Arbitration of M&A Transactions

A Practical Global Guide
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Procedural and tactical issues

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1. Introduction

The aim of this chapter is to highlight certain key procedural and tactical issues that can arise in M&A-related arbitrations, including requirements for notification of, and financial restrictions on, claims, and issues that arise once an arbitration commences, such as the applicable law, selection of the tribunal and disclosure. The extent to which any or all of these issues will arise will depend on the wording of the relevant contractual provisions, and so as well as being important once a dispute arises, they should also be considered when negotiating the terms of the M&A contract in the first place.

2. Contractual formalities and limitations

2.1 Notification requirements

M&A contracts usually specify time limits for certain types of claim that the buyer might bring against the seller (eg, a warranty or indemnity claim). These 'limitation periods' (or 'warranty periods' as they are often known) tend to vary depending on the type of claim. Claims arising from general commercial matters usually have shorter limitation periods than other types of claim where the existence of a liability may not come to light until some significant time after acquisition (eg, environmental or tax claims (where, in addition, the purchaser is likely to want a limitation period beyond the relevant tax authority's time limit for making an assessment)). The purpose of these limitation/warranty periods is to shorten the period of time that would otherwise be allowed to the buyer to bring such claims under the relevant governing law. This allows the seller not only to reduce the length of its exposure to, and therefore risk of, potential claims, but also to provide some certainty as to when such exposure ends.

Notification requirements for indemnities usually require the buyer to notify the seller as soon as a matter arises that might give rise to a claim under an indemnity. This is because the seller will usually want to be kept informed of the relevant matter and have the option of controlling its conduct (eg, where a third-party claim against the target arises from pre-acquisition matters) in order

to minimise its liability. By contrast, notification requirements for warranty claims tend to adopt a two-stage process: first a requirement that a claim is notified within a set period of time, and secondly a requirement that legal proceedings be commenced in respect of any notified claims within a certain further period of time.

(a) Timing

The consequences of failing to notify the seller of a warranty claim within the contractual limitation period or failing to thereafter commence proceedings within the specified time limit will turn on the express provisions of the contract as applied by the relevant governing law. However, M&A contracts are often drafted to ensure that failing to comply with either time limit is an absolute bar to a claim. If such agreement is made in an M&A contract governed by English law, the English courts will strictly apply the terms of the contract and will not generally grant relief to a purchaser who fails adequately to notify or bring a claim within the prescribed time frame.[1]

It is common for the agreement to provide that the time limit for the commencement of legal proceedings should run from the date of notification by the purchaser to the seller of the existence of the claim. However, it is much more preferable from a purchaser's perspective for the time to run from the expiry of the contractual limitation period for notifying claims, rather than the actual notification date. The reasons for this are three-fold.

- It avoids the risk of multiple proceedings. If a claim has to be commenced by reference to when it was first notified (eg, within six months), it may lead to situations – especially when claims have to be notified as soon as possible – where proceedings have to be brought promptly and before the expiry of the contractual notification period. If further claims subsequently arise, these have to be notified and subsequent legal proceedings commenced. Over the course of a three-year warranty period, several sets of proceedings might have to be

1 See, eg, *ROK Plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm), where the English court struck out one of the purchaser's three claims against the seller because the level of detail of that particular claim provided in the notice from the purchaser to the seller was inadequate. Also, *Ener-G Holdings plc v Hormell* [2011] EWHC 3290 (Comm), where under the terms of the sale-and-purchase agreement the purchaser had to commence and serve proceedings in respect of any claim within 12 months of notification of the claim. The purchaser left a notice of claim at the seller's address and then, a day before the 12-month limitation period expired, left the claim form at the seller's address. The seller actually obtained the notice on the day it was delivered, but did not actually obtain the claim form on the day it was delivered because he was away from home. As a result, the court applied a deemed date of receipt to the claim form (but not to the notice), which meant it was deemed received two days after delivery and therefore served out of time. However, in *Hopkinson v Towergate Financial (Group) Ltd* [2018] EWCA Civ 2744, the English court emphasised once again that notification requirements turn on the express terms of the M&A contract. In that case, the Court of Appeal held that the purchaser's notice of an indemnity claim to the seller was not defective in lacking the necessary detail because the notification requirements in the M&A contract only required such detail to be given specifically in relation to warranty claims and not indemnity claims.

commenced in order to avoid each one becoming time-barred before the next claim arises. In court proceedings this would be unsatisfactory; but in arbitration proceedings, where the consolidation of claims is much more difficult, this can lead to significant additional expense and, if different tribunals are constituted, inconsistent awards.

- It avoids the risk of the purchaser inadvertently notifying the seller of a claim but, because (say) it was communicated informally, thereafter forgetting to commence legal proceedings within the requisite time limit.
- As discussed further below in relation to limitations of liability, having to commence claims other than by reference to the expiry of the warranty period may result in claims having to be brought earlier than is desirable for the purchaser. In particular, the deadline for commencing a particular claim may occur before there are sufficient claims to meet any minimum threshold value necessary to bring a claim.

(b) Validity

In many cases, the validity of the notification of claims by the purchaser is disputed by the seller. This is especially the case in situations where the notice is given near or on the expiry of the contractual limitation period such that any defect in the notification of claims cannot be remedied in time. If, under the terms of the relevant contract, the result of a defective notice is to make the notice ineffective, there is a great incentive for the seller to seek to challenge the validity of the notice. For this reason, the validity of a notice is invariably challenged by the seller and the seller will often seek to have this determined by the arbitral tribunal as a preliminary issue. Furthermore, it is unlikely that an arbitral tribunal will refuse to determine the validity of the notice as a preliminary issue if this is requested by the seller since resolving this issue at the outset will result in a substantial saving of time and costs, compared with leaving it until the final hearing, if indeed the notice is invalid.

As a result, purchasers need to take great care in the preparation of any notices of claim in order to ensure that they are valid and effective. Some of the most common grounds for disputing the validity of notices of claims centre on the following aspects.

- Timing. As mentioned above, failing to ensure that notification of a claim is given within the relevant contractual time limit is generally fatal to that claim.[2] As such, it is essential to carefully review the notice provisions within the M&A contract to ascertain how the deemed date of notification is calculated. Particular care should be given to how notifications outside business hours are treated and how business days

2 *ROK Plc v S Harrison Group Ltd, op cit.*

are calculated. If a notification is actually received by the seller before the expiry of the limitation period, but is not deemed to have been received until after the limitation period has expired, some jurisdictions may treat the notification as not having been made in time. Similarly, as ENER-G Holdings plc found to its cost, if the M&A contract is not carefully drafted, the same method of service may result in two different notification dates depending on whether the notice is actually received or only deemed to be received.[3]

- Communication method and official recipient. Similarly, the method of notification and the necessary recipient of the notification need to be carefully checked in the M&A contract. Giving notice by email or fax when such a method of communication is not provided for in the contract is again likely to be fatal to the validity of the notification; likewise, if the notification is sent to the wrong address (eg, to the seller's headquarters rather than the address for notices specified in the M&A contract), again the claim is likely to fail.
- Details in the notification. It is important to ensure that the content of the notice itself is compliant. The validity of such notices is frequently disputed for failure to provide sufficient detail. For the most part, this is because of the windfall to the seller should such a challenge succeed, as described above; however, occasionally it is because the notice genuinely lacks sufficient detail or turns out to be different from the claim that is later brought.

What amounts to a sufficient level of detail in these circumstances is purely a question of construction of the relevant clause under the governing law. The English courts have made clear that in their view the interpretation of a notification clause in one agreement is of little assistance in interpreting any other. Rather, the question is whether the notification fulfilled the commercial purpose of the notice requirement to ensure that the seller is informed, by the expiry of the limitation period, that there are claims under the contract, and with sufficient information (by reference to the terms of the M&A contract) to understand the nature of these claims. Under English law, a failure to provide the contractually agreed level of detail of any claim in a notice is not just a mere technicality but renders the notice ineffective.[4]

The circumstances giving rise to the warranty or indemnity claim of the purchaser may actually prevent the purchaser from notifying the seller of the existence of such claim whether within the prescribed timeframe or with the necessary level of detail regarding the nature of the claim. For example, if the

3 *Ener-G Holdings plc v Hormell, op cit.*
4 *ROK Plc v S Harrison Group Ltd, op cit*; *Hopkinson v Towergate Financial (Group) Ltd, op cit.*

claim arises from allegations of money laundering, bribery and corruption or other criminal conduct, local legislation may actually prohibit the purchaser from notifying the seller of the discovery of such conduct and a potential claim under the M&A contract for any resulting losses. This is because such notification might amount to 'tipping-off' the seller, which is a criminal offence in certain countries.[5] It is unlikely that the M&A contract will deal expressly with such circumstances. As such, it will probably still be necessary to provide such notification to the seller, if any, as may be legally permissible, possibly working with local law enforcement agencies to ensure such notification is as detailed as possible without constituting a tipping-off or similar offence.

(c) Arbitration-specific issues

Most of the matters described above apply equally whether the dispute is to be resolved through arbitration or litigation, but there are specific matters that arise in the context of arbitration proceedings which need to be borne in mind. These are set out next.

Date of commencement: As noted above, there are often two relevant time limits that need to be satisfied in order to bring a claim: the time by which notification to the seller of the existence of the claim must take place, and the time by which legal proceedings (in this case, arbitration proceedings) must be started. As such, it is important to ascertain with great care, especially if the limitation period is near, as to when arbitration proceedings are technically commenced. This calculation is made by reference to the arbitration rules and/or mandatory laws of the seat of the arbitration (the *lex arbitri*). For example, under the London Court of International Arbitration (LCIA) Rules, the date of receipt by the registrar of the request for arbitration shall be treated as the date on which the arbitration has commenced for all purposes.[6] However, the request shall be treated as not having been received by the registrar and the arbitration as not having been commenced if the request is not accompanied by the prescribed registration fee.[7] As such, for the unwary practitioner the omission of the relevant fee could result in arbitration proceedings not being commenced within the relevant time limit. In contrast, under the International Chamber of Commerce (ICC) Rules of 2017 it appears that failure to pay the filing fee along with the request for arbitration does not mean that the arbitration is not deemed to have commenced on the date on which the request is received by the secretariat.[8]

In addition, it is common to find that notification clauses not only require

5 For example in the UK under Section 333A of the Proceeds of Crime Act 2002.
6 Article 1.4 of the LCIA Rules 2014.
7 Article 1.4 of the LCIA Rules 2014.
8 Article 4.2 of the ICC Rules 2017.

arbitration proceedings to be commenced, but also that the seller be notified of them before the expiry of the limitation period. This should not be an issue in LCIA arbitrations, where the respondent needs to be notified of the request for arbitration simultaneously with the request being filed with the registrar. However, under the ICC Rules, although the date on which the request is received by the secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration,[9] the ICC is responsible for notifying the respondent of the request and this usually takes several days at least. As such, if the limitation period is near, not only should the claimant ensure that the filing fee is paid and the ICC has sufficient copies of the request, but steps should be taken to notify the ICC secretariat of the urgency of the need to notify the respondent. In addition, the claimant should take its own steps to notify the respondent of the request independently of the ICC.

Formalities: There may be a potential conflict between the notification requirements under the M&A contract and the notification requirements under the relevant arbitration rules and/or the *lex arbitri*. For example, if the contract requires that arbitral proceedings be commenced and notified by a certain date, does such notification have to take place in accordance with the notification provisions in the contract (which might require notification of a particular officer, branch or agent) or in accordance with the notification provisions under the relevant arbitration rules and/or the *lex arbitri* (which might specify the respondent's main place of business)? In order to avoid any potential conflict, it is advisable when drafting the arbitration agreement contained in the M&A contract expressly to provide that requests for arbitration are to be served in accordance with the notice provisions under the contract. That express agreement between the parties will override any inconsistent provision under the relevant arbitral rules. If there is still doubt or if such express language was not included in the contract, then it is appropriate to serve any request both pursuant to the notification provisions of the M&A contract and in accordance with the notification provisions under the relevant arbitration rules and/or the *lex arbitri* so as to avoid any argument that valid notification of the arbitral proceedings has not taken place.

Multiple proceedings: With the difficulties that will inevitably arise in arbitration with multiple proceedings, including difficulties in consolidating proceedings, the cost of appointing different tribunals and the possibility of inconsistent awards, it becomes very important that the time limit for commencing arbitral proceedings is drafted in such a manner as to avoid or minimise the need for multiple proceedings.

9 *Ibid.*

Choice of arbitrator: If there is an issue regarding the validity of the notification of any claim, whether because the notification of the claim was late, was sent to the wrong recipient, lacked detail or is otherwise alleged to be defective, then the profile of the arbitral tribunal is likely to be especially important. While the requirements for notification and the consequences for failing to satisfy these requirements is ultimately a question of interpretation of the contract and applying the relevant governing law, arbitrators do not operate in a vacuum. Their interpretation of the contract and application of the governing law will naturally be influenced by their legal background; and if that background does not strictly apply notification provisions, they are less likely to be inclined to find that a notice is defective or that a defective notice bars a claim.

2.2 Financial limitations of liability

Another method by which sellers seek to limit their liability is excluding their liability for certain types of claim (eg, innocent or negligent misrepresentation). The validity, effectiveness and potential scope of such exclusion clauses is to be determined by reference to the governing law of the contract. By way of example, English law does not permit exclusion clauses in respect of fraud claims and any such clause is null and void.[10]

In virtually all M&A contracts there will also be financial limitations of liability in respect of certain types of claim and/or in respect of the contract as a whole. Often, sellers will insist on a total financial cap (ie, maximum liability) in respect of any and all claims. Frequently, this is no more than the purchase price to be received under the contract for the shares or assets. However, such a cap should not be agreed without due consideration, and care should be taken if, for example, the purchase price is artificially low because the purchaser is taking on liabilities of the target. Likewise, sellers will seek to impose a minimum threshold of liability for all claims in the aggregate (also known as a basket) before the purchaser is able to pursue a claim (whether for the full amount or just the extent to which the threshold has been exceeded). This is because it is often impracticable or impossible to be entirely precise in relation to the state of the business, and the seller should not be expected to face claims for breaches of the M&A contract that only involve in total a small amount in the context of the value of the business. Furthermore, sellers will often seek to impose a *de minimis* threshold for each claim, where claims below this sum are ignored entirely on the basis that the sums involved are so small that it is unreasonable to expect the seller to warrant or be subject to claims in respect of

10 Under Section 3 of the Misrepresentation Act 1967, as replaced by Section 8(1) of the Unfair Contract Terms Act 1977, and as a matter of common law – see *S Pearson & Son Limited v Dublin Corp* [1907] AC 351.

such sums. While claims falling below the *de minimis* threshold are ignored entirely, claims for sums in excess of the *de minimis* threshold but below the basket threshold are placed in the basket and are able to be brought if and when the basket threshold is exceeded following the addition of further claims.

A common problem in relation to limitations on liability revolves round a requirement on the purchaser to notify the seller of any claims as soon as they arise, whether they exceed the basket or not. As discussed above, this is often combined with a requirement that legal proceedings be brought in respect of such notified claims within a relatively brief period (eg, six months). If this is the case, with the requirement for immediate notification there is a risk that by the time the deadline for commencing legal proceedings occurs the basket threshold will still have not have been reached. As a result, the seller will be able to rely on the *de minimis* threshold to defeat such a claim.

2.3 Strategies to address potential issues

There are various drafting and/or procedural strategies that can be deployed to deal with some of the common issues regarding difficulties with the timing and/or quantum limitation issues discussed above. These comprise so-called 'standstill agreements', contingent liability clauses in the M&A contract, and formal declarations by an arbitrator.

(a) Standstill agreements

If a claim arises, but the purchaser does not want to notify the claim or commence an arbitration (eg, because there may be issues regarding liability or whether the basket threshold will be exceeded), it may be possible to agree a standstill period with the seller. Such a 'standstill agreement' has the effect of halting the limitation period for the notification of a claim or category of claims or the commencement of arbitration.

Clearly, to be effective any such standstill agreement will require the agreement of the seller. Nevertheless, a seller might be inclined to agree to a standstill while, for example, the purchaser attempts in good faith to calculate the quantum of any claim or defend a claim brought by a third party, when the alternative is to become a respondent to arbitration proceedings commenced by the purchaser in order to protect its position. Even if the arbitration is subsequently discontinued (eg, because it becomes apparent to the purchaser that the liability threshold has not been exceeded), the seller will face wasted costs and management time in dealing with what ultimately proves to be unnecessary arbitration.

(b) Contingent liability clauses

Contingent liability clauses are often included in M&A contracts. They provide that the seller shall have no liability in respect of contingent liabilities unless

and until such contingent liability becomes an actual liability. Such a clause would potentially prevent claims for contingent liabilities being validly notified or commenced within the relevant limitation period, as no actual liability has yet arisen. In order, however, to avoid sellers evading liabilities that remain contingent when the limitation period under the M&A contract expires, it is advisable, if acting for the purchaser, to include a provision in the M&A contract allowing claims for contingent liabilities to be brought once they become actual liabilities, notwithstanding the expiry of the limitation period, provided that the claim for what, at the time the notification was made, was still a contingent liability has been properly notified within the relevant limitation period. Such clauses have the effect of delaying the need to commence arbitration until claims amounting to contingent liabilities have matured.

(c) Declarations

A further possibility is to commence an arbitration process to seek a declaration of liability in respect of claims that might not yet be quantified. The ability to simply seek a declaration of liability, especially where there are liability thresholds before any recovery can be made, will ultimately turn on the language of the M&A contract.

3. Procedural issues

3.1 Applicable law

Although the question of applicable law has been discussed in some detail in earlier chapters of this publication, it is worth revisiting the topic here because it influences so many of the procedural issues of arbitration.

The law applicable to the merits will govern any questions of substance such as whether there has been a breach of warranty, or the correct interpretation of a particular contractual provision regarding the decision-making process in a joint venture. Parties may – and should for the sake of certainty – unambiguously select a governing law in their agreement and consider any potential rules of public policy which might impact on the validity of that choice. In the absence of a contractually agreed governing law, the arbitrators will be free to select the law that is deemed as applicable,[11] and any award they render will only be subject to limited, if any, substantive review, depending on the seat of the arbitration and the arbitral rules selected by the parties. The award will, however, always be subject to public policy considerations of the place of enforcement.

A combination of national arbitral law(s) and any arbitral rules chosen by

11 See, eg, Article 22.3 of the LCIA Rules 2014 and Article 21.1 of the ICC Rules 2017.

the parties will govern the arbitration procedure. The national arbitral law of the seat of arbitration will be the procedural law governing the arbitration (and possibly the law governing the arbitration agreement itself).[12] That national law will give effect to the arbitration agreement and will likely impose a number of conditions on the arbitral procedure through its mandatory provisions. The courts of the seat of arbitration will usually have supervisory jurisdiction over the arbitration, including the power to grant relief, including interim injunctive relief, in support of the arbitration,[13] the power to determine any challenge to an arbitrator and the power to annul an award in certain limited circumstances (such as lack of jurisdiction or serious irregularity in the procedure).[14]

Parties may also tailor their procedure by adopting institutional or other arbitral rules, either in the arbitration agreement, or by agreement once the dispute has arisen. By choosing institutional rules, parties are bound by that institution's tried-and-tested rules and will enjoy the support that the institution, such as the ICC or the LCIA, provides. Other arbitral rules, such as the UNCITRAL (United Nations Commission on International Trade Law) Rules, are simply rules that supplement the applicable national procedural law without any institutional support. Institutional arbitration is usually recommended for M&A disputes, as the rules are capable of dealing with complex, high-value, multi-party arbitrations, and institutional support can help streamline the arbitral process.

Sometimes parties opt for different substantive and procedural laws – for example because the seat has arbitration-friendly legislation and courts but another law offers a more favourable treatment of a particular area of substantive law. Consider, for instance, the question of limitation periods for a breach-of-contract claim. Under English law, it is a question of procedure whereas in China it is a question of substance. If the arbitration clause provides for a seat in England but for Chinese governing law, should the English law of limitation apply (six years for a breach of contract) or Chinese law (two years)?

12 Due to the doctrine of separability of the arbitration agreement/clause from the main contract in which it is contained, the governing law specifically chosen by the parties to govern the M&A contract may not, unless expressly stated, extend to the arbitration agreement. See, eg, *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638. In such circumstances, the arbitral tribunal may apply the law of the seat to govern the arbitration agreement as opposed to the law governing the underlying contract.

13 However, the grant of interim relief or other assistance in support of arbitration is not necessarily limited to the courts of the seat. For example, in appropriate cases the English court will grant assistance, including interim injunctive relief, in support of foreign arbitrations. See, eg, *Company 1 v Company 2* [2017] EWHC 2319 (QB).

14 However, the setting aside of an award by the courts of the seat of the arbitration will not necessarily prevent the enforcement of the award in all jurisdictions. The setting aside of an award by a competent authority of the country in which, or under the law of which, that award was made is a ground on which another country may (not must) refuse enforcement of an arbitral award under Article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). As a consequence, certain countries, such Italy and Germany, will not enforce awards that have been set aside, while other countries, such as France and the United Kingdom, do not consider this to be an absolute bar to enforcement in all cases and will, in certain circumstances, enforce an award despite it having been set aside in its seat.

The question is particularly relevant at the stage of enforcement. In the present example, a tribunal sitting in London would most likely apply English law and render an award on the basis of a breach of contract occurring four years before the claim. A Chinese court at the place of enforcement could, however, refuse enforcement of such an award.

3.2 Selection of the tribunal

Once the decision has been taken to arbitrate an M&A dispute, it is essential to choose the right arbitral tribunal.

(a) The selection procedure

The procedure for the selection of arbitrators should have been analysed and decided prior to agreeing the arbitration clause. At the time of entering into such an agreement, the potential disputes are largely unknown and the choice is essentially between a number of standard selection procedures. These procedures are usually provided for by either institutional rules or the law of the seat of arbitration chosen in the arbitration agreement (or, less commonly, explicitly in the arbitration agreement).

The standard procedures provide for the selection of either a sole arbitrator or a panel of three arbitrators with one presiding. Opting for either a one- or three-member tribunal will ensure that there is a designated leader of the arbitral process and avoid deadlock. A sole arbitrator is usually appointed by agreement between the parties under institutional oversight, or by the institution directly. Using a sole arbitrator usually makes the arbitral process quicker and more cost effective, but it entails a higher risk of a poor decision as the sole arbitrator's decision is not balanced by the review of two further arbitrators. In addition, if the parties are unable to agree on the identity of the sole arbitrator, this would also deprive them of one of the key benefits of arbitration, ie, selecting the arbitrator.

Where it is likely that the dispute will be of high value and involve complex issues of law and fact, it is usually more appropriate to agree to a panel of three arbitrators. A three-member tribunal is undoubtedly more expensive and the proceedings are likely to be lengthier (due to the need to accommodate three arbitrators' availability), but such an arrangement usually results in, if not a higher-quality award, then at least a reduced risk of a flawed award. This is important where options for review on the merits are limited.

The recommended (and usual) system for appointing a panel of three arbitrators is for each of the parties to appoint one arbitrator, who in turn together appoint a presiding arbitrator in consultation with the parties. Of particular relevance to cross-border M&A disputes is the fact that this allows each party to choose an arbitrator that would understand its cultural and legal background, as well as any relevant M&A custom and practice.

The default position under the ICC and LCIA Rules is that where the parties have not agreed on the number of arbitrators a sole arbitrator will be appointed, unless the institution finds that, in view of the circumstances of the case, a three-member tribunal is appropriate.[15] The UNCITRAL Rules provide, however, that if the parties have not previously agreed otherwise, three arbitrators will be appointed, and a similar provision is contained in the UNCITRAL Model Law.[16] It should be noted that the arbitration rules of certain institutions[17] provide for the institution to appoint all three members of the tribunal by default, rather than following a party nomination process. As such, careful consideration of the chosen rules at the outset is therefore required, combined with an appropriately drafted arbitration clause that, if necessary or desired, varies the default tribunal formation process under the selected arbitral rules.

(b) Choice of specific arbitrator(s)

A number of issues need to be addressed when selecting arbitrators. Once a dispute arises, the choice of arbitrators may be limited by the restrictions placed on that choice by the arbitration agreement, the arbitral institution (where applicable) and the law of the seat. In most cases, the law of the seat will be quite flexible (apart from imposing mandatory rules of independence and impartiality). There are, however, a number of national arbitration laws that impose certain requirements on the selection of the arbitral tribunal (eg, that the number of arbitrators must be uneven or that the presiding arbitrator must be of a particular nationality) and these would of course have to be carefully analysed prior to appointing the members of the arbitral panel. Other issues of relevance will be fact-driven and pragmatic, such as the size of the claim, the nature of the dispute (legal or factual), whether any particular expertise is required to evaluate the facts, whether the claim is time sensitive, etc.

When choosing 'their' arbitrator, the parties should be sensitive to any difference of language, legal tradition and culture between the parties in order to be certain that their case is fully appreciated by the tribunal.[18] Both sides should, however, resist appointing an arbitrator who will be too keen to further the case of the party appointing him – a circumstance that will likely result in the decision being down to the chairman acting in effect as a sole arbitrator, but with the costs of a three-party tribunal. The chairman should be experienced, in order to ensure that the process is efficient and that the particular sensitivities of the parties are respected. In addition, particularly in M&A disputes, where disputes may be of a highly technical nature (such as those over price

15 Article 12(2) of the ICC Rules 2017; Article 5.8 of the LCIA Rules 2014.
16 Article 7(1) of the UNCITRAL Rules 2013; Article 10(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006).
17 For example, the LCIA.
18 See Lawrence W Newman and Thomas Yates, *International Arbitration Checklists*, 2016, Juris, Chapter 8, for further details on the impact of cultural factors on international arbitration.

adjustment or completion accounts), a party may consider appointing an arbitrator with an accountancy or other specialist background rather than a lawyer.

The legal background of the arbitrators is also a critical factor. Where the laws of the seat and the substance of the dispute are different, it may be helpful to ensure that the panel comprises an arbitrator with a background in each of the legal systems. However, while it is helpful to have an arbitrator appointed who has a background in the law of the seat of arbitration, in order to ensure the efficient conduct of the proceedings the obvious concern would be that, if that arbitrator is not familiar with the law of substance of the dispute, the arbitrator may not be as effective or influential in the determination of the merits of the dispute. The legal background of the arbitrators is also likely to influence the nature and likelihood of the procedural orders the tribunal may make, such as interim measures, security for costs and their approach to disclosure. If at the outset of the dispute it is apparent that substantial amounts of documents held by the other side would likely assist one side's case, this will be a strong factor in favour of selecting an arbitrator from a legal background where broad disclosure orders are the norm. Alternatively, if a party is defending a speculative claim or has all the documentation necessary to prove a claim, meaning that broad disclosure would be an unnecessary and expensive step, this would be a strong factor in favour of selecting an arbitrator from a legal background where disclosure orders are not common. Further issues regarding disclosure are discussed in section 3.5 below.

3.3 Timetable

The costs of the arbitration should not be allowed to outweigh the benefits of having the dispute finally resolved by an arbitral tribunal. Where the dispute revolves around a limited or discrete issue, such as price adjustment, considerations such as the impact of a lengthy process on cash flow and ongoing trading partnerships may favour having an expedited or simplified arbitral procedure or timetable. To this end, where time and costs are of the essence, some of the leading arbitral institutions offer a set of parallel rules. Parties may want to consider including these expedited or summary procedures in the arbitration agreement, or proposing their use once the threat of arbitration exists.

(a) Expeditious appointment of the tribunal

In cases of exceptional urgency, certain arbitral institutions' rules permit either party (although usually the claimant) to seek the expedited formation of a tribunal.[19] There have been instances where a tribunal has been appointed

19 See, eg, Article 9A of the LCIA Rules 2014.

within 48 hours of the request for arbitration.[20] Once the tribunal is appointed, it can render procedural orders or grant interim relief to address any urgent issues the parties may have.[21]

(b) Expedited or simplified procedures and fast-track arbitration

A number of arbitration institutions, including the ICC, the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the American Arbitration Association (AAA), the China International Economic and Trade Arbitration Commission (CIETAC) and the Swedish Chamber of Commerce (SCC), have established a separate, simplified and expedited procedure for certain cases. The availability of such an expedited process varies slightly from institution to institution, but generally it can be available where the value of the dispute is below a certain threshold (eg, US$1 million) or where the parties have agreed to use it or, under certain rules, where the case requires exceptional urgency.[22] This enables relatively low value claims to be determined in a cost-effective manner and provides the parties with the option of agreeing a more streamlined, expedited process, whatever the value of the dispute.

The availability of these alternative procedures also enables the arbitration to be tailored to the specific dispute in circumstances where it can be difficult to do so during the drafting of the arbitration agreement (eg, because the value, complexity and urgency of any subsequent dispute will be difficult to predict) or after a dispute has arisen (eg, because the parties might have differing strategic aims).

The procedure usually involves a single arbitrator, a limit on written pleadings (only statement of case, defence and, where applicable, counterclaim and reply), a single hearing, and a time limit for rendering the award. This process may be particularly useful for parties who want a binding award but wish to avoid the delay and cost involved in a traditional international arbitration process.

Moreover, even where a formal expedited/simplified process under the relevant rules is not available,[23] the parties can still seek to agree between themselves or seek from the arbitral tribunal a fast-track procedural timetable that seeks to simplify the process, limit document production and the length of written submissions and/or shorten the usual timeframes for completing the

20 *Redfern and Hunter on International Arbitration*, 2015, Oxford University Press, para 6.30.

21 Most institutions, however, now address the need to be able to provide urgent relief through the appointment of a temporary emergency arbitrator (see section 3.6 (below)).

22 For example, both the HKIAC and the SIAC rules both allow their expedited arbitration process to be used, even where the value of the dispute exceeds the relevant threshold and notwithstanding the objection of one party, if the case is of exceptional urgency.

23 For example, because the relevant rules (such as the LCIA rules) do not provide for such expedited procedure or because the value of the dispute exceeds the relevant threshold and the counterparty is not prepared to adopt voluntarily the relevant expedited procedure.

various stages of the arbitration. If one or both parties wish to adopt such a bespoke fast-track process, it is essential to appoint an arbitral tribunal that has sufficient availability so as not to be the cause of any delay.

3.4 Multiple parties

A standard arbitration process usually involves only two parties, namely claimant and respondent, which together concluded the arbitration agreement. More and more often, however, and particularly in M&A disputes, disputes involve multiple parties – either because there are several parties to the agreements (eg, in shareholder or subscription agreements) or because there are a number of related agreements with different parties (eg, in the context of a joint venture).

To save time and money, and to avoid conflicting decisions, it may be appropriate to resolve all the issues in the same proceedings. However, the difficulty with consolidating disputes which have been referred to arbitration is that it is a largely consensual process which often depends heavily on inter-party agreement.

(a) One contract with multiple parties

A situation where all the parties to the arbitration are parties to the same arbitration agreement is likely to be the least problematic form of multi-party arbitration. That being said, a difficulty in arbitration may arise where each of the parties to the dispute decides that they would like to appoint its own arbitrator.

The ICC and LCIA Rules provide that parties to each side of arbitration proceedings (ie, the claimant side and the respondent side) must jointly nominate their side's nominated arbitrator. If the multiple claimants or respondents cannot agree on their side's joint nomination, then under the ICC Rules,[24] in the absence of agreeing another method for the constitution of the arbitral tribunal, the ICC will appoint all members of the tribunal. Under the LCIA Rules, the LCIA Court will appoint all the members of the arbitral tribunal if the parties cannot agree which parties fall into the two separate sides.[25] The aim of such a rule is to respect the principle of equality between the parties, but there is always the risk that the courts of the seat or enforcement may consider a procedure by which the parties did not each nominate a member of the tribunal against public policy.[26]

The ICC Rules have formalised the procedure to join an additional party to

24 Article 12.8

25 Article 8.1. However, if the parties can agree the constitution of the two sides, but one side cannot agree their side's nominated arbitrator the LCIA Court will only appoint that side's arbitrator without regard to any nomination by the parties forming that side, but not the entire tribunal.

26 See, eg, the decision of the French court in the case of *BKMI and Siemens v Dutco* (French Cass civ, 7 January 1992).

the arbitration, and confirm that no additional party may be joined after the confirmation or appointment of any arbitrator unless all parties, including the additional party, agree otherwise.[27] The concern is that after the arbitrator is confirmed or appointed by the ICC Court, the additional party will be deprived of the opportunity to take part in formation of the arbitral tribunal and therefore their express agreement to the joinder is required. Similarly, the LCIA Rules require any additional party to consent to being joined to an arbitration, but such consent may be given at any stage and, notably, the consent of all the other parties is not required.[28]

Where multiple arbitrations have been brought under the same contract, it is often sensible to seek to consolidate the arbitrations into a single arbitration to avoid inconsistent decisions and to reduce unnecessary costs.

(b) A number of related contracts between different parties

When there are various disputes under interrelated contracts, it may be possible to avoid conflicting decisions and save time and cost by consolidating the resolution of the various disputes. One pragmatic approach that was taken by the English Court of Appeal was to exercise its power to appoint an arbitrator by appointing the same arbitrator in two parallel cases.[29] The more usual approach, however, is a consolidation ordered by a court or arbitral institution or agreed to by the parties.

National laws of the seat of arbitration may provide that the court is entitled to order consolidation of connected arbitral proceedings. In such cases, the court may order consolidation and ask the parties to appoint the tribunal; and if parties cannot agree on the tribunal, the court can appoint all of the members of the tribunal. This solution may be particularly effective if all related parties agreed to arbitration with the same seat. Where such agreement is unclear, a consolidation may be seen as forcing the parties to arbitrate and would not be enforceable.

Parties may also agree to the consolidation, either directly or through the choice of institutional rules that permit such consolidation in particular circumstances. By way of example, under the ICC Rules[30] the ICC Court may, at its discretion (and only at the request of one of the parties), consolidate two or more pending arbitrations into a single arbitration, provided that:

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27 Article 7.1.
28 Article 22.1(viii).
29 *Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corp* [1982] 2 Lloyd's Rep 425, CA. However, having the same individual sitting as an arbitrator in related cases carries the risk of any award being susceptible to challenge on the grounds that information or arguments raised in one arbitration might influence the arbitrator's thinking in the second arbitration, but without the relevant party in the second arbitration being able to address those points (see, eg, *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201, where the court refused to appoint the same arbitrator in two related cases for such reasons, but also *Halliburton v Chubb* [2018] EWCA Civ 817 where a challenge to an arbitrator on these grounds, among others, was rejected).
30 Article 10.

- the parties have agreed to consolidation;
- all of the claims in the arbitrations are made under the same arbitration agreement; or
- where the claims in the arbitrations are made under more than one arbitration agreement:
  - the arbitrations are between the same parties;
  - the disputes in the arbitrations arise in connection with the same legal relationship; and
  - the court finds the arbitration agreements to be compatible.

In practice, the ICC Court will usually accept consolidation where the arbitrators in parallel proceedings are identical or where only one tribunal has been appointed when the consolidation application is made. Once multiple proceedings have started, parties should appoint the first tribunal and request consolidation as soon as practicable as it would generally be the tribunal that was first appointed that would be chosen to hear the consolidated proceedings. Where this issue is likely to be important if a dispute arises, parties should consider specifically addressing it in the arbitration agreement. For example, where an M&A transaction involves a suite of contracts with differing parties, which together form one set of transaction documents, it will usually be beneficial to ensure that all the contracts contain at least common arbitration clauses (eg, with common arbitral rules, number of arbitrators and seats), and preferably also ensuring that the arbitration clauses provide express consolidation provisions in respect of any disputes arising under the transaction documents.

3.5 Disclosure and discovery

As a result of the international nature of many M&A disputes, and in particular the different legal backgrounds of the parties and arbitrators, there can often be a secondary dispute as to the appropriate extent of document production (ie, disclosure or discovery of documents). The influence that the issue of disclosure can have on the selection of a tribunal is discussed in section 3.2(b) above. Unless this issue is specifically dealt with in the relevant arbitration agreement, the arbitral tribunal will have wide discretion as to the scope and nature of any document production it might order (unless the parties are able to agree on the issue after the arbitration has started). For example, neither the LCIA Rules nor the ICC Rules specify the approach to be taken to disclosure but instead give the arbitral tribunal a broad discretion to adopt procedure suitable to the circumstances of the dispute, bearing in mind the need to conduct the proceedings in an efficient and cost-effective manner.[31] It is also not often the case that the applicable national law(s) will prescribe the extent of disclosure.

31 See Article 22 of the ICC Rules 2017 and Article 14 of the LCIA Rules 2014.

Historically, common law systems have favoured a wide-ranging approach to the documents that must be disclosed to the other side in an arbitration, which includes those that favour the opposing party's case and are adverse to their own case. Civil law systems have taken a much narrower approach, often just requiring a party to disclose those documents upon which it wishes to rely. The middle ground, which is often taken in arbitration, is the document category-based system of 'justified and reasoned requests to produce', provided for in the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules).

As mentioned above, it is possible for the parties to agree at any stage if and how disclosure should take place, and in some cases it is agreed and set out in the arbitration agreement. Often the parties agree to adopt the IBA Rules; however, occasionally they might agree full US-style discovery or simply that there be no disclosure. It often comes down to the parties' (or their legal advisers') legal backgrounds, their previous experience of disclosure and their respective bargaining strength. In M&A agreements it is generally advantageous for the seller to seek agreement for broad disclosure, as it is likely that following the sale of the business the buyer will have control of all the documents relating to the operation of the business that was sold, which are likely to be important in any claim. For the same reasons, it is likely to be advantageous to the buyer to seek to avoid or limit disclosure so as to create information asymmetry in the buyer's favour and hinder a seller's ability to defend any claim. However, it will not necessarily be the case that the buyer will always have in its possession all the documents necessary to prove a claim. For example, for a claim under a knowledge-based warranty (eg, by a seller manager or a fraud claim) documents may well have been retained by the seller. Ultimately, which approach will be suitable will therefore depend on the nature of the dispute that eventuates. In most cases, this is difficult to predict at the point in time when the M&A contract is being drafted, so a balanced approach is likely to be the most suitable one to take.

If the IBA Rules are adopted for disclosure, it is important that requests for documents comply with the criteria set down in those Rules. Parties frequently make broad, unspecific requests for documents, despite the IBA Rules being adopted, and end up with the request being rejected in its entirety in circumstances where a more specific request on the same issue would have been granted. The rules regarding the form and content of Requests to Produce under the IBA Rules are quite clearly set out in Article 3(3) of the IBA Rules, and tribunals are entirely justified to (and do) reject requests for documents that are not compliant with the rules.

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32 Article 28.2 of the ICC Rules 2017; Article 25.3 of the LCIA Rules 2014; Article 30.3 of the SIAC Rules 2016.

33 See, eg, Article 9B of the LCIA Rules 2014, Article 29 of the ICC Rules 2017 and Article 30.2 of and Schedule 1 to the SIAC Rules 2016.

A request must describe the relevant document sufficiently to identify it or describe 'narrow and specific' categories of documents in sufficient detail. The Request to Produce must also state how the documents requested are relevant to the case and material to its outcome. While a relevance test is one with which common law lawyers in particular are familiar and is broad enough to catch any sensible request for documents, often parties fail to adequately address the second limb of the test: why the documents requested are material to the outcome of the case. One way of seeking to establish materiality to the satisfaction of the tribunal is to make requests for documents specific to a particular paragraph or issue in a statement of case and explain how the requested document or category of documents is material to the determination of that issue.

3.6 Interim relief

In certain types of M&A dispute, one of the parties may want an order for interim relief to restrain the other party from taking certain steps while the substantive dispute is being determined by the arbitral tribunal. This could be, for example, to prevent a call on an escrow account, letter of credit or on-demand bond, or to forestall an anticipated breach of confidentiality or change of control (eg, in a joint venture scenario). Most major arbitral institutions' rules, including the LCIA, SIAC and the ICC, give arbitral tribunals wide-ranging powers to order interim and conservatory measures, as well as making clear that, even after the arbitration has commenced but only where appropriate, parties can seek such orders from national courts (subject to any restrictions on doing so under the relevant applicable law).[32] Should the specific circumstances of the M&A transaction make certain type(s) of interim measures particularly important or likely to be necessary, the parties should consider making specific provision in the arbitration agreement itself.

The rules of most major arbitral institutions now provide for the possible appointment of a temporary emergency arbitrator to determine any applications for urgent interim relief that might be required before a tribunal can be formed.[33] They allow a party to get an arbitrator appointed within a very short period, typically two days, to hear an application for emergency measures, with the application to be determined as soon as possible and usually within 14 days.

Such emergency arbitrator procedures provide additional support for parties needing urgent interim relief and are now quite frequently used in practice.[34] However, the process does have its limitations and cannot be considered to be a perfect substitute for interim relief ordered by a state court. For example, the

34 The ICC introduced its emergency arbitrator rules in 2012 and in the six years following its introduction, 80 applications for emergency measures were made.

ICC Rules provide that the emergency arbitrator's decision shall take the form of an order rather than an award, which will reduce its ability to be enforced.[35] While the LCIA Rules and the SIAC Rules provide that the emergency arbitrator may make an order or an award, even if the interim measure is made in the form of an award, such award may be confirmed, varied, discharged or revoked, in whole or in part, by the arbitral tribunal subsequently appointed.[36] Accordingly, as any award of the emergency arbitrator cannot be considered final, there will be difficulties in seeking to enforce it in certain jurisdictions.[37]

Additionally, for some forms of urgent interim relief, state courts are the only viable option regardless of the existence of emergency arbitrator provisions in the chosen arbitral rules. This might be, for example, where *ex parte* relief is required, where the measures sought concern or affect third parties, or where the relief required is extremely urgent and the timeframe of one to two weeks (under the emergency arbitrator provisions) would be too long.

Under some national laws, state courts will only grant interim relief in support of arbitration where the arbitral tribunal (including any emergency arbitrator) is unable to act effectively. As such, emergency arbitrator provisions can have the effect of limiting the scope of the state court's jurisdiction to grant interim relief in support of arbitration by offering an alternative to seeking assistance from the courts.[38] As a consequence of this, and due to the current limitations with seeking relief from an emergency arbitrator, it is not uncommon for parties in their arbitration agreements to expressly exclude any emergency arbitrator provisions and to confer exclusive jurisdiction on state courts should urgent interim relief be required.

3.7 Expert evidence

Parties will often choose a tribunal composed of three lawyers, usually with each arbitrator familiar with the legal system of the party that nominated him, and the chairman being an experienced arbitrator of a 'neutral' nationality and legal background. Although such a tribunal may be experienced in law and arbitration procedure, it may not have the required expertise to form a suitable opinion on a particular issue without having an expert perform a factual analysis. As noted above briefly in section 3.2(b), this may be particularly relevant to M&A disputes of a highly technical nature, and/or requiring a

35 With the exception of Hong Kong, New Zealand and Singapore, there is at present no provision in national laws expressly providing for enforcement of emergency arbitrator orders. In many other jurisdictions the enforceability of such orders is uncertain, not necessarily due to the characterisation of any decision as an 'order' rather than an 'award', but due to the provisional nature of interim measures (whether expressed as orders or interim awards) as opposed to the finality of final awards.

36 Article 9.11 of the LCIA Rules 2014 and paragraph 10 of Schedule 1 to the SIAC Rules 2016.

37 See fn 35 above.

38 See, eg, *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327, where the English court refused to grant interim relief relating to an arbitration in circumstances where the court considered an application could be made to an emergency arbitrator.

detailed understanding of the practice in a particular field, such as accountancy or finance.

Experts can be either appointed by the tribunal itself or by the parties to the dispute, leaving the tribunal to evaluate the competing evidence presented by each side. The two processes are quite different in nature and are the remnants of the compromise in arbitral procedure between the inquisitorial system of civil law, where the court takes an active role in investigating the truth, and the accusatorial system of common law, where the parties have the main burden of presenting to the court the evidence on which it will reach its conclusion.

3.8 Witness evidence

In disputes arising out of the sale and purchase of a business, knowledge relating to the dispute will often be vested in the staff that transfer to the purchaser's group as part of the acquisition. Such staff will frequently have the detailed knowledge relating to the operations of the acquired business that can assist the purchaser in discovering and pursuing claims against the seller. However, despite this, it is not unusual for senior staff at the acquired business to be made redundant shortly after the acquisition. If such a step is to be taken, it is sensible to try to ensure as much information as possible is obtained from departing staff and possibly some commitment is obtained to provide assistance to the purchaser in any ongoing or future dispute. It would also be sensible to try to have departing staff enter into a confidentiality agreement in order to prevent such staff from passing information to the seller. Such a step would especially hinder sellers such as private equity firms who are less likely to have been involved in the day-to-day management of the business and therefore have detailed knowledge of the business themselves.

Should the seller in due course seek the assistance of former employees who have entered into a confidentiality agreement with the purchaser, the employee risks breaching the confidentiality agreement and the seller risks procuring such a breach, should the employee provide confidential information to the seller. However, depending on the relevant governing laws, the confidentiality agreement would not likely prevent the seller from calling the individual to give evidence at any hearing, but may well prevent the ex-employee from discussing such evidence with the seller prior to such hearing.

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