

Homburger

Post-M&A Disputes and Expert Determination

Issues that may arise before, during and after
Expert Determination

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The Setting

- A certain fact is not established at the time the parties enter into the agreement
 - Final value of a share or another asset depends on closing accounts, not signing accounts → how much did the value change between signing and closing?
 - Monetary worth of a reference value used to calculate the price is not known or must be updated (earn-out, etc.)
 - Certain quantities have to be established (stock...)
- The parties decide to implement **two alternative dispute resolution systems**

Arbitration
To resolve 'the dispute'

Expert Determination
to establish 'the fact'

The simple sample: Expert Determination Clause

Presentation of the fact by one party	No later than 60 days following the closing date, the buyer shall deliver the consolidated financial statements (the Final Closing Accounts) to seller.
Substantiated objection by the other party within a deadline	Unless the seller gives written notice (the Notice of Objection) to the buyer within 20 days, stating in such notice in detail, on an item-by-item basis, the reasons for his objection, the Final Closing Accounts shall be final and binding...
Conciliation during a specific period	The parties shall endeavor to resolve in good faith any objection within 20 days (Conciliation Period).
Expert Determination	If the parties are unable to resolve the objections within the Conciliation Period, any party may refer the dispute to an internationally recognized accounting firm within 20 days after the end of the Conciliation Period.

The Basics

Expert Determination: Agreed Alternative Dispute 'Resolution' to 'finally' determine a 'fact' in a simplified process, based on special know-how of expert

But:

- No final resolution of the dispute, because no enforceable judicial decision
- No finality, because subject to limited judicial review
- Not only for facts, also legal questions
- Special know-how of expert limited to one specific set of questions, not procedure, not generally legal issues
- Simplified process, but core requirements, such as right to be heard, equal treatment must be complied with

And:

- Importance of agreement, because no clear legal framework; contractual provisions tend to leave many issues undecided

Issues Before Expert's Determination (1|2)

- **Arbitrability**, Article 177 PILA, Article 354 CCP (e.g. DTF 4A_92/2015)
- **What** did the parties agree on? ('arbiter', 'expert arbitrator', 'appraiser', 'expert report', 'independent accountant', etc.)
 - Arbitration, e.g. DTF 4P.299/2006
 - Expert Determination, e.g. DTF 4P.199/2003
 - Simple expert report, e.g. DTF 4A_369/2011
- What is the relationship between the **expert determination and the arbitration**, in case of preceding, parallel or subsequent arbitration

Issues Before Expert's Determination (2|2)

- Issues with the **expert**
 - Parties cannot agree on expert, default mechanism does not exist or fails (Treuhandkammer)
 - Chosen expert is not sufficiently independent or lacks the agreed qualifications (cf. DTF 4A_655/2014)
- It is not clear whether the **prerequisites** for an expert determination are fulfilled, i.e. whether the notice of objection is sufficient (Zurich High Court ZR 108 (2009) no 42; DTF 4A_428/2015), whether the deadlines were met, whether the disputes relates to the issue for which the expert has authority
- Parties cannot agree on the formulation of the **questions** to be submitted to the expert or fail to formulate the questions clearly

Issues During Expert's Determination

- The parties (or the target company, i.e. a third party) fail to provide the necessary information or documentation to the expert
- The expert violates the
 - parties' rights to be heard
 - parties' right to equal treatment
 - procedural rules agreed by the parties
- The expert does not comply with the deadlines set in the agreement

Issues After Expert's Determination (1|2)

- The expert's opinion is manifestly incorrect
(cf. very broad definition, DTF 129 III 535 consid. 2.1; 4A_369/2011),
 - factually,
 - because of an incorrect application of rules or of the wrong rules, or
 - in its result (the expert is more than '25 % off'),
- The expert decides issues beyond his|her authority given to him|her by the agreement or the joint instructions of the parties
 - additional factual issues
 - Legal questions not covered by the expert's mandate
(cf. Australian Vintage v Belvino, NSWCA 275, September 11, 2015)

Issues After Expert's Determination (2|2)

- The expert's determination was declared not binding (by an arbitral tribunal)
 - tribunal decides to correct the expert opinion and to decide the issue itself
 - tribunal decides to send the issue back to the expert, but
 - expert was found to be incompetent, lacking independence
 - refuses to continue acting in the case
- OR the arbitral tribunal finds that it is bound by the expert determination, even though serious defects exist

Possible Remedies (1|2)

It's all in the contract:

- Specifically refer to "expert" within the meaning of article 189 of the Swiss Civil Code
- Define the questions for which the expert has authority
- Name the expert in the clause, and provide a fallback clause for appointment of expert (appointing authority)
- Create for obligations of the parties, and the target, to provide information and documentation
- Define the parties' rights in the expert determination process
- Clarify the consequences of missed deadlines (e.g. Notice of Objection, for the parties, the expert)
- Define finality of the expert's determination (not in case of fraud, manifest error, violation of right to be heard and of the principle of equal treatment)

Possible Remedies (2|2)

- Define what happens if the expert report is annulled: *"binding except in the event of a manifest error, in which case the matter be remitted to the expert"*
- Provide for an umbrella arbitration proceeding in which the expert can render his|her decision, by default or if one of the parties so prefers:
"either party may refer the matter to the arbitration, whereby the arbitral tribunal shall appoint an independent expert to render an expert opinion (Schiedsgutachten) as that term is defined in article 189 of the Swiss Code of Civil Procedure or to expert XY, unless a party refers the matter to arbitration before the terms of engagement of the expert are agreed"

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Thank you for your attention.

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