordnung* – GCCP).

However, there are doubts as to the effects of a third party joinder (respectively, of a notification and request to joint the proceedings) in court proceedings on a third party who is a signatory to an arbitration agreement and the later arbitral proceedings. Are the third party and the arbitral tribunal bound to the essential elements of the court decision in the arbitral proceedings that are to follow?

The effects of the third party notification and joinder in court proceedings on the third party in subsequent arbitral proceedings will depend on the scope of the arbitration agreement. In Germany, it has been argued by *Elsing* that in the absence of any agreement to the contrary, the arbitration agreement (in our example, between the seller and the purchaser) has to be construed as having a very wide scope with the effect that the arbitral tribunal is not bound by any decision of the state court even if there was a third party notification and it can decide independently.[9]) Only in the event that the third party had joined the court proceedings without any reservation, this joinder could be regarded as a restriction of the arbitration agreement with the effect that the third party would be bound to the court's decision. From the point of view of the author, the same considerations apply for Austrian law: Under Austrian law, the arbitration clause also has to be construed widely and on the assumption that the parties intended to entrust the arbitral tribunal with all aspects regarding the dispute.[10])

2. Third Party Joinder and Arbitration

The admissibility of third party notification and joinder in arbitral proceedings – as in our case, where we have an arbitration agreement under the Vienna Rules for the warranty claim arising from the delivery contract as well – will depend on the applicable *lex arbitri* and, in the case of institutional arbitration, on the arbitral rules. Very often, the *lex arbitri* does not contain express regulations on a third party joinder comparable to the respective regulations in civil procedure codes. For example, while Austrian and German law contain regulations for third party notification and joinder in court proceedings, there are no such regulations for arbitral proceedings. Despite this lack of regulations, according to the prevailing opinion, third party joinder is possible[11]) – however, considerable restrictions apply which render third party notification and joinder in arbitration

[9]) Elsing, *supra* note 5.

[10]) Christian Hausmaninger, *Sec 581, in* Kommentar zur ZPO IV/2 item 227 (Hans W. Fasching ed., 2nd ed. 2007).

[11]) Karl J. T. Wach & Frank Meckes, Tactics In M & A Arbitration 47 (2008).

much less attractive than in court proceedings. These restrictions will differ between jurisdictions.

In Germany, it seems to be generally recognized that joinder is only possible if all involved, *i.e.* the parties to the arbitral proceedings, as well as the third parties, agree on such joinder.[12]) *Elsing* stresses that the regulations of the GCCP on third party joinder are neither applicable directly nor *per analogiam* and that therefore an agreement is necessary.[13]) Furthermore, the third party shall only be bound to the effects of the award rendered in the arbitral proceedings if the third party and the party which notified the third party of the dispute and requested it to join, expressly agree so (the consent of the opposing party is not required).[14])

In Austrian legal writing, it has been stated that third party notification is admissible, but only has a binding effect on the third party if the third party expressly was or becomes a party to the arbitration agreement (in our example, the one in the distribution contract). Only in this case would the third party be bound to the award, even if it did not participate in the arbitral proceedings despite a third party notification and request to join.

It goes without saying that it is impossible for an arbitration agreement included in a distribution contract that had been entered into well before the seller sold its shares in the target to have been signed by the purchaser or even the seller. Therefore, according to the Austrian legal doctrine,[15]) the seller would not be bound to an arbitral award derived from such arbitration. Furthermore, the Austrian Supreme Court stated that a third party notification and request to join an ongoing arbitration will not lead to a binding effect of the award on the third party if the third party was not also a party to the arbitration agreement.[16])

If the parties agreed on arbitration pursuant to the rules of arbitration of an arbitral institution, the provisions of these rules also have to be adhered to. As several rules of important arbitral institutions contain restrictions on the possibility to join proceedings, joinder will again only be possible if certain requirements are met.

The Vienna Rules (that would be applicable in our example) do not contain express regulations on joinder. Some scholars writing on the subject have stated that based on Art 15 (8) of the Vienna Rules – which provides that consolidation of proceedings requires, *inter alia,* the consent of the parties – there is a systematic argument that a joinder of a third party in ongoing proceedings also requires the consent of all parties involved. This means that not only the consent of the parties and the third party, but also the consent of the arbitrators is required.[17])

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[12]) Jens-Peter Lachmann, Handbuch für die Schiedsgerichtspraxis item 2832 (2008); Karl Heinz Schwab & Gerhard Walter, Schiedsgerichtsbarkeit chapter 7 item 23 (2005).

[13]) Elsing, *supra* note 5, at 91.

[14]) *Id.* at 93.

[15]) Hausmaninger, *supra* note 10, at Sec 594 item 144.

[16]) OGH, Oct 1, 2008, docket no. 6 Ob 170/08f, *in* ecolex 39 (2009) (Austria).

[17]) Schwarz & Konrad, *supra* note 4, at 15-077.

The ICC Rules do not expressly provide for a joinder of one or more third parties in arbitral proceedings either. However, it has been said that if a respondent has a claim against a third party, it can add a third party to the ICC arbitration if the claimant and the third party consent to such a cross-claim.[18]) Without the consent of the claimant, a joinder of the third party is only possible if the third party has signed the arbitration agreement on the basis of which the request was filed and that the request for joinder has been made before the constitution of the arbitral tribunal. As, in the case at hand, usually neither the seller nor the purchaser will have signed the arbitration agreement on the basis of which the request was filed, such joinder will in most cases be impossible.

3. Interim Result for M&A Disputes

In the case of "standard arbitration clauses", a joinder of the seller in the proceedings between the target and its customer will not be easy. As described above, pursuant to Austrian or German procedural law, such a measure requires that all parties agree to the joinder and the binding effect, or that the seller is already a party to the arbitration agreement in the ongoing arbitration which it is required to join. However, the disputes between the seller and the purchaser on the one hand and the target and its customer on the other usually derive from two separate agreements: the share purchase agreement on the one hand and the distribution agreement on the other; consequently, there is not one arbitration agreement but two different arbitration agreements: one under the ICC Rules, the other one under the Vienna Rules. As a result, a binding effect of the third party notification will only be given if the seller expressly agrees to this effect.

On the other hand, should all parties agree, the prerequisite of a "recognized legal interest" of one party winning its case – like in Austrian state proceedings – does not seem to be necessary, but may be substituted by the mutual consent of all parties to recognize the outcome of the arbitration as binding.

B. Consolidation of Proceedings?

In the case of a consolidation of arbitral proceedings, several pending or initiated arbitrations are united into a single set of arbitration proceedings before the same panel of arbitrators.[19]) Again, a consolidation will require respective provisions in the applicable *lex arbitri* or the applicable arbitration rules. There are several jurisdictions in which the relevant state courts are authorized to order the consolidation of arbitration proceedings, *e.g.* in the Netherlands and in Hong Kong.[20])

[18]) Michael W. Bühler & Thomas H. Webster, Handbook of ICC Arbitration 5-50 (2nd ed. 2008).

[19]) Schwarz & Konrad, *supra* note 4, at 15-57.

[20]) Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 3-82 (Sweet & Maxwell eds., 2004).

However, neither the UNCITRAL Model Law on International Commercial Arbitration nor most national legislation contain regulations on this issue. In the absence of regulations, "compulsory consolidation" will not be possible.[21]) Only if all parties to the proceedings agree and if the arbitral tribunals in the different proceedings are either identical or not yet constituted will consolidation therefore be possible.[22])

Furthermore, consolidation will be possible under the conditions set out in the applicable arbitral rules. Pursuant to Art 4 (6) of the ICC Rules, the consolidation of several arbitral proceedings requires the affirmative decision of the ICC court upon the request of one of the parties and is only possible if the arbitration proceedings are between the same parties; furthermore, the proceedings must all be ICC arbitration proceedings and either be at an initial stage or meet the requirements of Art 19 of the ICC Rules.[23]) In our example, no such consolidation would therefore be possible.

Art 15 (8) of the Vienna Rules provides that the consolidation for two or more disputes shall be admissible only if the same arbitrators have been appointed in all the disputes to be consolidated and if all parties and the arbitrators agree. Again, without being expressly stated, consolidation is only possible between different arbitrations which are all subject to the Vienna Rules. Art 4 (1) of the Swiss Rules also requires that the proceedings which are to be consolidated are all Swiss Rules proceedings. However, the Swiss Chambers are entitled to decide on the consolidation of proceedings between different non-identical parties after consultation with the parties. The consolidation of proceedings under the Swiss Rules therefore does not require the consent of all parties.

Because of these strict requirements, the consolidation of proceedings will in most M&A disputes – and definitely in our example – not be an option as it requires that all proceedings are subject to the same arbitration rules or the same lex arbitri. Even if this requirement is met, consolidation of the liability and the warranty proceedings would again not be possible if both proceedings were subject to the ICC Rules and all parties agreed to consolidation, as the requirement of identity of the parties is not met. If the share purchase agreement and the agreement between the target and the third party would both provide for arbitration under the Vienna Rules, consolidation would only be possible if all parties involved agree. However, if only one party objected to the consolidation, there is no such option, other than under the Swiss Rules, where consolidation of proceedings between different parties is also possible against the will of one of the parties involved.

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[21]) Schwab & Walter, *supra* note 12, chapter 16 item 20.

[22]) Lachmann, *supra* note 12, at item 2834 *et seqq.*

[23]) Bühler & Webster, *supra* note 18, 4-71 *et seqq.*

VI. Possible Solutions

Several of the aforementioned problems could be avoided when drafting the share purchase agreement. At this time, the parties can provide for binding effects of decisions between the target and its main contractors. Such an agreement would, of course, have to be covered by a detailed framework on duties of the purchaser to provide information to the seller, and on the effects of default to cooperate, both on the part of the seller and on the part of the target (which would be attributed to the purchaser).

Alternatively, the parties could merely agree on the seller's obligation to assist the purchaser or the target in proceedings relating to the representations and warranties or indemnification clauses and the effects of the failure to do so. Whether and which of the solutions the parties choose will depend mainly on the factual circumstances and which of the parties has the stronger bargaining position.

However, even if such a clear solution is not possible as the buyer cannot persuade the seller to agree on them, there are some agreements on procedural issues which might make a harmonization of proceedings easier. Firstly, the parties should try to synchronize the competent venue of the share purchase agreement with the competent venue for the most important possible third party claims against the target: for example, if the target has, in its main contracts, always opted for arbitration under the Vienna Rules, it will be a wise solution also to submit any and all claims arising from the share purchase agreement to these rules. If, however, there are probably different venues or arbitration clauses in different contracts with third parties, it will not be possible to have one competent venue for all possible situations. Still, choosing the same arbitration clause in the share purchase agreement that is part of the contract with the most important supplier of the target would be a good solution. If there are many important contracts, it might be wise to submit the share purchase contract to the same arbitration that most of them contain. On the other hand, this should not be the only argument: if most contracts are subject to national litigation, and a national decision is not enforceable against the seller, it would be a real mistake (and trigger professional liability) to submit disputes from the share purchase agreement to this national jurisdiction.[24]) So, joinder or harmonization of various proceedings is not a goal in itself, but only a tool to avoid unnecessary diverging decisions, and careful consideration should therefore be given to it.

[24]) Irene Welser & Michaela Siegwart, *Die praktische Durchsetzung von Gewährleistungsansprüchen aus Unternehmens- und Anteilskaufverträgen, in* Handbuch Unternehmenskauf & Due Diligence Band I: Legal 154 (Althuber & Schopper eds., 2010).