

Claims for breach of representations and warranties

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1. Introduction

In the field of mergers and acquisitions (M&As), representations and warranties are statements of fact regarding the status, qualities, and material aspects of the seller, the buyer and the target business. They offer certain assurances and allocate risk for frustrated expectations, thereby facilitating transactions.¹ They are indeed essential: while a comprehensive agreement and a proper due diligence verification are crucial, differences may yet subsist between the buyer's pre-closing expectations regarding the target and its post-closing experience.² Adverse changes may also arise prior to closing. The representations and warranties of an M&A agreement allocate responsibility for such adverse changes and differences between the buyer and the seller. Described as the most hotly debated clauses in M&A agreements,³ they are a main source of claims resulting from such transactions.⁴

The public or private nature of the companies involved will affect the scope of the representations and warranties. In the case of private companies, which do not have the same reporting requirements as public companies, the seller will require stronger assurances.⁵ Furthermore, arbitration is very rarely chosen in transactions involving public companies.⁶ This chapter will thus focus on M&A arbitrations involving private companies.

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- 1 R Tschäni, "Post-Closing Disputes on Representations and Warranties" in G Kaufmann-Kohler and A Johnson, (eds), *Arbitration of Mergers and Acquisitions Disputes*, ASA Special Series No 24, May 2005, at pp68–9. EL Greebel, "Key Priorities for Buyers and Sellers in Acquisitions of Public and Private Companies" in *Strategies for Negotiating Mergers and Acquisitions: Leading Lawyers on Understanding Clients' Needs and Successfully Negotiating M & A Transactions*, Aspatore, 2011, at p3.
 - 2 H Peter, "M&A Transactions: Process and Possible Disputes" in G Kaufmann-Kohler and A Johnson, *op cit*, at p7.
 - 3 R Tschäni, *op cit*, at p67. Cf the German and the Hungarian experience, where these types of clauses are leaner owing to the more exhaustive background statutory framework: D Weber and R Giebeler, "Germany" in Mauro Rubino-Sammartano, (eds), *Warranties in Cross-Border Acquisitions*, IBA, 1994, at p46; "Hungary" in American Bar Association, *Model Asset Purchase Agreement with Commentary, International Asset Acquisitions: Summaries of 33 Countries Laws*, ABA, 2001, at p84.
 - 4 R Hall and MM Pitkowitz, "Tailor-Made: Unique Dispute Resolution Clauses" 5:2 *New York Dispute Resolution Lawyer* (2002) 30; JP Morgan, "JP Morgan Issues 2010 M&A Holdback Escrow Report", available at www.jpmorgan.com/tss/General/J_P_Morgan_Issues_2010_M_and_A_Holdback_Escrow_/1284071199297.
 - 5 LR Kling, EN Simon and M Goldman, "Summary of Acquisition Agreements" 51 *U Miami L Rev* 779 at p780.
 - 6 G von Segesser, "Arbitrating Pre-closing Disputes in Merger and Acquisition Transactions", in G Kaufmann-Kohler and A Johnson, *op cit*, at p18; JF Cogan, "Managing Disputes through Contract: Evidence from M&A," 2 *Harv Bus L Rev* 23 (2012) at Table 3.

Claims related to breaches of representations and warranties most often arise in the post-closing phase, after the signing of the transaction agreement, the fulfilment of the conditions for the agreement's validity, and the transfer of the purchase price or shares.⁷ However, they may also be filed in the post-signing, pre-closing phase, when the conditions precedent to closing have not all been fulfilled.

While it is usual for both the buyer and the seller to offer representations and warranties, the seller is most often the defendant in arbitration claims for breach.⁸ These disputes may have two types of legal bases. The first corresponds to the provisions of the applicable national law, which may provide warranty rules for sales as well as a right to avoid the contract for certain mistakes.⁹ In many jurisdictions, for example, representations as to the seller's possession of valid title, existence and organisation are deemed implied in the contract. The second basis consists in the relevant clauses of the agreement, which the parties often intend to be an exhaustive legal framework regulating their rights and obligations.¹⁰

2. Overview of typical representations and warranties

2.1 Definition

Representations and warranties are most often included in the text of the agreement, although they may also be listed in one of its exhibits.¹¹ While their precise definition depends on the applicable law, representations are generally conceived as precise statements about past or present facts, while warranties are viewed as promises regarding existing or future facts, especially earnings and profits. The concepts are largely coterminous¹² and both are usually distinct from indemnities, which are assurances given solely in respect of identified future facts to which the parties assign financial consequences.¹³ The scope of indemnities may, however, overlap with that of the representations and warranties when parties attach specific sums to potential negative developments related to known or assumed facts predating or existing at the date of closing.

7 I Welser, "M&A Closing Issues: Arbitration and Third Party Joinder" in Christian Klausegger, Peter Klein *et al.* (eds), *Austrian Yearbook of International Arbitration* (2011) 3, at p3; R Hall and MM Pitkowitz *op cit*, at p30.

8 R Tschäni, *op cit*, at p67.

9 W Peter, *Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes*, at p491. For statutory warranties, see eg, D Weber and R Giebeler, *op cit*, at pp50 *et seq.*

10 R Tschäni, *op cit*, at p73. W Peter, *op cit*, at p492.

11 R Tschäni, *op cit*, at p67.

12 "Representations and Warranties of Seller and Shareholders" in American Bar Association, *Model Asset Purchase Agreement with Commentary* (ABA, 2001) at p69. In the United Kingdom, 'warranties' is the preferred term and 'representations' is rarely used alongside it, due perhaps to misplaced concerns as to potential liability under the Misrepresentation Act 1967: see Jones Day, "Some Differences in Law and Practice between UK and US Stock Purchase Agreements", 2007, available at www.jonesday.com/some-differences-in-law-and-practice-between-uk-and-us-stock-purchase-agreements-04-13-2007/.

13 R Tschäni, *op cit*, at p68. Alice Broichmann, "Disputes in the Fast Lane: Fast Track Arbitration in M&A Disputes" 11(4) *Int'l ALR* 143, at p151.

2.2 Scope

(a) *Seller representations and warranties*

The seller's representations and warranties offer three key benefits to the buyer. First, they sharpen the buyer's understanding of its target business and constitute the basis of the due diligence process. Secondly, they offer the buyer the possibility of refusing to proceed with the transaction if the representations and warranties are not true at closing. Thirdly, if they turn out to be false, they entitle the buyer to damages regardless of whether or not the transaction closes.¹⁴

The types of seller representations and warranties included in an agreement usually reflect the buyer's principal concerns and vary according to the particularities of the transaction. They are generally related to the validity of the target business's corporate existence and transactional power, its financial state, as well as the sources of its potential liabilities. As such, the representations and warranties cover aspects such as the company's (including its subsidiaries') valid corporate organisation and existence, its good standing, its capitalisation and title to stock, its possession of due authorisation to execute the transaction, its potential breach of certain agreements and legal obligations as a result of execution of the transaction agreement, its financial statements and liabilities, its participation in pending litigation or arbitrations,¹⁵ its compliance with applicable laws and regulations (notably in environmental matters), its title to assets, its tax matters, its employee benefits plans, the truthfulness of the statements made during the negotiations,¹⁶ as well as the non-occurrence of any material adverse change from a particular reference date up to the closing date (see next paragraph). Often, the parties will expressly limit the seller's representations and warranties to those included in the share purchase agreement (SPA).¹⁷

The 'no material adverse change' or 'absence of certain changes' provision offers the buyer important pre-closing protection against subsequent events and developments that may have a substantial negative impact on the target's business, assets, revenue, financial status, and sometimes even prospects. The parties will typically agree on the definition of a material adverse change, and then expressly exclude certain events from its scope.¹⁸ The clause's coverage usually begins at the end of the last financial year for which audited financial statements are available.¹⁹ It should, however, be noted that some tribunals have rejected the applicability of

14 LR Kling, EN Simon and M Goldman, "Summary of Acquisition Agreements" 51 *U Miami L Rev* 779, at p783; R Tschäni, *op cit*, at p69.

15 See, however, V Denoix De Saint Marc, "Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations", 20:2 *Journal of International Arbitration* 211 (2003).

16 "Representations and Warranties of Seller and Shareholders" in American Bar Association, *Model Asset Purchase Agreement with Commentary*, ABA, 2001, at pp69–151; LR Kling *et al*, *op cit*, at pp783–94; D Weber and R Giebeler, *op cit*, at p65–81.

17 G von Segesser, *op cit*, at p28; GW Jones and D Lutton, "United States of America", in Mauro Rubino-Sammartano (ed), *Warranties in Cross-Border Acquisitions*, IBA, 1994, at pp361, 366, 367 and 379.

18 C Scotti and P Martin, *Key Issues in Private and Public M&A Transactions*, at p3; LR Kling *et al*, *op cit*, at pp787–8.

19 R Tschäni, *op cit*, at pp70–1; "Representations and Warranties of Seller and Shareholders" in American Bar Association, *Model Asset Purchase Agreement with Commentary*, ABA, 2001, at pp98–9 (and cross-reference at p79, "balance sheet").

this provision where its drafters had not quantified the negative impact of the adverse change and where the application of the clause would have permitted the buyer to refuse to perform the transaction.²⁰

The protection offered by the representation regarding the financial statements of the target company is a key provision that merits special attention. The seller is usually requested to affirm that the financial statements are accurate, exhaustive, prepared from the books of the company in accordance with a certain set of accounting principles consistently applied (except as indicated in the notes thereto), and that they truly and fairly present the financial condition, cash flows and results of operations of the company for the periods indicated. The reliability of this representation will depend on the chosen set of accounting principles (Swiss GAAP-FER, for example, is less stringent than US GAAP or IFRS), on the manner in which the accountants exercise their allotted degree of discretion, as well as on whether the financial statements have been audited.²¹ To attenuate residual uncertainty, the buyer may require a warranty that a specific position on the balance sheet and income statement is in fact correct, for example that the accounts receivable are all collectible and that the seller will compensate for any difference between the amount on the balance sheet and the amount ultimately collected.²²

If a buyer is only interested in part of a business, the target division's financial statements may not have been prepared in accordance with generally accepted accounting principles but pursuant to a set of internal accounting procedures. Unaudited financial statements that are not compliant with generally accepted accounting principles must be disclosed as such.²³

Finally, the scope of these representations and warranties tends to extend in the United States to the three previous fiscal years, while in Europe only to the last one.²⁴

(b) Buyer representations and warranties

The buyer's representations and warranties are more transaction-specific. The seller mainly seeks assurances that the buyer has the capacity to close the transaction and the resources to make payment.²⁵ The buyer's representations and warranties hence focus on its authority and ability to carry out the transaction smoothly, its possession of adequate financing means, and its acquisition of the seller's shares, assets or business for proper investment purposes. In addition, particularly where the purchase price is wholly or partly paid out in the form of buyer equity, the buyer will make representations with regard to the valuation of its equity, the adequate preparation of its financial statements, the absence of a material adverse change since the date of the most recent balance sheet provided to the seller, and the absence of any pending or threatened litigation against the buyer that could produce such a material adverse effect.²⁶

20 R Tschäni, *op cit*, at p71.

21 R Tschäni, *op cit*, at p69; D Weber and R Giebeler, *op cit*, at pp67–8.

22 R Tschäni, *op cit*, at p70; D Weber and R Giebeler, *op cit*, at p69.

23 LR Kling *et al*, *op cit*, at pp786–7.

24 R Tschäni, *op cit*, at p70. In Germany, however, the desired period also seems to be three years: D Weber and R Giebeler, *op cit*, at p68.

25 LR Kling *et al*, *op cit*, at p794.

26 LR Kling *et al*, *op cit*, at p794–5.

2.3 Materiality limitation

While most agreements allow the buyer to refuse to proceed with the closing if the representations and warranties are not to a sufficient degree true and accurate at closing, the degree of truthfulness and accuracy required varies according to the outcome of each negotiation. Demanding the absolute accuracy of each representation is often deemed impractical. Most transaction agreements contain a materiality standard, requiring either that representations and warranties be ‘true in all material respects’, that they be ‘true except for individual inaccuracies that do not constitute a material adverse change’, or that they be ‘true and accurate except for inaccuracies that, in the aggregate, do not constitute a material adverse change’.²⁷

The materiality limitation may be quantified in economic terms, as discussed further below.²⁸ Ultimately, the materiality limitation is a function of the parties’ bargaining power as well as of the economic and other parameters of the transaction.²⁹

Certain representations, such as those related to due organisation, capitalisation, authority to execute the transaction and compliance with law, are never qualified in the manner just described.

2.4 Life of the contracted representations and warranties

The transaction agreement often expressly assigns a term to the representations and warranties. This term usually ranges between one and three years.³⁰ As the detection of the inaccuracy of some types of representations and warranties may be more complex or slower to detect, certain matters, including title, taxes and the environment, are usually assigned longer terms.³¹

3. Types of claim and legal analysis

3.1 Buyer’s claims

(a) *Claims against the seller*

The truth and accuracy of the representations and warranties is often a condition precedent to closing. If one or more conditions have not been waived and remain unfulfilled at closing, the transaction agreement will either be rescinded automatically or become open to termination by the parties.³² After closing, if the representations and warranties turn out to be inaccurate before the expiry of their term, the buyer may file a damages claim against the seller and/or request a purchase price adjustment.³³

Indeed, to safeguard against such situations, SPAs frequently include a

27 C Scotti and P Martin, *op cit*, at pp2–3. See also GW Jones and D Lutton, *op cit*, at p365.

28 See Section IV.B., p12.

29 LR Kling *et al*, *op cit*, at pp793–4.

30 C Scotti and P Martin, *op cit*, at pp5–6; D Weber and R Giebeler, *op cit*, at p53.

31 C Scotti and P Martin, *op cit*, at pp5–6. R Tschäni, *op cit*, at p75.

32 G von Segesser, *Post-Closing Disputes* at p25. R Tschäni, *op cit*, at p82; LR Kling *et al*, *op cit*, at p807.

33 R Hall and MM Pitkowitz, *op cit*, at p30; B Ehle, “Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions” at p294. See also *C and K v S Compagne SA*, Geneva Court of Justice, Decision of October 15 1999, *ASA Bulletin*, 2000, at pp793–802.

provisional price and set out a purchase price adjustment mechanism. Part of the purchase price is often put in escrow for this purpose, pending the expiry of the term of the representations and warranties.³⁴ This mechanism permits a change in the initial price to mirror the change in a specified benchmark, such as the net asset value of the target company, between the date of the financial statements used during the negotiation of the purchase price and the closing balance sheet upon which the purchase price is ultimately determined.³⁵ Arbitration claims for a reduction in the purchase price have been filed, for example, for substantial errors and gaps in the balance sheet of the target company.³⁶

In addition, virtually all M&A contracts provide that a successful third-party claim against the target company may enable the buyer to claim against the seller for breach of representations and warranties.³⁷ Attempts to avoid the redundancy and the potentially contradictory decisions arising out of, on one hand, the proceedings between the target company and a third-party claimant and, on the other, the proceedings between the buyer and the seller, are rife with complex unsettled issues. One of them relates to notification: while the buyer must usually notify the seller of such third-party claims, is the buyer obliged to make regular inquiries as to the existence of these claims if the target company does not bring them to its attention?³⁸ Another issue concerns the extent of seller participation in the defence of the third-party claim, which not only depends on the buyer's approval but also on the target company's consent: ideally, the contract between buyer and seller will provide for the buyer to try to persuade the target company to allow seller assistance³⁹ and for the seller not to defend itself in subsequent proceedings against the buyer using arguments advanced unsuccessfully in the first proceeding (or arguments that it failed to advance, unless the target company vetoed its strategy).⁴⁰ The M&A agreement may also include a positive obligation on the part of the seller to assist the target in third-party claims and set out the effects of the failure to do so,⁴¹ as well as allocate responsibility for the costs of the proceedings and any settlement amounts.⁴² As a practical matter, because the adjudication of third party claims may post-date the expiry of the representations and warranties, after filing for arbitration the buyer should ask the tribunal for a stay of proceedings against the seller pending the outcome of the case against the third party.⁴³ Finally, there is the issue of third-party joinder and consolidation of proceedings: as explained further below,⁴⁴ arbitral

34 EL Greebel, "Key Priorities for Buyers and Sellers in Acquisitions of Public and Private Companies" in *Strategies for Negotiating Mergers and Acquisitions: Leading Lawyers on Understanding Clients' Needs and Successfully Negotiating M & A Transactions*, Aspatore, 2011, at p7. See also JP Morgan, "JP Morgan Issues 2010 M&A Holdback Escrow Report".

35 W Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", 19:4 *Arbitration International* 491. EL Greebel, *op cit*, at p2.

36 K Sachs, "Schiedsgerichtsverfahren über Unternehmenskaufverträge – unter besonderer Berücksichtigung kartellrechtlicher Aspekte", *SchiedsVZ*, 2004, at p126.

37 LR Kling *et al*, *op cit*, at p806.

38 I Welser, *op cit*, at pp3 and 5.

39 I Welser, *op cit*, at p5.

40 I Welser, *op cit*, at p7.

41 I Welser, *op cit*, at p13; LR Kling *et al*, *op cit*, at p806.

42 R Tschäni, *op cit*, at p78–9.

43 *Id.*

tribunals are reluctant to join third parties without their express consent. The transaction agreement should therefore select an arbitral venue and arbitral rules that facilitate potential third-party joinders and consolidation of proceedings,⁴⁵ as well as provide that a joinder would bind the seller to the outcome.⁴⁶

Tortious remedies are also available alongside contractual ones. The buyer could, for example, claim that it was induced to enter into a transaction by certain material misrepresentations in the seller's representations and warranties.⁴⁷

In many jurisdictions, contractual remedies are not exclusive and a party may file independent or concurrent claims on grounds such as defect in the object of the purchase, non-performance and fundamental error. In most jurisdictions, an error is considered fundamental if the party in error would not have contracted, or would have contracted under different terms, had it known the true facts.⁴⁸ Where the parties have stated that no other representations and warranties were given except those included in the transaction agreement (eg, in an 'entire agreement' clause), it could be more difficult to make such a claim for fundamental error.⁴⁹

The availability of these extra-contractual grounds can be especially useful after the expiry of the term of the representations and warranties. In arbitrations governed by Swiss law, for example, buyers frequently plead fundamental error alongside their claim for breach of representations and warranties. This avails them of a statutory term of one year after the discovery of the error for commencing an action, regardless of the detection and notification period set out in the contract.

Finally, and also independently of the provisions for representations and warranties in the M&A contract and sometimes even despite the existence of an 'entire agreement' clause, a fraud claim may be made.⁵⁰

(b) Claims against auditors

If the auditors have been negligent in preparing the financial statements relied upon during the M&A contract negotiations, the buyer may claim against them based on tort principles or, if it has purchased the target in a share deal, bring a contractual claim as a shareholder or through the target company once the deal is closed.⁵¹

3.2 Seller's claims and defences

(a) Claims against the buyer

The seller would have a damage claim against the buyer if the buyer's representations

44 See Section VI, p18.

45 The Swiss Rules of International Arbitration (Art 4) and the Rules of the Belgian Centre for Arbitration and Mediation, CEPANI (Art 12) appear to be the most favourable.

46 I Welser, *op cit*, at p13.

47 N Fletcher, "Case Management and Advocacy in the Arbitration of Merger & Acquisition Disputes", in G Kaufmann-Kohler and A Johnson (eds), *Arbitration of Mergers and Acquisitions Disputes*, ASA Special Series No 24 (May 2005) at p247. See generally GD West and W Benton Lewis, Jr, "Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the 'Entire' Deal?" 64 *The Business Lawyer* 999 (August 2009).

48 The determination involves both an objective and a subjective test: R Tschäni, *op cit*, at pp79–81.

49 Jones Day, *op cit*; R Tschäni, *op cit*, at pp73–4.

50 R Tschäni, *op cit*, at p81. GD West and W Benton Lewis, Jr., *op cit*, at p1001.

51 R Tschäni, *op cit*, at p70. GW Jones and D Lutton, *op cit*, at p401.

and warranties turn out to be untrue, especially if this results in the buyer being unable to pay the purchase price. Pre-closing, the seller could request specific performance if the buyer is reluctant to comply with its obligations and boycotts the closing.⁵²

The seller may also rely on tortious remedies. Like the buyer, it could claim that it was induced to enter into the transaction by certain material misrepresentations in the other party's representations and warranties.⁵³

(b) Defences

The applicable law and the provisions of the contract may grant the seller a number of defences against claims for breach of representations and warranties. Some jurisdictions, including Switzerland, require the buyer to investigate the business shortly after the closing, failing which it will lose access to remedies for breaches that could have been detected during such an investigation. This statutory duty may be waived, or conversely inserted in the contract where it is not part of the applicable law. In an arbitration governed by German law, the contract specifically required the buyer to investigate the business "as soon as reasonably possible" after closing. While the dispute was settled between the parties prior to a decision being rendered, the tribunal was leaning towards considering that a one-month period would have satisfied this requirement.⁵⁴

M&A contracts also frequently provide that the buyer will forfeit its claim if it does not report a breach within a specified time frame (usually between 30 and 90 days) after its discovery or within a certain period after the representations and warranties have lapsed. As a more recent development, parties now tend to agree that while late notification would not result in forfeiture of the claim, the buyer would have to bear the consequences of its delay.⁵⁵

As it is now customary for the seller to grant the buyer pre-purchase access to information regarding numerous aspects of the target business, such as its finances, its legal liabilities and its compliance with environmental rules, the seller may ask that certain claims be excluded following this due diligence process.⁵⁶ It is worth noting, however, that in certain US states the reverse presumption applies: courts may consider that the due diligence process precludes the buyer from pursuing a breach of warranty claim, unless the parties contractually specify that it does not.⁵⁷ Otherwise, under the 'general disclosure' approach, parties may agree that all knowledge gained through due diligence will prevent the buyer from claiming for breach of representations and warranties. If, however, the buyer possesses superior bargaining power or if the time to carry out due diligence is limited, it will at least insist on a provision stating that all relevant facts have been fairly disclosed, sometimes

52 G von Segesser, *op cit*, at pp26 and 51. R Hall and MM Pitkowitz, *op cit*, at pp29–30.

53 N Fletcher, *op cit*, p247.

54 R Tschäni, *op cit*, at p74.

55 *Id.*

56 B Ehle, *op cit*, at p294.

57 GW Jones and D Lutton, *op cit*, at pp365–6, referring to eg, *Faw v Greenwood*, 101 Idaho 387, 613 P 2d 1338 (1980). *Cf Ziff-Davis case*, 75 NY2d 496 (1990), see Jones Day, "Some Differences in Law and Practice between UK and US Stock Purchase Agreements", 2007, online at www.jonesday.com/some-differences-in-law-and-practice-between-uk-and-us-stock-purchase-agreements-04-13-2007/.

accompanied by a definition of ‘fair disclosure’. Under the ‘specific disclosure’ approach, parties may agree that only certain specifically disclosed or defined facts attached to the contract as exhibits, or included in a so-called ‘disclosure letter’, are deemed known to the buyer and constitute exceptions to the representations and warranties.⁵⁸ Occasionally, the parties will agree that knowledge does not in any way affect the buyer’s prospective remedies. Uncertainties relating to tax assessments are typically solved in this manner, usually in the form of an indemnity.⁵⁹

It is important to note that usually neither the seller’s absence of negligence nor its lack of knowledge may constitute defences to liability for breach of representations and warranties.⁶⁰ The transaction contract may sometimes expressly vary this position by stating that the warranties and representations are being offered “to the best of the knowledge of the seller after having made due inquiry”,⁶¹ but this approach has been criticised for impairing the utility of these provisions as a risk allocation tool.⁶² In this situation, parties can seek recourse to buyer-side warranty insurance to protect against the warranties being untrue.⁶³ Also, while any knowledge possessed by the seller’s representatives, including outside counsel and accountants, will be automatically imputed to it, the parties should expressly settle in their agreement the more unclear issue of whether the knowledge of the target company could be imputed to the seller.⁶⁴

4. Remedies

4.1 Interim relief

Where permitted by the applicable arbitration rules, a party may apply for a measure to preserve assets or evidence, an injunction, or an order for specific performance before the national courts of competent jurisdiction. A party may also apply for such forms of interim relief before the arbitral tribunal if it is constituted in time and if such powers are permitted both by the arbitration rules and by the law of the competent jurisdiction.⁶⁵ The adjudicative authority will usually require the requesting party to satisfy *prima facie* certain key conditions such as jurisdiction, exposure to harm or injury that could not be remedied through a subsequent award of damages, a reasonable chance of success on the merits, urgency and, sometimes, provision of security.⁶⁶

In M&A disputes, interim relief may be used to avert potentially irreparable

58 R Tschäni, *op cit*, at p75; H Peter, *op cit*, at p5. Jones Day, *ibid.*

59 R Tschäni, *op cit*, at p75.

60 R Tschäni, *op cit*, at p77.

61 R Tschäni, *op cit*, at p77; LR Kling, EN Simon and M Goldman, “Summary of Acquisition Agreements” 51 *U Miami L Rev* 779, at p793.

62 R Tschäni, *op cit*, at p77.

63 Norton Rose LLP, “Key Issues in Insuring an M&A deal”, February 2011, available at: www.nortonrose.com/knowledge/publications/34892/key-issues-in-insuring-an-ma-deal; Curtis LLP “Protecting buyers and sellers in European M&A deals: Warranty & Indemnity insurance policies”, October 2011, available at www.curtis.com/siteFiles/Publications/Newsletter%20_ENG_-Warranty%20%20Indemnity%20insurance%20policies%20in%20European%20MA%20deals.pdf.

64 R Tschäni, *op cit*, at pp76–7.

65 N Fletcher, *op cit*, at p262.

66 G von Segesser, “Post-Closing Disputes” at pp40–1.

effects on the transaction. Such relief may block actions such as the completion of the transaction with another party, or the breach of confidentiality, non-compete, non-solicit or exclusivity clauses.⁶⁷ The latter could be particularly harmful where joint ventures or alliances are involved.⁶⁸

The buyer may also request interim relief to enforce the provision of an M&A agreement obliging the seller to manage the target company in the ordinary course of business until the date of closing. This tactic may be used, for example, to bar the seller from disposing of any assets or shares, from paying any dividends,⁶⁹ from transferring certain activities to entities beyond the control of the target company, from entering, modifying or rescinding important contracts, or from waiving certain rights.⁷⁰ In one ICC arbitration, the tribunal's order of interim measures set out detailed parameters for important aspects of the target company's management (eg, its place of business, its asset sales and purchases, the maximum refinancing permitted without the buyer's permission), regulated the conduct and relations between the parties, and ordered that the shares in dispute be placed in escrow, in trust, or with a receiver.⁷¹

At the interim relief stage, it can generally be difficult – according to some, even inappropriate⁷² – to require a recalcitrant party to consummate a transaction through an order of specific performance. It has been advanced, however, that such a measure could be justified where a party has not fulfilled a condition precedent solely out of bad faith; the tribunal could then deem the condition to have been met and order the share exchange, perhaps in escrow, pending the final award.⁷³ Requests for specific performance also have higher chances of success where a party is *prima facie* refusing or failing to perform an essential prerequisite – an act or a payment – for the execution of the transaction. In an ICC case concerning a pre-closing dispute on seller warranties, the seller asked the tribunal to issue interim awards ordering the payment of the three outstanding instalments of the purchase price, pending the final award. The tribunal granted in large part this request and rejected the buyers' demand for security and guarantees for potential reimbursement, deeming it unnecessary and highlighting that the buyers were already exposed to the same risk, unalleviated, under the terms of the parties' SPA.⁷⁴

4.2 Damages

(a) *Types of damages and their quantification*

The types of damages available for breach of representations and warranties, and their method of calculation, will depend on the applicable law and the terms of the parties' agreement. The parties may, for instance, expressly include or exclude certain types of damages.

67 H Peter, "M&A Transactions: Process and Possible Disputes" at p9; R Hall and MM Pitkowitz, *op cit*, p30.

68 Ian Hewitt, *Hewitt on Joint Ventures* (5th edn), p333.

69 W Peter, "Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes", p503.

70 G von Segesser, *op cit*, pp40–1.

71 *Ibid.*, referring to ICC *ICArb Bull* 11, No 1 (Spring 2000), pp84 *et seq.*

72 H Peter, *op cit*, at pp11–12.

73 G von Segesser, *op cit*, at pp42–3.

74 G von Segesser, *op cit*, at pp43–4.

A party will usually be able to request an amount to place it or the target company in the same position that it would have been in without the breach. Contractual damages are generally conceived in this manner, with some disparities, across several common law and civil law jurisdictions such as the United States ('expectation damages', which give the winning party the benefit of the bargain⁷⁵), the United Kingdom,⁷⁶ Germany,⁷⁷ France⁷⁸ and Switzerland ('positive damages'⁷⁹). In some cases in certain jurisdictions such as the United Kingdom, where the shareholder's (buyer's) loss is less than the loss suffered by the company (the target), the compensated loss may be only this so-called 'reflective' loss.⁸⁰

Alternatively, a party may ask to be reimbursed for the loss caused by its reliance on the contract, and thus be put in as good a position as it would have been in had the contract not been made. This approach is termed 'reliance damages' in common law jurisdictions such as the United States⁸¹ and the United Kingdom,⁸² and it is ordinarily a smaller amount than expectation damages as it does not include incidental or consequential damages, such as lost profit.⁸³ In Switzerland and Germany, this type of damages is known as 'negative damages' and seeks to place a party in the situation in which it would have been had it never started negotiating, including compensation for expenses incurred in view of the transaction such as lawyers' fees, and perhaps loss of other opportunities.⁸⁴

Quantification difficulties may arise where the breach translates into a recurring diminution in the income of the target company and the buyer claims the capitalised difference resulting from this lower income stream.⁸⁵ Consequential damage such as loss of profits (when the agreement does not waive this head of damage)⁸⁶ will also usually raise calculation difficulties, particularly where the buyer has failed to pay the purchase price.⁸⁷ Claims for loss of opportunity, loss of positive synergy effects, loss of reputation, and moral damages are admissible under certain laws but are rarely awarded owing to the high standard of proof required.⁸⁸

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- 75 US *Restatement (Second) of Contracts*, ss 344, 347 (1979). GW Jones and D Lutton, *op cit*, at p391. *Duncan v Theratx, Inc*, 775 A2d 1019, 1022 (Del 2001).
- 76 The classic position was articulated in *Robinson v Harman* (1848) 1 Ex 850 at 855; 154 ER 363 at 365: "that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".
- 77 D Weber and R Giebeler, *op cit*, at p53. M Fontaine and F de Ly, *Drafting International Contracts*, 2006, Brill, at p51.
- 78 French Civil Code, Article 1149: "*Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après.*" French law has not formally adopted a distinction between what are known in other jurisdictions as 'positive'/ 'expectation' and 'negative'/ 'reliance' damages: M Fontaine and F de Ly, *op cit*, at p52.
- 79 H Peter, *op cit*, at p12; R Tschäni, *op cit*, at p77.
- 80 V Joffe QC, "The No Reflective Loss Principle: Two Wrongs Don't Make A Right", *Trusts and Estates Law & Tax Journal* 17 (2010), available at www.serlecourt.com/files/news/TE&E116%20p17-20%20Joffe.pdf.
- 81 US *Restatement (Second) of Contracts*, ss 344, 347 (1979). GW Jones and D Lutton, *op cit*, at p391.
- 82 MP Furnston et al, *Cheshire, Fifoot And Furnston's Law of Contract*, (2007) OUP, at p754. See also eg, *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1984] 3 All ER 298.
- 83 GW Jones and D Lutton, *op cit*, at p391.
- 84 H Peter, *op cit* at p12. M Fontaine and F de Ly, *op cit*, at p51.
- 85 R Tschäni, *op cit*, at p83.
- 86 GD West and SG Duran, "Reassessing the 'Consequences' of Consequential Damage Waivers in Acquisition Agreements", 63 *Bus Law* 777 (May 2008); G von Segesser, *op cit*, at p51.
- 87 G von Segesser, *op cit*, at p51.
- 88 G von Segesser, *op cit*, at p51-2.

Many M&A contracts include a liquidated damages clause. If carefully drafted, liquidated damages clauses may pre-empt laborious calculations,⁸⁹ although they usually remain reviewable by the tribunal.⁹⁰ A frequent example of liquidated damages in M&A disputes is the termination (or break-up⁹¹) fee, contractually agreed to be paid by the target to the prospective buyer if it decides not to go through with the closing, or the ‘reverse termination fee’, paid by the buyer to the target in the same situation.⁹² Although in the United States the Delaware Chancery Court has deemed that a termination fee of 3–5% of the purchase price may be acceptable,⁹³ in other jurisdictions such as France termination fees are rare as they are considered to be penalty clauses and are carefully scrutinised by courts lest they amount to unenforceable punitive damages.⁹⁴ Indeed, punitive damages, which sanction particularly offensive conduct by the party found in breach and are meant to serve a deterrent, not compensatory, purpose, are not recognised in all jurisdictions (eg, Switzerland).⁹⁵

(b) Caps and minimums

The seller’s obligation to indemnify or compensate the buyer in case of breach of representations and warranties is often subject to a monetary limitation, which includes a minimum as well as maximum (cap) amount⁹⁶ or percentage of the purchase price.⁹⁷ The minimum may be structured as a ‘tipping basket’ – which requires a certain threshold of damages (typically between 0.5% and 2% of the purchase price), as well as a minimum value for individual claims,⁹⁸ before the seller is required to reimburse the buyer. A tipping basket may be set up either as a ‘deductible’, which limits the seller’s indemnification obligation to the damages exceeding the threshold, or as a ‘first dollar’ basket, where the seller’s indemnification obligation extends to all damages after the threshold is reached.⁹⁹

The cap amount varies with the jurisdiction: in Switzerland, for example, the cap is frequently below 50% of the purchase price, while in the United States it is closer to 100%.¹⁰⁰ The contract may, however, provide for exceptions where the cap does not apply, eg, in a case of fraud.¹⁰¹ Further restrictions that parties may apply include

89 G von Segesser, *op cit*, at p52.
 90 H Peter, *op cit*, at p12.
 91 O Guéguen, “Négocier un Share Purchase Agreement aux Etats-Unis : quels éléments spécifiques avoir à l’esprit pour un investisseur français ?”, *Fusions et Acquisitions Magazine*, December 19 2011.
 92 EL Greebel, “Key Priorities for Buyers and Sellers in Acquisitions of Public and Private Companies” in *Strategies for Negotiating Mergers and Acquisitions: Leading Lawyers on Understanding Clients’ Needs and Successfully Negotiating M & A Transactions*, 2011, Aspatore, at p6.
 93 *Id* at pp. 4–5. C Scotti and P Martin, *op cit*, at p5.
 94 O Guéguen, *op cit*.
 95 H Peter, *op cit*, at p12.
 96 C Scotti and P Martin, *op cit*, at p6. LR Kling, EN Simon and M Goldman, *op cit*, at p806.
 97 EL Greebel, *op cit*, at p4.
 98 Davies Ward Phillips & Vineberg LLP, “Trends and Developments in Private Mergers & Acquisitions” (September 2011), available at www.dwpv.com/Sites/academy/PDFs/Fall2011/Davies-Academy-September-20-2011.pdf; Hogan Lovells LLP, “Corporate Arbitrations: Arbitrations after Mergers and Acquisitions” (March 2012); [www.integrites.com/uploads/file/Part%203_%20Post%20M&A%20disputes\(1\).pdf](http://www.integrites.com/uploads/file/Part%203_%20Post%20M&A%20disputes(1).pdf).
 99 EL Greebel, *op cit*, at p4.
 100 R Tschäni, *op cit*, at p78.
 101 See eg, *Ameristar Casinos, Inc v Resorts Int’l Holdings, LLC*, CA No 3685-VCS (Del Ch May 11 2010); and *Merrill Lynch & Co, Inc v Allegheny Energy, Inc*, No 02 Civ 7689, 2005 WL 832050 (SDNY April 12 2005).

a preclusion of claims by the buyer where provisions in the target company's financial statements have been drafted specifically to cover the relevant occurrence, or to the extent that the damage is already covered by insurance.¹⁰²

(c) **Securing recovery of damages**

To alleviate the buyer's concerns about the seller's ability to pay indemnification amounts that may become due in the future, the contract may also set up a purchase price payment mechanism which allows for set-offs for any subsequent claims. For instance, the parties could agree to pay the purchase price in instalments and allow the buyer to delay or reduce later instalments, as needed, to offset successful claims against the seller. The parties could also agree, at any stage, on a bank guarantee to be provided by the seller. More frequently, part of the purchase price may be deposited into a hold-back escrow account with a third party whereby the buyer could ultimately retain the amount due for any successful claims.¹⁰³ Hold-back amounts vary greatly and could reach 100% of the indemnification cap.¹⁰⁴

4.3 Specific performance

Specific performance as interim relief is addressed in section 4.1 above. Where the applicable law allows this remedy, a request for specific performance as a final remedy in a dispute regarding a representation or warranty is often most appropriate after the signing of the agreement, when the parties are attempting to close the transaction. For instance, one party may request the tribunal to order the other to perform its pre-closing obligations.¹⁰⁵ Whether the breach warrants specific performance hinges on the nature of the transaction: while it may be feasible to order the assignment of all shares in a company, it may be unreasonable to order the parties to cooperate in a joint venture.¹⁰⁶ The threshold is generally higher to obtain an order of specific performance in common law jurisdictions.¹⁰⁷

The post-closing phase is generally not conducive to specific performance requests. At that stage, claims arising out of the representations and warranties clauses would typically give rise to monetary damages.¹⁰⁸

4.4 Termination and rescission

A breach of representations and warranties may give rise to a right to terminate or rescind the contract.¹⁰⁹ For instance, where the parties have inserted as a condition precedent to closing the truthfulness and accuracy of the representations and

102 R Tschäni, *op cit*, at p78.

103 R Tschäni, *op cit*, at p84.

104 EL Greebel, *op cit*, at p4.

105 G von Segesser, *op cit*, at p44-5; GW Jones and D Lutton, *op cit*, at p388. *US Restatement (Second) of Contracts*, introductory note to ss 357 *et seq*.

106 H Peter, *op cit*, at p9.

107 J Aaron and A Goudiss, "The Challenges for Sellers in Obtaining Effective Remedies in M&A Transactions", Bloomberg BNA, 15 *MALR* 1277 (2012) at p2.

108 G von Segesser, *op cit*, at pp44-5.

109 D Weber and R Giebel, *op cit*, at pp52-3; G Picot, *Mergers and Acquisitions in Germany* (2nd edn), 2000, Juris, at p38; RS Vineberg, D Ward Phillips, M Issitt, M Jonk, "Major Legal Issues: Canada, England and Wales, The Netherlands", in M Whalley and F-J Semler (eds), *International Business Acquisitions: Major Legal Issues and Due Diligence*, 2007, Kluwer, 2007, at pp82, 123, 347.

warranties, a breach that subsists past a certain date before closing may automatically rescind the purchase agreement or may entitle a party to refuse to consummate the transaction.¹¹⁰ The existence of a right to terminate the contract in such cases will turn on the interpretation of the parties' chosen qualification of the required degree of truthfulness and accuracy (eg, 'in all material respects').¹¹¹ M&A agreements will sometimes provide for the payment of a fee from the target to the buyer in the event that the target's breach of its representations and warranties leads to the termination of the agreement.¹¹²

Rescission is usually not an available remedy after the closing, except in cases of fraud.¹¹³ Some jurisdictions, however, offer more opportunities for rescission. For example, under Swiss law, the buyer may claim for total or partial rescission (eg, through a price reduction) for fundamental error within a year of realising the error, without having met the duty to investigate and to object and even after the lapse of the term of the representations and warranties.¹¹⁴ Accordingly, contracts governed by Swiss law often explicitly exclude the possibility of rescission that is otherwise available as a matter of law.¹¹⁵

5. Dispute resolution methods

5.1 Arbitration

Although arbitration proceedings for pre-closing conflicts are rare and any resulting awards seldom published, some research suggests that the vast majority of private M&A agreements opt for dispute settlement by arbitration.¹¹⁶ Arbitration is an attractive option because it offers parties the possibility of selecting adjudicators with specialised expertise and an international background, increased privacy (and, potentially, confidentiality, depending on the applicable law¹¹⁷), freedom to choose the procedure and the language of the proceedings, as well as a more cooperative environment favourable to the preservation of the business relationship.¹¹⁸

While expedited or fast-track arbitration proceedings may be available where the parties value speed,¹¹⁹ they are not necessarily preferable for resolving M&A disputes arising out of representations and warranties claims. It is difficult to anticipate the type and extent of these disputes in a transaction agreement and they may span fields that are too diverse to allow efficient consolidation into a single fast-track

110 C Scotti & P Martin, *op cit*, at pp5–6; G von Segesser, *op cit*, at p25.

111 R Tschäni, *op cit*, at p82; C Scotti & P Martin, *op cit*, at pp4–5.

112 EL Greebel, *op cit*, at pp4–6; C Scotti & P Martin, *op cit*, at pp4–5.

113 R Tschäni, *op cit*, at pp82–3.

114 R Tschäni, *op cit*, at p79.

115 R Tschäni, *op cit*, at p82.

116 I Hewitt, *op cit*, at p323–4. B Ehle and M Scherer, "Arbitration of International M&A Disputes", *Inter-Pacific Bar Association Journal* 23 (Sept 2007) at p23; R Tschäni, *op cit*, at p67. In the United States, where the deal contracts normally include a price adjustment clause, arbitration is nearly ubiquitous in private bids (89%), according to a 2007–08 study: JF Cogan, "Managing Disputes through Contract: Evidence from M&A," 2 *Harv Bus L Rev* 23 (2012).

117 J Reul, "Arbitration of Merger and Acquisition Disputes: the User's Perspective", in G Kaufmann-Kohler and A Johnson (eds), *Arbitration of Mergers and Acquisitions Disputes*, ASA Special Series No 24, May 2005, at p86; I Welsler, *op cit*, at p3.

118 B Ehle and M Scherer, *op cit*, at p23; I Welsler, *op cit*, at p3.

119 J Reul, *op cit*, at pp86, 89.

arbitration proceeding. In addition, any claims of fraud and default prior to or during conclusion of the agreement require extensive taking of evidence, thus lending themselves to normally paced proceedings. A fast-track proceeding could be useful, however, where there is an imminent risk for the company or where the emphasis is on the preservation of the parties' relationship.¹²⁰

5.2 Conciliation and mediation

Many M&A transaction agreements include a conciliation procedure, which may be combined with other dispute settlement mechanisms or used alone. An attempt to conciliate or mediate the dispute may constitute a condition precedent to filing a request for arbitration or court adjudication.¹²¹ Conciliation is worthwhile where the concern is to minimise disruption on the ongoing transaction or management of the business. Mediation could also be a valuable tool in these cases, and is an increasingly popular dispute resolution mechanism for joint ventures and alliances.¹²² Such multi-tier dispute resolution clauses or escalation clauses¹²³ should be drafted carefully to ensure that the conditions precedent can be fulfilled clearly, such that the validity of the arbitration agreement is not compromised or the steps in the process subjected to undue delay.¹²⁴

Because of the prevalence of arbitration clauses in private M&A agreements in many jurisdictions, litigation is mostly used as a support mechanism to enforce an award or an order against a recalcitrant party where these are not complied with voluntarily. Parties do, however, sometimes choose to submit their dispute directly to the national courts of a certain state.¹²⁵

5.3 Expert determination

If the dispute may be confined to a factual issue, such as a valuation matter, requiring specialised expertise, it may be useful for the parties to opt in whole or in part for settlement via expert determination by a jointly appointed (or third-party-appointed) neutral expert.¹²⁶ For instance, expert determination clauses are almost always inserted in the purchase price adjustment provisions of M&A contracts (see the chapter entitled "Price adjustment and closing account disputes").¹²⁷ In such cases, the parties should seek to set out clearly an agreed framework governing the expert's role and the applicable procedure.¹²⁸ In contrast to court- or tribunal-appointed experts, and unless the parties agree otherwise, these jointly appointed experts may make a binding determination, with regard to a particular issue, which

120 A Broichmann, *op cit*, at p151. G von Segesser, *op cit*, at p39.

121 *Ibid*, at pp30–1.

122 I Hewitt, *op cit*, at p321.

123 KP Berger, "Law and Practice of Escalation Clauses", in *Arbitration International*, Vol 22 No 1 (2006), at p1.

124 Available at www.cedr.com/about_us/arbitration_commission/ICDR_Guide_to_Drafting_International_DR_Clauses.pdf.

125 I Hewitt, *op cit*, at p324.

126 K Sachs, "The Interaction between Expert Determination and Arbitration", in G Kaufmann-Kohler and A Johnson (eds) *Arbitration of Mergers and Acquisitions Disputes*, ASA Special Series No 24 (May 2005) at p235; G von Segesser *op cit*, at p32.

127 K Sachs, *op cit*, at p236.

128 G von Segesser, *op cit*, at p33.

would be difficult to challenge in any subsequent proceedings (except for material error, fraud or misinformation).¹²⁹

While a failure to comply with an expert determination can form the basis of a claim for contractual breach, such determinations do not, however, result in a directly enforceable decision *per se*.¹³⁰

6. Practical considerations

6.1 Arbitrator selection

Documents drafted by experts, such as financial statements, cash flow statements, auditors' working papers, charts and spreadsheets will almost certainly play an important role in an M&A arbitration based on representations and warranties. While commonly assisted by party- or tribunal-appointed experts,¹³¹ arbitrators may sometimes be called upon to act without their guidance – eg, to determine the content and meaning of a balance sheet item impacting upon an evaluation before the expert can determine the correctness of a financial statement.¹³²

As M&A arbitrations involve complex valuation and accounting issues, appointed arbitrators should have the requisite expertise to understand and interpret these documents as well as the broader commercial context.¹³³

6.2 Use of experts

Experts are almost invariably used in M&A arbitration.¹³⁴ Parties benefit from identifying early the key issues that will require expertise. Expert accounting could be needed, for example, to ascertain whether certain representations and warranties have been honoured as a matter of accounting practice. Other relevant expertise may be required when the dispute concerns the performance of a certain product that was the subject of a representation or warranty.¹³⁵ The question of quantum – as regards the value of the target company and the price paid – is often also central to these proceedings, necessitating expert analysis and quantification.

In terms of case management, witness conferencing – or at least joint hearing of certain experts and technically qualified witnesses – has been highly recommended in M&A arbitrations.¹³⁶

6.3 Recording the parties' pre-closing knowledge

When a seller's representations and warranties are made to the best of its knowledge, or when parties agree that due diligence limits potential buyer claims under a 'general disclosure' or a 'specific disclosure' approach, it is important for the parties to record

129 K Sachs, *op cit*, at p241; G von Segesser, *op cit*, at p32.

130 *Id.*

131 R Tschäni, *op cit*, at p70.

132 B Ehle, "Arbitration as a Dispute Resolution Mechanism in Merger and Acquisitions", *Comp LYb Int'l Business*, at p298.

133 B Ehle and M Scherer, *op cit*, at p23; W Peter, *op cit*, at p502.

134 *Ibid.*, at p. 502.

135 N Fletcher, *op cit*, at pp249–50.

136 W Peter, *op cit*, at p503.

clearly the extent and nature of their knowledge when entering into the transaction and leave a paper trail of information exchange. Written documents should be favoured as they provide more certainty than reliance on witness testimony.¹³⁷ Thus, the due diligence verification is often based on a detailed index of documents. More cautious parties could even seal the relevant documents and deposit them in a neutral location.

6.4 Confidentiality

Because an M&A dispute is likely to involve sensitive information about the business and structure of the companies involved, parties which desire protection should agree to express confidentiality rules where necessary and possible.¹³⁸ This is a more secure means of ensuring the confidentiality of the arbitration and the documents produced in it than merely relying on the applicable national law's approach to confidentiality, which varies considerably from one jurisdiction to another.¹³⁹

6.5 Document production

The scope of document production depends not only on the procedural rules of the selected arbitral institution and the arbitral seat, but also to some extent on the legal culture of the parties, their counsel and the arbitrators. The common-law tradition, for instance, embraces a broader approach to discovery than most civil-law systems. In recent years, however, the diverging approaches of the principal players of international arbitration seem to have blended into an attenuated form of discovery¹⁴⁰ – a moderate approach that enables targeted document production. A tribunal may also opt to seek advice from party-appointed experts to narrow down the scope of discovery.

Another useful technique, which may for instance be used when the breach of a representation or warranty hinges on the existence of certain transactions or the functioning of a transaction processing system, is to sample a random group of contentious transactions.¹⁴¹ If an issue raised in the M&A arbitration is particularly complex, however, a fair assessment may require more extensive document production.¹⁴²

In terms of case management, because of the sensitive nature of certain documents, particularly when the dispute concerns direct competitors, parties may avail themselves of special procedures such as in camera production.¹⁴³ In a claim for

137 R Tschäni, *op cit*, at pp76, 82.

138 W Peter, *op cit*, at pp48–9.

139 See J-F Poudret and S Besson, *Comparative Law of International Arbitration*, at paras 368–74; G Born, *International Commercial Arbitration*, at pp2271–2; Redfern and Hunter, at paras. 2.149–2.157; P Ritz, “Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law”, *J Int Arb* 2010 at p228; A Buchanan and DAR Williams, “New Zealand: the confidentiality of arbitral proceedings under the New Zealand Arbitration Act 1996”, *International Arbitration Law Review* (2000) at paras 24–5; T Giovannini and S Giroud, “Confidentiality in International Arbitration: the Swiss Perspective”, ILA Swiss National Report (unpublished 2010) at p7; B Barin and K Taylor, “Droit de l’arbitrage, Confidentiality and Commercial Arbitration in Canada – A Tale with a Cautious Ending”, *Revue du Barreau* (2005), at p336; and many other sources.

140 B Ehle, *op cit*, at p307.

141 N Fletcher, *op cit*, at pp255–6.

142 *Ibid*, at p253.

143 B Ehle and M Scherer, *op cit*, at p27.

breach of representations and warranties, the parties' positions towards document production are likely to be particularly polarised because one party (the buyer) will likely have most of the documents, and this may therefore merit particular attention at the contract drafting stage. In this connection, see also the chapter entitled "Procedural and tactical issues arising in M&A disputes".

6.6 Extension of arbitration agreements to third parties

One or more parties may wish to extend the agreement to third parties or arbitrate claims under multiple contracts, especially when dealing with corporate groups. Arbitral tribunals have, however, been reluctant to use theories such as legal succession, 'group of companies', 'alter ego', or 'piercing the corporate veil' to extend an arbitration agreement.¹⁴⁴ Moreover, not many arbitration rules allow a third party joinder or consolidation of proceedings without express consent and/or where the parties and the arbitration agreements are not identical.¹⁴⁵ The safe approach is therefore to secure in advance the consent to arbitration of each party that may potentially be involved in a dispute.¹⁴⁶

In terms of case management, several sets of modern arbitration rules provide frameworks for the appointment of arbitrators in multi-party disputes.¹⁴⁷

7. Conclusion

Given the wide-ranging nature of these provisions in M&A transactions and the potentially high amounts at stake, disputes in connection with representations and warranties are likely to continue to increase. While careful drafting of these provisions can alleviate some of the uncertainty which may otherwise surround such disputes, it cannot resolve all disputes that may arise.

Arbitration as a relatively flexible and fast means of dispute resolution is particularly well suited to these disputes in light of their international context, specialised nature and, often, urgency. Efficient resolution by arbitration can be enhanced significantly through effective drafting of the arbitration agreement and careful delineation and implementation of a procedure that is closely tailored to the parties' transaction and any dispute arising.

144 Y Derains, "Is There a Group of Companies Doctrine?", in B Hanotiau and EA Schwartz (eds), *Multiparty Arbitration* (ICC Institute of World Business Law, 2010) at pp142–3; B Ehle and M Scherer, *op cit*, at p26.

145 See eg, ICC Rules of Arbitration (2012), Arts 7–10; Vienna Rules of Arbitration, Art 15; on joinder only (and silent on consolidation and multiple-contract situations), the LCIA Rules of Arbitration, Art 22.1(h); CRCICA Arbitration Rules, Art 17(6); UNCITRAL Arbitration Rules (2010), Art 17(5) (these are explicit provisions on joinder only; the LCIA, the CRCICA or the UNCITRAL Rules are all silent on consolidation and multiple-contract situations). *Cf* Swiss Rules of International Arbitration (2004), Art 4; CEPANI Rules, Art 12.

146 B Ehle and M Scherer, *op cit*, at p26.

147 See eg, LCIA Rules, Art 8; ICC Rules, Art 12(6)–(8); UNCITRAL Rules, Art 10; CRCICA Rules, Art 10; ICDR Rules, Art 6(5).