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Conflicts between Expert Determination Clauses and Arbitration Clauses

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One of the most commonly cited attractions of international commercial arbitration is that it provides parties with a single forum for the resolution of all their disputes under a given contract. Moreover, as other chapters in this volume illustrate, arbitral procedures can readily be adapted to ensure the efficient resolution of parties' disputes, in particular those relating to M&A transactions. Nonetheless, in addition to the usual broadly worded arbitration agreement, the parties to an arbitration agreement frequently provide for a subset of narrowly defined valuation questions to be referred to an industry expert, typically a valuation specialist, for determination. Parties cannot always agree the final price of a company and will in that case appoint an expert familiar with the relevant type of transaction to set or adjust the price according to specified criteria. This chapter contrasts the two procedures and examines the conflicts that may arise between them. Many of those difficulties can be minimised if parties have a clear understanding of the differences between the procedures from the outset.

In some respects, arbitration and expert determination are alike. Both arise under the parties' contractual agreement. Both limit or exclude the jurisdiction of the courts. Both result in a more or less binding non-judicial decision. And both have historically been seen as forms of alternative dispute resolution, although commercial arbitration, particularly international arbitration, has evolved into a discipline in its own right.[2] In an age of complex, high-value disputes, arbitration is no longer an invariably quick and informal alternative to the courts. However, although expert determination is often seen to be swift, complex contested valuations may take a year or more to resolve.

There are also important differences. Expert determination should not be mistaken for arbitration by different means. Whereas parties appoint arbitrators for their ability to decide a legal dispute, the value of experts lies principally in an ability to apply specialist knowledge to solve a problem that is blocking or complicating a transaction, or otherwise one that has arisen after closing. Even the most fair-minded expert has no general aptitude as an adjudicator. This distinction informs the different procedural safeguards, practices and scope for challenging a decision. Moreover, expert determination is largely a matter of domestic law, usually that of the main contract.[3] Parties may then supplement the provisions in the main contract with detailed terms of appointment as appropriate. Expert determinations do not have a juridical seat. By contrast, parties to international arbitration frequently choose a seat unconnected to the transaction, as well as international institutional rules, and the New York Convention sets an international standard for the recognition and enforcement of awards.

Aspects of expert determination

As a matter of convenience, 'expert determination' is used here to describe any binding resolution of a disagreement by a decision-maker with specialist knowledge, who is appointed under a contract and acts as neither a judge nor an arbitrator. Beyond that, generalisations are difficult.

Procedural requirements and the powers of an expert will vary, sometimes significantly, according to jurisdiction.[4] Moreover, any expert's mandate will depend on the detailed terms of the parties' agreement. There are 'no international standards',[5] although the ICC, DIS and WIPO, for example, have issued procedural rules suitable for international use.

Expert determination clauses

A well-drafted provision for determination will reflect the expert's function. The value of experts lies, above all, in their valuation and industry expertise. For this reason, parties should define the mandate or authority of any expert – or experts, where there is a panel – precisely and narrowly.[6] They should not push an expert into making complex legal findings. In particular, they must specify whether the end result should be limited to a simple figure or extend to a fully reasoned analysis in a report. It is desirable to specify minimal procedural rules, such as the number of experts, whether members of a panel of experts may reach majority decisions, a possible time line, or how costs will be allocated. Even where the main contract contains detailed provisions on the expert's role, parties do well to draw up detailed terms of appointment, identifying procedures for gathering evidence, interviewing witnesses and ensuring confidentiality. As a matter of good sense and indeed law in some jurisdictions, the agreement should be in writing.[7]

By contrast, typical arbitration agreements provide that any arbitral tribunal will have jurisdiction to resolve all disputes arising out of or in relation to a given contract. Parties to an arbitration agreement can easily adopt a substantial package of procedural law, rules and practices by specifying a seat of arbitration and the applicable institutional rules. This makes detailed terms of appointment unnecessary. The difference between the narrow remit of an expert and the broad remit of an arbitrator may be reflected in different approaches to the interpretation of expert determination and arbitration clauses. The English Court of Appeal has held that, since, in a particular contract, the parties did not intend expert determination to serve as a single forum for resolving disputes but only a narrow range of issues, there could be no presumption in favour of a broad interpretation of an expert determination provision.[8]

Historically, English agreements specified that a valuer would decide as an expert and not an arbitrator.[9] Although the label 'expert' or 'arbitrator' may of itself not be conclusive, this is helpful where certain types of valuation, such as rent reviews, are in practice sometimes settled by an arbitrator.[10] There is less likely to be confusion where an M&A contract also includes an arbitration agreement, which is clearly different in specifying a seat of arbitration and probably institutional rules. Still, it is worth making the distinction.

In an expert determination agreement, it may be desirable to consider conflicts of interest specific to the profession, especially because a firm or team of valuers or auditors rather than an individual will sometimes act as

experts. For example, it may be helpful to address whether the auditor of any of the parties could undertake a valuation.[11]

The expert's role

It is sometimes difficult to distinguish the role of an expert from that of an arbitrator, who resolves parties' disputes.[12] Historically, the role of the valuer was to complete the parties' bargain by setting a price, where they had not done so.[13] That function could be distinguished from the function of a judge or arbitrator. In completing the parties' bargain, the expert did not determine their rights under the contract. There was less a dispute between the parties than a difference as to price. The valuation was largely a matter of fact and not law. Depending on the applicable law, an expert's authority to make legal findings may be limited. For example, under French and Swiss law, an expert may determine facts but not the legal consequences of a finding.[14]

These distinctions may arise in different forms in some jurisdictions, but they may be of only limited practical use in understanding modern expert determination. The difference between resolving a difference as opposed to a dispute was perhaps never entirely clear. It is hard not to see parties' inability to set a price as a disagreement. Moreover, parties often refer valuation disputes to arbitration. Arbitrators are used to making complex economic determinations and are sometimes called on to set or adjust the price of a company or stake in it. In relation to valuation disputes, the key feature of expert determination is that the valuation of a company is not a matter of accurate bookkeeping but one that leaves the valuer with considerable discretion. As discussed below, the value depends on numerous parameters open to divergent interpretations.

Fast and authoritative?

The procedures of expert determination are very different from those in arbitration or other forms of adjudication. Experts are free to draw on their own knowledge rather than establishing exhaustive evidence and may not need to hear the parties on every substantive issue relevant to their decision.[15] However, expert determination is not a 'quick fix' and the speed of a procedure will depend on the scope of a referral. There is a considerable difference between valuing a bank and deciding a narrow question under a representation or warranty in relation to a small business. Procedures in expert determination are often described as 'informal', meaning that an expert is not bound by rules of civil procedure or evidence but is free to take the initiative and adopt a more 'inquisitorial, investigative approach'.[16] As the English Court of Appeal noted, 'there is no procedural code for expert determination.'[17] In a civil law jurisdiction, that inquisitorial approach may not of itself mark a significant departure from arbitral practice.

Enforcing and challenging experts' decisions

The expert's powers

A procedure driven by the factual knowledge of an expert rather than the legal and procedural expertise of an arbitrator brings with it compromises. Where parties deliberately opt out of the jurisdiction of courts in favour of an expert who is not legally trained, they cannot expect the same procedural standards as before well-run domestic courts or international arbitrations. It is suggested that the Singaporean courts rightly recognise that strict requirements of due process are at odds with the aims of expert determination.[18]

Minimum standards of procedural fairness vary according to jurisdiction. The English view is extreme: '[T]here is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties.'[19] By contrast, French and Swiss law require minimum standards of procedural fairness.[20]

Expert determination can only proceed expeditiously where the questions referred to the expert are narrow and technical. Parties lose speed if they expand the referral to a broad issue of valuation, especially that of a large company, such as a bank. While parties sometimes need a binding decision within weeks to complete a transaction, in a complex case, a procedure may involve detailed terms of appointment, agreement on procedural rules, resolution of preliminary questions of law, provision of documents, possibly witness interviews and the provision of a draft report for comment by the parties, before the final report is issued. A timetable extending up to a year, as is common in larger arbitrations, may be appropriate depending on the complexity of the dispute.

Once an expert has rendered a decision, its recognition and enforcement are usually a matter of domestic law.[21] International parties should consider that there is no equivalent to the New York Convention. Where a party challenges a decision, the standard for setting it aside is high. The fact that a decision is wrong is not necessarily sufficient. [22] As a matter of policy, this is consistent with the notion that, in choosing expert determination, parties opt to rely on the expert to decide a matter. They must live with the outcome.

Decisions may be set aside where the expert has materially departed from the parties' instructions and acted outside his or her mandate. Parties appoint experts to resolve a specific problem or answer a particular question and, like any other contract debtor or obligor, the expert must perform that obligation – no more and no less. In extreme borderline cases, the question may arise whether experts have discharged their mandate so badly that they can be said not to have discharged it all, and their incompetence said to amount to a material departure from their instructions.[23] This may arise where an expert has badly misunderstood the nature of a task, for example by applying the wrong accounting rules.

Expert determination in M&A agreements

Some jurisdictions provide for experts' decisions to be set aside where the expert's valuation is badly wrong, in the sense of arriving at the wrong answer as opposed to having answered the wrong question. The standard will vary according to jurisdiction. In Austria and Germany, a decision may be set aside where it is obviously incorrect or inequitable. For the mistake to be obvious it must be easily detected. Beyond that it must be wrong by a margin of at least 10 per cent and, in practice, more likely 25 per cent to justify legal intervention.[24] Such standards are indicative and allow for considerable discretion in their application. In Switzerland, the courts apply a similar standard of a deviation of at least 25 per cent.[25] The English common law does not provide that a decision may be set aside for error,[26] but parties often add a contractual term that an expert's decision will be binding absent 'manifest error'. For a decision not to be binding, the error must be easily detected and so clear as 'to admit of no difference of opinion'.[27] Irrespective of whether a standard is expressed in words or as a percentage, it risks giving a false impression of precision and may prove difficult to apply to valuations that depend heavily on judgements and assumptions, and leave the valuer considerable discretion.

Finally, any decision may be set aside for fraud. In a judgment of the English Court of Appeal, Lord Denning MR may be taken to have spoken on behalf of all civilised jurisdictions when he observed: 'Fraud or collusion unravels all.'[28]

Arbitral tribunals – at least those in seats that support the arbitral process – enjoy many of the powers of state courts to control and manage proceedings. By contrast, experts have little or no power to compel parties or witnesses.[29] Nor can they order measures, such as the production of documents, against third parties.[30] This may be a disadvantage where the expert determination agreement is between the buyer and seller, and the third party is the target company. By comparison, an arbitral tribunal might be able to compel production of documents from the target company where they are within the possession, custody or control of the buyer.[31]

Experts cannot usually order interim measures as arbitral tribunals routinely do. Consequently, parties to expert determinations need a measure of good will and trust for the procedure to succeed.[32] The expert is vulnerable to disruptive behaviour.

Parties choose to adopt expert determination in a range of transactions, including the sale of a company or a stake in it, the valuation of a partnership share or minority shareholding. It would equally be possible to refer any of the issues identified in this Section to arbitration or litigation.

In practice, the use of experts to value companies or shares in them or to set the final purchase price is particularly widespread.[33] The price is a delicate feature of any transaction, and buyers and sellers have opposing interests. Moreover, major M&A transactions are so complex that the

contract may not always be entirely clear as to the price adjustment mechanism. Combined with huge financial stakes, this may spawn disagreements.[34]

Occasionally, parties will agree to refer a complex valuation to an expert for binding determination before an opportunity for disagreement has arisen.[35] More commonly, in M&A transactions, the expert's role is limited to resolving contentious issues between the parties that arise after signing and before, or sometimes after, closing. The past decades have seen the emergence of international practices in M&A transactions and the adoption of prevailing Anglo-American terminology.[36] A number of typical situations can therefore be identified in which buyers and sellers refer disagreements to a valuation expert irrespective of jurisdiction.

Completion accounts

Parties to an M&A transaction will sometimes agree a fixed price for a company, a 'locked box' transaction.[37] This may be the case where a company is sold in a bidding process to institutional investors who require maximal certainty at the time of signing.[38] No subsequent adjustment will then be possible. Quite often, however, the purchase price at the time of signing will be subject to subsequent adjustment. This happens, for example, where the parties agree at the time of signing to set the final purchase price by reference to financial statements reflecting the state of the target company on a future date, once closing is complete. The time lag between signing and closing may be attributable to the need to obtain regulatory approval, for example, from competition authorities, consent from third parties or confirmatory due diligence. The price payable at the time of signing will be based on recent historical accounts, which will no longer be current at the time of closing. Companies change over time. Between signing and closing, inventory may have been sold, loans refinanced or assets revalued.

A 'completion accounts' mechanism allows the parties to adjust the price once the updated accounts are available upon closing.[39] In practice, parties may base any adjustment on, inter alia, net asset value, working capital, levels of indebtedness, a full profit and loss account, and changes in the value of stock.[40] In our experience, adjustments based on changes to net asset value are particularly common.

Just as when they negotiated the provisional price, the parties' interests are opposed, and there is ample scope for disagreement. Parties may disagree, for example, over applicable rules and principles, materiality standards or exchange rate fluctuations. When preparing the closing accounts, the buyer may decrease receivables and inventories, increase depreciation of fixed assets or create provisions for contingent liabilities, such as environmental risks. In contrast, the seller will seek to increase the value of balance-sheet items. In practice, the buyer's valuation may be several times higher than the seller's, yet the parties are working from essentially the

same documentation and both may be supported by reputable experts in their analysis.[41] This illustrates the role of judgement in the valuation of companies and, therefore, the subjectivity of any expert.

Earn-out clauses

Sometimes the purchase price of a company or stake in it will be defined by reference to the company's future, post-completion performance.[42] An earn-out clause will define both a fixed and a variable component of the price. The fixed component will be payable in any event. The variable component will depend on the company's subsequent performance in accordance with specified measures, and the final price will be set accordingly. The more successful a company, the higher the variable component payable by the buyer to the seller is.

In theory, at least, the interests of the buyer and seller become aligned. At first the seller will want the highest possible price, whereas the buyer will want to pay as little as possible. However, once the buyer owns the company, it will have every interest in the company's commercial success. That success will increase the variable component of the price and benefit the seller as well. In practice, in price adaptation disputes, parties may argue about the company's subsequent success and the contractual measures for evaluating that success.

Earn-out provisions also feature in agreements for the sale of a stake in a company. The seller will sell some shares and grant the buyer an option to purchase further shares later. The price will be set on the basis of the original sale price as adjusted in light of the company's subsequent performance.[43]

Although the principle is easily stated, its application may prove difficult in practice. The 'success' of a company may be measured differently. The parties may disagree on which valuation method to apply, with one side preferring, for instance, the broadly accepted discounted cash flow (DCF) method, and the other preferring earnings-based valuation or even book value.[44] Even where parties agree on a method, its application can still be contentious. For instance, if parties opt for the DCF method, they may still disagree on the various elements determining the applicable discount rate or the acceptable time frame in which to expect future cash flows. Parties can also disagree on the validity of the information provided by the company. They can argue over the relevance of the accounting principles used, the correctness of the accounts and the calculation of relevant periods. Further, the application of an earn-out clause requires continuity of management procedures during the reference period to prevent a buyer from manipulating the results, for example, by modifying a previously agreed business plan to increase charges during the reference period and delay earnings until after the end of the reference period.[45] Parties often refer disagreements to expert valuers.

Partnership shares and minority shareholdings

Parties may appoint an expert not to adjust but to determine the purchase price of a company or stake in it, where the buyer and seller cannot reach agreement. This sometimes happens where the value of shares in a small company that is not listed is difficult to assess. Similarly an expert may be appointed to value a partnership share, where a partner wishes to leave the partnership and withdraw an equity share from it.[46]

Representations and warranties

Experts sometimes determine disputed claims under representations and warranties.[47] While 'representations are statements of past and existing facts', warranties are 'promises that existing or future facts are or will be true'.[48] The disputed content of representations and warranties is not necessarily a matter of valuation. The expert will consider what exactly the seller represented or promised to the buyer. Claims under representations and warranties often involve contractual interpretation and factual assessments beyond the analysis of financial data. Further, it will be necessary to determine whether the facts relied on by the buyer fall within the scope of a warranty claim. While such claims may be referred to expert determination, they are often left to arbitrators or courts.

Competing dispute resolution mechanisms

An arbitral tribunal's jurisdiction will typically be broad, while an expert's authority will be narrow. The relationship between arbitration and expert determination clauses will depend on the terms of the contract.[49] This makes generalisations difficult. Parties may adopt a number of different approaches. They may provide for certain issues to be referred exclusively to expert determination and, in doing so, carve out an exception to the broad jurisdiction of an arbitral tribunal. Alternatively, they may provide for a tiered provision, where a matter must first be referred to expert determination and then subject to review by an arbitral tribunal. It is also possible for a dispute resolution provision to leave the parties with a choice of referring a matter to either an expert or arbitral tribunal. In that case, an arbitral tribunal would have the authority to decide any matter that might equally be referred to expert determination, in addition to any other dispute arising under the M&A agreement and covered by the arbitration agreement.[50]

In international disputes, an arbitral tribunal and state court, or one of several arbitral tribunals, sometimes concurrently assert jurisdiction over the same matter. Parallel proceedings before an arbitral tribunal and expert cannot arise in the same way. Unlike arbitral tribunals, experts do not have Kompetenz-Kompetenz (the authority to determine their own jurisdiction).[51] This is consistent with the role of an expert as a valuer rather than a legally qualified adjudicator. Decisions by experts as to the scope of their mandate are subject to review and not binding in the way arbitral awards or court judgments are. Nor would a court likely be disposed to accord them the authority that it would a jurisdictional award rendered by a competent arbitral tribunal.

There is not so much a danger of competing judgments or satellite proceedings but rather the difficulty that the expert's mandate is very narrow. Experts cannot make binding rulings on objections to their authority. Whether, and to what extent, experts can determine questions of law – such as contractual interpretation – will depend on the law of the jurisdiction and may even be a matter of doctrinal controversy within that jurisdiction.[52] Sometimes a respondent to an expert determination will start court or arbitral proceedings to establish that a reference does not fall within the scope of the expert's authority, either because the referring party has misconstrued the expert determination agreement or because it has misrepresented the matter referred and wrongly brought it within the expert's mandate. Conceivably, a respondent to an expert determination might also seek an injunction from an arbitral tribunal blocking the expert determination pending the tribunal's binding decision. In making these arguments, the respondent may be concerned to avoid the cost and effort of participating in an expert determination that it did not agree to. It may also have a tactical, if less than proper, interest in using parallel proceedings to delay and complicate the resolution of a dispute.

Alternatively, either party to an expert determination may seek a preliminary ruling on a legal question raised in the referral but which only an arbitral tribunal would have jurisdiction to decide. In that case, the role of the tribunal will be to support and clear the way for the expert determination. This may raise practical difficulties where an arbitral tribunal has not already been appointed. Starting arbitral proceedings and appointing a tribunal may take weeks or months. An arbitral tribunal may be required to rule on the scope of an expert's mandate, where the expert determination is already under way but not completed. In that case, the arbitral tribunal may also have to consider procedural efficiency and case management. The arbitral tribunal must decide whether it is better for an expert determination to proceed, with the risk that the expert's decision will subsequently be found to be invalid, or for the expert determination to be interrupted pending a ruling by the tribunal. Depending on the terms of the expert determination and arbitration clauses, the tribunal might not only rule on the scope of the expert's authority but also assume jurisdiction over and decide the substantive issue itself. In the English case of Barclays Bank plc v. Nylon Capital LLP,[53] the Court of Appeal upheld a first-instance decision that an accounting expert did not have authority to determine a profit allocation under a partnership agreement. The claimant applied to the Court for a declaration that it was not required to make a payment to the respondent, who contended that the matter fell to an accounting expert for determination, and the accountant should proceed, subject to final review after the determination was complete. In the leading judgment, Lord Justice Thomas adopted the following approach in relation to determining the scope of an expert's mandate as distinct from the substantive issue referred to determination, which may also be relevant to arbitration:

Deciding challenges to an expert's decision

The court has to determine first whether it is faced with a dispute which is real and not hypothetical and then if it is real, whether it is in the interests of justice and convenience to determine the matter in issue itself rather than allowing the expert to determine it first.[54]

As a starting point, a party must have a genuine interest in obtaining a ruling. Abstract determinations serve no purpose. For example, there is probably no value in ruling on an expert's jurisdiction before a dispute has started, or before the referring party has set out its referral in detail. Whether a referral falls within an expert's mandate may depend on the detail and may not be evident until the determination is under way. In Barclays v. Nylon, however, the scope of the expert's authority turned on a straightforward point of contractual interpretation, which the court could easily decide as a preliminary matter and so prevent an unnecessary and unenforceable expert determination.

In other cases, it may be better for the expert determination to proceed. Expert determination should be an efficient procedure and would lose that efficiency if an expert were blocked by repeated legal challenges and objections.

Assuming that there is a real issue to be decided, the question becomes one of fairness and practicality. The following competing factors may be significant:

- the case management decisions of an expert, in particular whether the expert is willing to stay the determination pending a decision by the arbitral tribunal;
- any request by the parties or expert for legal guidance from the tribunal;
- the general desirability of expert determination to proceed efficiently and promptly as a means of alternative dispute resolution;
- the prejudice to the parties if the arbitral tribunal does or does not make a preliminary ruling;
- the efficiency of deciding the issue at a later stage, for example, in a challenge to the expert's decision;
- the cost and complexity of the expert determination – it may be unacceptable for a major financial services firm or auditor to conduct a large-scale project, unless it is certain that the scope of the project complies with the terms of the contract;
- the relative efficiency and cost of deciding a preliminary issue – an arbitral tribunal may require two rounds of submissions to do so, whereas a simpler expert determination may be completed in a matter of weeks; and
- the possibility that all the parties will eventually accept the expert's decision, even if it does not fall precisely within the scope of the mandate.

These considerations apply to the case where an expert has exclusive authority to decide any matter properly referred under the contract. Where the expert's authority overlaps with the jurisdiction of an arbitral tribunal and proceedings run in parallel, there may be a good argument for the tribunal to resolve all the issues, including those before the expert, in the interests of procedural economy.

Where a contract provides for both expert determination in relation to some issues, as well as a broad arbitration clause, such as a standard institutional clause, an arbitral tribunal will usually have jurisdiction to decide whether to set aside an expert's decision. Where an arbitral tribunal does so, whether the arbitral tribunal should refer the matter to another expert determination or replace the expert's decision with its own will depend on the contract and parties' preferences.[55]

If the complaint requires technical substantive – as opposed to – procedural analysis, an arbitral tribunal, like a domestic court in a similar position, will face the difficulty of not having accountancy expertise. Parties would therefore do well to appoint an arbitrator – and indeed counsel – experienced in post-closing disputes, economically complex cases in general, possibly transactional work, or, at least, complex expert evidence.[56] By contrast, the emergence of international M&A terminology and practices may make specialist knowledge of the governing law of the contract a lower priority.

In the case above, the arbitral tribunal will still need further expert evidence to assess the decision. Typically, the parties will appoint valuation experts as expert witnesses to assist the tribunal. A dispute between competing valuations leads to the appointment of one or more further valuers to act as experts, which results in yet more valuers becoming involved. Triebel wryly notes that, on occasion, financial experts apparently multiply miraculously.[57]

Before embarking on such proceedings parties should consider that the arbitral tribunal will depend heavily on expert evidence, which it may find a challenge to evaluate in reaching a decision. Where the result of an expert determination is contested the tribunal and parties will have to decide whether there should be a single tribunal-appointed expert or whether each party should appoint its own expert. The second approach is preferable. In particular, with a single tribunal-appointed expert, there is a danger that the tribunal will be over-reliant and too accepting of the expert's opinion. Where a tribunal must choose between the views of two or more highly qualified experts, it will be forced to engage with their competing analyses and, more generally, may benefit from hearing different assessments of the same question.[58] Sometimes, there is a practical difficulty in finding an expert more authoritative than the expert who undertook the original expert determination. If there is no one clearly senior to that expert in a small specialist field, where conflicts of interest arise easily, a critical review of the expert's finding will be difficult. Finally, where the expert exercised judgement or discretion in reaching a decision, it will be difficult to challenge, because the exercise of discretion will usually allow for several legitimate answers.

The binding effect of an expert's decision

Conclusions

An expert's decision does not have res judicata effect in the sense of a judgment. Rather, it binds the parties as a matter of contract.[59] Where an arbitral tribunal is confronted with a prior decision by an expert in a matter between the same parties, it is suggested that the correct approach is for the arbitral tribunal to treat the decision as binding on the parties according to the terms of their contract and the applicable law. This does not preclude a review of the decision but the conditions for any review, as indicated above, may be very limited, for example excess of mandate, blatant error or fraud.

Expert determination and arbitration use different means to serve different ends. An understanding of those differences is key to drafting workable agreements and navigating overlapping proceedings. In order to avoid difficulties parties need a realistic understanding of those procedures. It would be unwise to try to expand an expert determination to a full-scale arbitration, as if experts could match a seasoned arbitrator's legal knowledge or understanding of due process, or expect an arbitrator and lawyer to display the expertise of a valuation specialist without relying heavily on expert evidence.

Notes

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[2] E Fischer, M Walbert, Chapter I: 'The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions', in Austrian Yearbook on International Arbitration, 2017, 21.

[3] B Gross, 'M&A disputes and expert determination: getting to grips with the issues', Arbitration (11), 2010, 2.

[4] BK-ZPO, B Berger, Berner Kommentar zur Zivil Prozessordnung - Band I, 2012, ad Art. 189 ZPO, 1859 et seq.; M Würdinger, Münchener Kommentar zum Bürgerlichen Gesetzbuch, 2016, ad §§ 317-319 BGB; J Kendall, Expert Determination, 2015, Section 12.1; V Triebel, 'Der Wirtschaftsprüfer als Schiedsgutachter bei M&A Transaktionen', in Der Experte im Verfahren, 2005, 132, 135, 136; N Erk, Streitbeilegungsmechanismen im Aktionärbindungsvertrag, in REPRAX 4/2017, on the binding procedural or substantive nature of expert determination, 154; C Klausegger, Chapter III: 'The Arbitrator and the Arbitration Procedure, Ad Hoc Expert Determination – Useful Tool or "Too Much of a Headache"', in Austrian Yearbook on International Arbitration, 2013, 168 with reference to the Austrian Civil Code, § 1056 ABGB.

[5] C Klausegger, op. cit. 4, 167.

[6] See B Gross, op. cit. 3, 2; R Tschäni, H Frey, Streiterledigung in M&A-Transaktionen, 2010, 81; R Tschäni, H Frey, D Müller, Streitigkeiten aus M&A-Transaktionen, 2013, 105-106. For drafting suggestions see: Centre for Effective Dispute Resolution, Model Expert Determination Agreement, including guidance notes, 2017; J-B Zufferey, L'expertise-arbitrage, Texte explicative, Modèle de contrat (en français et en anglais), 2013; N Erk, op. cit. 4, 156; BGB Erman Kommentar, Hager, 2017, ad §317, paras. 6 to 8; V Triebel, op. cit. 4, 138; R Tschäni, H Frey, D Müller, op. cit. 6, 111.

[7] Like an arbitration agreement, to be valid under Swiss law an expert determination agreement must be in writing or in any other form allowing it to be evidenced by a text (Art. 189 para. 2 cum 17 para. 2 of the Civil Procedure Code [CPC]), see CR-CPC, P Schweizer, Commentaire Romand: Code de procédure civile, 2019, para. 10, ad Art. 189 CPC; V Triebel, op. cit. 4 (on German law), 138.

[8] Barclays Bank Plc v. Nylon Capital LLP [2012] Bus. L.R. 542 (2011), at para. 28.

[9] A Redfern, 2001, 'Experts and arbitrators - an international perspective', in International Arbitration Law Review (4), 2001, 106; J Kendall, op. cit. 4, Section 1.1-8.

[10] A Kotb, 'Alternative Dispute Resolution: Arbitration Remains a Better Final and Binding Alternative than Expert Determination', in Queen Mary Law Journal (8), 2017, 130.

[11] See V Triebel, op. cit. 4, 126; J Kendall, op. cit. 4, Section 3.2-5 and 3.2-6; F Borde, 'Expert determination by accounting firms', in ICC Dispute prevention and settlement, 2017, Sections 20 to 32.

[12] For a discussion of this sometimes elusive distinction in common law jurisdictions, see M Valasek, F Wilson, 'Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective', in Arbitration International, Volume 29, Issue 1, 2013.

[13] A Kotb, op. cit. 10, 127; McHugh, 2.

[14] Court of Cassation, 16 February 2010, No. 09/11586 (on French law); N Erk, op. cit. 4, 173.

[15] A Redfern, op. cit. 9, 106.

[16] J Kendall, op. cit. 4, Section 1.1-2.

[17] Barclays Bank Plc v. Nylon Capital LLP [2012] Bus. L.R. 542, at para. 37.

[18] M Valasek, F Wilson, op. cit.12, 82.

[19] Bernhard Schulte GmbH and Others v. Nile Holdings Ltd [2004] EWHC 977 (Comm), at para. 95.

[20] French case law tends to consider that experts must respect the principle of adversarial proceedings, see D Tricot et al., L'évaluation à dire d'expert prévue par l'article 1843-4 du code civil: Etat actuel de la jurisprudence, 2013, p. 16. Under Swiss law, experts must be independent and impartial, and it has been argued that the grounds for recusal of arbitrators apply by analogy to them (Art. 189 para. 3(b) cum Art. 367 et seq. CPC), see CR-CPC, P Schweizer, op. cit. 7, para. 13. Moreover, in making their findings and conclusions, experts must respect the standard of due process, in particular equal treatment of the parties and the right to be heard (Art. 189 para. 3(c) CPC), see BK-ZPO, A Dolge, Basler Kommentar: Schweizerische Zivilprozessordnung, 2017, para. 52, and B Berger, F Kellerhals, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 158. See also R Tschäni, H Frey, op. cit. 6, 82.

[21] E Fischer, M Walbert, op. cit. 2, 43.

[22] For instance, under Swiss law, they 'can only be invalidated by means of an ordinary procedure in which the Plaintiff must prove that the findings of the expert are manifestly unfair, arbitrary, incorrect or inequitable to a high degree, or has been based on false assumptions or even vitiated by defects in consent', see TF 4A_254/2011, c. 4.1, B Berger, F Kellerhals, op. cit. 20, para. 159 and BK-ZPO, A Dolge, op. cit. 20, para. 53; under US law, the standard is 'fraud, bad faith or palpable mistake', see Liberty Fabrics v. Corporate Props. Associates 5, 636 N.Y.S.2d 781 [1st Dept. 1996]; under French law, they can be reviewed in case of gross mistake (erreur grossière), see Court of Cassation, 19 October 2017, No. 16-22660 (for Art. 1592, Civil Code [CC]) and Paris Court of Appeal, 10 April 2014, No. 13/22132 (for Art. 1843-4 CC); for German Law, see BGB §§317 and 318; V Triebel, op. cit. 4, 136, on legal review, 138, on no exclusion of 'ordentlichen Rechtsweg', 141 to 143; J Kendall, op. cit. 4, Sections 14.6-9 and 3.2-11 on 'material departure from instructions', Section 14.2-3 and 14.6-7 on 'procedural unfairness'; C Klausegger, op. cit. 4, 173; C Freedman, 'Expert determination', in ICC Dispute prevention and settlement, 2017, Section on legal errors, 9; Premier Telecom Communications Group Ltd, and Darren Michael Ridge v. Darren John Webb [2014] EWCA Civ 994, at paras. 8 and 9 (for a recent discussion by the Court of Appeal of the principles applicable to setting aside a decision under English law).

[23] The issue is addressed in the judgment of Lord Neuberger MR in Barclays Bank Plc v. Nylon Capital LLP [2012] Bus. L.R. 542 (2011), at paras. 62 to 66.

[24] C Klausegger, op. cit. 4, 174, 175.

[25] See the Swiss Supreme Court decision ATF 129 III 535, c.2.1.; R Tschäni, H Frey, D Müller, 111, op. cit. 6.

[26] J Kendall, op. cit. 4, Section 14.5.

[27] Veba Oil Supply & Trading GmbH v. Petrotrade Inc. [2001] EWCA Civ 1832, at para. 33; J Kendall, op. cit. 4, Section 14.11-2. Similarly, under Swiss law, the error must be 'manifest', which means that the deviation from the actual situation must be immediately obvious to any expert examining it carefully, see BK-ZPO, A Dolge, op. cit. 20, para. 53.

[28] Campbell v. Edwards [1976] W.L.R. 403 at 407.

[29] V Triebel, op. cit. 4, 137.

[30] R Tschäni, H Frey, op. cit. 6, 84, on the position specifically under Swiss law.

[31] IBA Guidelines on the Taking of Evidence, Article 3.

[32] N Erk, op. cit. 4, 174.

[33] J Kendall, op. cit. 4, Section 3.4-1; R Tschäni, H Frey, op. cit. 6, 50.

[34] R Tschäni, H Frey, op. cit. 6, 60.

[35] ibid.

[36] M Schöll, Réflexions sur l'expertise-arbitrale en droit suisse, in ASA Bull. (24), 2006, 624; V Triebel, op. cit. 4, 126.

[37] V Triebel, op. cit. 4, 129.

[38] J Kendall, op. cit. 4, Section 3.4-3.

[39] B Gross, op. cit. 3, 1; J Kendall, op. cit. 4, Section 3.4-3.

[40] J Almoguera, 'Practical remarks on some of the most common issues in M&A arbitration', in Spain Arbitration Review (26), 2016, 72; J Kendall, op. cit. 4, Section 3.4-3.

[41] W Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes', in Arbitration International, Vol. 19, No. 4, 2003, 497.

[42] J Almoguera, op. cit. 40, 72.

[43] V Triebel, op. cit. 4, 129.

[44] A discussion of the full range of valuation techniques goes beyond the scope of this Article. On valuation techniques in general, see T Koller, M Goedhart, D Wessels, Valuation: Measuring and Managing the Value of Companies, 2015.

[45] W Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes', in Arbitration International, Vol. 19, No. 4, 2003, 499.

[46] J Kendall, op. cit. 4, Section 3.3-1.

[47] V Triebel, op. cit. 4, 129.

[48] R Tschäni, 'Post-Closing Disputes on Representations and Warranties', in ASA Special Series 24, 2005, 68, with references. For a list of some typical representations and warranties in M&A transactions, see R Gersbach, A Gallman, Der Unternehmensjurist – Ein Handbuch für die Praxis, 2016, 184, 185.

[49] See, for instance, the decision of the Swiss Supreme Court ATF 117 Ia 365 c. 5b; and F Bohnet, L Droese, Präjudizienbuch ZPO, 2018, para. 3.

[50] Under French law, the question also arises as to the relationship between expert determination under Article 1843-4 CC, which is a mandatory provision, and an arbitration clause. In 2018, the Court of Cassation held that although Article 1843-4 CC is a provision of French public policy that cannot be excluded by contract, it does not operate to render an arbitration agreement manifestly void and inapplicable. Therefore, even for matters normally devolved to an independent expert by operation of that mandatory provision, the arbitral tribunal is allowed to examine its jurisdiction under the arbitration agreement, see G Stephens-Chu, N Bellec, 'French court rules that mandatory expert determination provisions do not render arbitration clauses inapplicable', 2019, pp. 1, 2, which comments on the decision of the Court of Cassation, 10 October 2018, No. 16/22215.

[51] Barclays Bank Plc v. Nylon Capital LLP [2012] Bus. L.R. 542, at para. 23 (for the position under English law); M Valasek, F Wilson, op. cit.12, 69, 70 (for the position in common law jurisdictions).

[52] For example, for the difficult position under Austrian law, see C Klausegger, op. cit. 4, 174; and for the various positions under Swiss law, see CR-CPC, P Schweizer, op. cit. 7, paras. 5 to 7, BK-ZPO, A Dolge, op. cit. 20, paras. 12 to 14, 40, B Berger, F Kellerhals, op cit. 20, paras. 150, 153, and P Carr, M Vischer, Sinn und Unsinn von Schiedsgutachten bei M&A Streitigkeiten, which comments on the Swiss Supreme Court Decision 4A_428/2015, in Der digitale Rechtsprechungs-Kommentar, 2016.

[53] Barclays Bank Plc v. Nylon Capital LLP [2012] Bus. L.R. 542 (2011), [2011] EWCA Civ 826.

[54] ibid., at para. 42.

[55] R Tschäni, H Frey, D Müller, op. cit. 6, 111.

[56] ibid., at 43.

[57] V Triebel, op. cit. 4, 143.

[58] For a fuller discussion of the issues surrounding tribunal- and party-appointed experts, see W Peter, 'Party-Appointed Expert Witnesses v. Tribunal-Appointed Experts: Is there a Best Practice in International Arbitration?', in Festschrift für Gerhard Wegen zum 65. Geburtstag, 2015, 719.

[59] W Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes', in Arbitration International, Vol. 19, No. 4, 2003, 502.