M & A transactions: process and possible disputes

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M&A TRANSACTIONS: PROCESS AND POSSIBLE DISPUTES

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1. Introduction

The purpose of this paper is to set the scene. Before getting into specific topics, it indeed appears appropriate to briefly recall the chronology and logic of merger & acquisitions ("M&A") transactions. Although not codified, and subject to variations depending on the circumstances, M&A transactions actually tend more and more to follow a standardised pattern. This is less the result of dogmatic studies as to why such transactions should occur in this manner, than simply the pragmatic outcome of a somewhat darwinist evolution. Practitioners have thus progressively developed a process which provides a balance between the often conflicting interests of the seller and those of the buyer. It is important to know and understand this process, keeping in mind that, over the years and sometimes questionably, practitioners have come to believe that there is no alternative. One can safely say that there is currently an *opinio necessitatis* with respect to the standardised way of doing M&A deals.

While recalling the chronology and logic of M&A transactions, we will also identify and attempt to define specific concepts and terminology which have developed and are commonly used in this particular context.

Finally, we will list a series of potential and common disputes that may arise throughout the various stages of an M&A transaction.

By no means does this introductory paper attempt to address, let alone solve, all the complex issues that arise in or in relation to M&A transactions. Its limited ambition is to identify and put into perspective the much more technical and in-depth contributions that follow in this ASA special issue.

2. Chronology of an M&A Transaction

2.1. The standard process

Schedule 1 to this paper endeavours to illustrate the chronology of a standard M&A transaction. Using a timeline, it distinguishes between what happens ("facts"), which documents are drawn up and executed ("documents"), and highlights the specific clauses that are particularly relevant at the various stages and their effects ("clauses and effects").
In a normal pattern, the process is the following:

2.1.1 Preliminary contacts

First contacts between the parties take place directly or indirectly. It is not uncommon for third parties, such as investment or merchant banks, to be involved. Exploratory discussions are conducted. A bidding process may occur in order for the seller to decide with whom the negotiations should be pursued.

Quite obviously any potential buyer wishes to have access to at least a certain amount of information in this preliminary phase. This is usually achieved through an information memorandum issued by the seller or his agents. It is a more or less elaborate document that supplies data about the business that is for sale as well as the envisaged transaction and the process that should lead thereto.

Often, at least part of the information to which the potential buyer(s) has access in this first phase is confidential. Frequently, even the very fact that a selling process has been initiated with respect to the target is sensitive and must therefore remain secret. This may be a concern of the seller as well as the buyer. A confidentiality agreement may therefore be executed between the parties at some point during this initial part of the process.

It also occurs that, after preliminary discussions, the potential buyer wants to make sure that he is not bidding against others (or against himself). Depending on his bargaining power, the buyer may therefore require from the seller an exclusive right to negotiate, at least for a certain time. Exclusivity arrangements would then also be made.

2.1.2 Letter of Intent

Unless, for whatever reason, the negotiations collapse, the parties usually reach a stage where the seller has identified a purchaser with whom there exists a common intent to implement a specific deal. At that point in time, the parties often deem it useful to execute a "letter of intent", sometimes also called "heads of agreement", "memorandum of understanding", "term sheet" or the like. A separate paper will address more accurately the sometimes complex nature, content and effects of this kind of document\(^3\). Very synthetically, however, the main characteristics of letters of intent are:

(i) as such, a "letter of intent" has no codified meaning, neither with respect to its content nor to its nature or legal consequences. Caution should therefore prevail; what matters is the letter’s substance and the circumstances surrounding its execution;

(ii) in particular, the question as to whether a letter of intent has any binding effect depends on its content and on the parties’ intentions (whether expressed or implied);

(iii) usually the parties state that the only purpose of the letter of intent is to outline their (then current) intentions. They sometimes expressly say that it shall have no binding effect, and

\(^3\) See Henry Peter / Jean-Christophe Liebeskind, Letters of Intent in the M&A Context; see also Georg von Segesser, Arbitrating pre-closing disputes in merger and acquisition transactions, § 3.3.1.
that it is "subject to contract". However, this is usually untrue, at least in part. Most letters of intent probably do have legal implications, the real issue being which ones;

(iv) this said, any letter of intent usually describes the subject matter of the deal (the "target"), the price range or at least the methods or parameters which will enable the determination of the price; the nature of the deal (a share deal, an asset deal, a merger, a spin-off, etc.); the parties' intention to enter into the envisaged deal; the procedure that will be followed in order to implement the deal (due diligence, signing, closing, adjusting, etc.); as well as the relevant timetable. If the parties have not yet entered into confidentiality or exclusivity agreements, provisions governing these two aspects are usually included in the letter of intent.

2.1.3 Due diligence

The "due diligence" process then usually begins. It amounts to a phase during which the potential buyer is given access to more information in order to decide whether or not he will actually go through with the acquisition and, if so, under what conditions. This applies to all aspects of the target's business (financial, tax, legal, environmental, intellectual property, real estate, etc.).

Although the term "due diligence" has a clear meaning for any practitioner, it might be somewhat puzzling for M&A outsiders and from a terminological standpoint. Knowing the origin of the phrase is therefore helpful in better understanding the purpose of this particular phase of most M&A transactions. The term is derived from an obligation - or at least incumbency - of the buyer: during this particular - and by essence preliminary - phase, the buyer must display the diligence reasonably required from (or "due" by) any potential purchaser in investigating, understanding and therefore knowing the "object" which he envisages to buy. Having done that - or waived his right to do so, or not done it well - if he pursues the transaction he will be barred from asserting that he did not know. "Due diligence" is thus the part of the more global M&A process during which the potential buyer must be duly diligent about fully understanding the target and is - or should be - put in the appropriate conditions to do so.

This explanation should help better understand the somewhat complex nature and multifaceted purpose of due diligence. Its scope is broader than a plain "audit". It in effect aims at supplying the buyer with information about the target that is not only of an objective nature (pure facts) but also of a subjective nature, to help him understand the target and whether it will fit with his business, strategies, or even only intentions or tastes. A target that might seem perfect by auditing standards (whether financial, environmental or tax) could very well be deemed to be subjectively inappropriate by the potential buyer after the due diligence phase. This is why due diligence often includes direct contacts with

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4 Rudolf Tschäni, Post-closing disputes on representations and warranties, § 3.4.1; Jakob Hön, Einführung in die Rechtliche Due Diligence, Zürich 2003; Felix R. Ehrat, Switzerland, in Due Diligence for Corporate Acquisitions, London/The Hague/Boston (Kluwer Law) 1996, p. 275ss.

5 Sometimes "due diligence" is used as a synonym of "audit". We believe that this is wrong or at least inappropriate. The nature of an audit is narrower than that of a "due diligence". This difference is, we believe, generally acknowledged in the standardized M&A terminology.
the target's management ("management meetings") to enable the purchaser to get to
know the target's culture and understand how its management is likely to react should the
transaction be implemented.

To enable the buyer to perform the (its) due diligence, the seller often organises a "data
room". This is usually a room where all relevant data is put at the disposal of the
purchaser or of his appointed agents. In view of the sometimes highly confidential nature
of the process, this often takes place in a secret location, most likely a place which is
known only to a few people and is totally outside the target's or the seller's premises. With
the new technology available, a data room can take the form of a simple CD Rom
containing all relevant information or documents. In transactions of a certain complexity or
importance the parties often draw up a protocol which governs issues such as access to
the data room and the right to copy documents.

By enabling the buyer to better understand the target, due diligence also inevitably has a
direct effect on the terms and conditions of the purchase agreement. It is in fact only once
he has better understood the subject matter of the deal that the purchaser and his
advisors will be able to decide how the transaction should be structured and which
conditions should be included in the agreement. This regards, in particular, the
representations and warranties that the buyer will request. In many cases, the due
diligence findings will, indeed, have a substantial influence on these provisions.

Sometimes due diligence also enables the parties to identify conditions that will have to be
fulfilled before the execution and/or completion of the envisaged agreement can take
place. These are sometimes called "signing" or "completion" conditions precedent.

In any event, due diligence often leads parties to start or intensify their negotiations
regarding the content of the actual purchase agreement.

2.1.4 Purchase agreement (signing)

Unless the buyer has decided to give up in view of what he has learned as a result of the
due diligence, i.e. if the latter has proven "satisfactory" and provided the parties have
managed to agree on all terms and conditions of the deal, they then go on to execute the
"real" agreement. It is usually called "purchase agreement", or "share purchase
agreement" ("SPA") in the case of a share deal as opposed to an asset deal. One also
encounters "merger agreements" (in case of a merger as opposed to a plain acquisition)
or "share swap agreements" (in case the consideration is not paid in cash but through
shares of another entity).

This is in any event the contractual instrument pursuant to which the parties, in a binding
manner, implement - or agree to implement - the transaction and list all terms and
conditions thereof. It necessarily includes the subject matter of the deal (shares, whole or
part of a business, only assets, etc.), as well as the price or at least the way the price will
be (objectively) determined (pricing formula) and the nature of the consideration (cash,

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6 Wolfgang Peter, *Arbitration of mergers and acquisitions: purchase price adjustment arbitrations*, § 2.2.3, § 2.2.4 and § 3.
shares or a combination thereof). It also comprises provisions, sometimes very lengthy, governing the representations and warranties made by the seller as well as detailed clauses regarding the way the buyer shall be indemnified should these "reps and warranties" prove to be inaccurate. It also customarily contains "boilerplate clauses".

In order to attenuate the obligations of the seller deriving from its "reps and warranties" and therefore limit the rights of the buyer in such respect, it is not unusual for the seller to qualify them in the clauses themselves or to issue a "disclosure letter" in which the seller outlines facts that will thereafter be considered as known to the buyer, to prevent the buyer from later denying his awareness of them.

2.1.5 Completion (Closing)

In the vast majority of cases the transaction is not actually implemented upon signing. There are many reasons for this, usually because the parties have provided for "condition(s) precedent" of various kinds. Some of the most common ones include:

(i) in any deal of a certain size there will almost inevitably be competition law filing requirements which will make it advisable or necessary to obtain clearance from the relevant authorities before the transaction can be completed;

(ii) sometimes the buyer, but more often the seller, will have to take steps to be able to implement the deal. This can include restructuring the business, for instance by assigning some assets to or from the target, refinancing it or taking out all or part of the available free cash;

(iii) the parties may recognise that the due diligence has not been completed upon signing and that it has to be concluded thereafter. This can occur, for instance, when the buyer was deliberately not granted full access to very sensitive information before a truly binding agreement was executed. This is sometimes referred to as a "satisfactory (post-signing) due diligence" condition precedent;

(iv) under the "no material adverse change" ("MAC") clause, the seller represents that, at closing, the business will not be materially different to that known to the buyer through the information memorandum, due diligence and/or share purchase agreement.
the fact that all representations (and warranties) shall be true on the date of closing.

If a condition precedent is not satisfied, not fulfilled in the agreed time, or if the parties have agreed that the buyer could step out after signing and before completion (discretionary walk-away right, the granting of which is relatively rare), the signed agreement will not be "closed".

In a normal pattern, auditors often step in at this stage to assess the actual value of the target based on the agreed parameters (net asset value, discounted cash flow, turnover, EBIT or EBIDTA, etc., multiplied by an agreed number if appropriate). The result of this financial audit usually leads to the drawing up of "closing accounts".

Whether or not an audit takes place, assuming that all conditions precedent, if any, have been satisfied (or waived), the deal is then actually completed (in French "exécuté"; in German "durchgeführt") and the closing occurs. The transaction can be extremely simple (for instance cash against shares). It is often relatively complex due to all the steps it implies. A "closing agenda" or "completion list" might be useful in such cases. It describes what has to be done, by whom and when. For instance shares must be endorsed, shareholders and board of directors meetings must be held, resignations must be tendered, retention plans (with key managers or employees) must be entered into, new auditors and directors must be appointed, wire transfers must be made, amounts must be paid into escrow accounts, deeds, titles, opinions or secret formula must be handed over, and other related agreements must be executed.

2.1.6 Post-closing events

Although many scenarios can be envisaged at this stage, the closing is usually not – and sometimes by far – the end of the transaction.

First of all the amount which has been paid at closing is not necessarily the final price. In fact, it might be an approximation based on pro forma or non-audited accounts. In such cases, in accordance with the purchase agreement, a post-closing audit is often performed in order to assess what the actual and final price will be. This leads to so called "post-closing adjustments" of the price.

In some cases the parties agree that the final price will depend, in whole or in part, on the income, profit or cash flow which will be actually generated by the target following its assignment to the buyer. In such cases the purchaser is buying future cash flows, which is incidentally the rationale whenever the price is calculated applying a discounted cash flow ("DCF") method. If this is so, the purchaser might understandably wish to be protected in case these cash flows are less than what was envisaged. On the other hand, applying the same logic, the seller might require a price increase if the future results are more favourable than those which were used for calculating the price. To that effect "earn out adjustments" are often provided for. They trigger an increase (or decrease) of the

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14 Wolfgang Peter, Arbitrating pre-closing disputes in merger and acquisition transactions, § 2.
15 Wolfgang Peter, Arbitrating pre-closing disputes in merger and acquisition transactions, § 6.
16 Wolfgang Peter, Arbitrating pre-closing disputes in merger and acquisition transactions, § 3.2, § 4 and § 7.
amount paid at closing. Technically speaking, they have an influence on the price and should therefore not be confused with the "reps and warranties" and related indemnification mechanisms.

Earn out clauses do give rise to an inherent conflict of interest: in order to avoid or limit any price increase, the buyer might endeavour to reduce (or defer) the success of the target at least to the extent that this shall be reflected in its financial statements; on the other hand, the seller might try to artificially improve or accelerate the relevant financial results in order to benefit from the highest possible adjustment. The seller often plays—or can be suspected to play—an active role in this respect if he continues to manage the business for a certain time following the closing.

2.1.7 Representations, warranties and indemnification

As any practitioner knows, at this stage the transaction is still far from over. Even when due diligence has been well carried out and the purchase agreement well drafted, problems often arise because the target is not perfectly in line with what the buyer had in mind. This is when the representations and warranties come into play, an almost inevitable and often unpleasant phase which can sometimes start many years after closing depending on the provisions of the purchase agreement or relevant statutes.

This is a delicate topic that will be addressed by other contributions\(^\text{17}\). Simply put, the purpose of this set of clauses is to ensure that, should the promised qualities of the target not exist, the buyer will be indemnified by the seller to the extent that he has suffered a prejudice.

2.2. The three main phases

The entire process of an M&A transaction can last months and, sometimes, years or even decades, from the beginning of negotiations to the end of the time frame for making claims under the representations and warranties clauses, and the resolution of possible disputes.

This process can be divided into three periods based on two main events of the transaction (signing and closing), as illustrated in Schedule 2 hereto:

(i) pre-signing (as opposed to post-signing);
(ii) pre-closing (as opposed to post-closing);
(iii) post-signing but pre-closing\(^\text{18}\).

It is useful to distinguish these three phases for various reasons, including, *inter alia*, the fundamentally different legal regime that applies to each of them. Simply put, it can be said that:

\(^{17}\) See in particular Rudolf Tschâni, *Post-closing disputes on representation and warranties* and Wolfgang Peter *Arbitrating pre-closing disputes in merger and acquisition transactions*.

\(^{18}\) In this respect see the list of possible conflicts proposed by Georg von Segesser, *Arbitrating pre-closing disputes in merger and acquisition transactions*, § 3.4.
- **pre-signing**: there is no binding arrangement so that the applicable rules are (mostly) of a pre-contractual nature;

- **post-signing but pre-closing**: there is a binding agreement but, at least under Swiss law, rights and obligations are usually of purely contractual nature, i.e. there is not yet any transfer of property (shares or assets) and therefore of control of the target;

- **post-closing**: in addition to contractual rights and obligations, the business has actually changed hands, so that the actual owner of the target is now the buyer.

Depending on when the controversy arises in the process, the applicable rules (whether contractual or statutory) might provide a different answer to the same question, such as whether or not specific performance can be successfully claimed by either one of the parties, or whether they can terminate the contract for breach, error or fraud.

Among these three phases, the most problematic is not, contrary to what one might think, the post-closing phase.

### 3. Possible disputes

The quite complex and lengthy acquisition process can give rise to disputes at all stages. It is not our intent to identify them all, let alone to comment on them in detail. Considering the purpose of this introductory paper, our ambition will be limited to suggesting a list of issues which, traditionally, is frequently the basis of disputes. In an attempt to structure the list, it is subdivided into disputes about procedural issues and disputes regarding the merit.

#### 3.1. Procedural issues

**3.1.1 Applicable law**

The applicable law is expressly stated in most M&A contracts. Difficult issues arise, however, if it is not. These obviously mostly come up in the pre-signing phase, certainly before the execution of a letter of intent, but sometimes also thereafter. This might occur if the parties felt that choosing an applicable law is unnecessary in a letter of intent, or inappropriate since it could imply that the document has legal effects although they state (or wish) the opposite.

**3.1.2 Jurisdiction**

Here as well delicate problems can arise, including:

(i) what is the competent court if it is not specified in the relevant document (letter of intent or agreement);

(ii) if an arbitration clause is valid, and for whom. Does it extend to the target and/or to other companies of the groups to which the seller or the purchaser belongs?

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whether a particular issue falls within the scope of the arbitration clause. This problem may arise if specific types of disputes have been carved out or segmented so that they are to be submitted to different bodies (experts, expert arbitrators or arbitrators) depending on their nature\(^\text{20}\);

who has jurisdiction over interim relief, when and how. Additional issues arise when the laws of states involved deny arbitral tribunals the right to issue interim relief\(^\text{21}\).

### 3.1.3 Interim relief

Interim relief may also play an essential role in M&A disputes by preventing behaviours which could have irremediable consequences\(^\text{22}\), such as the breach of a confidentiality or exclusivity clause, or, most importantly, the completion of the proposed transaction with another party.

### 3.1.4 Specific performance

Specific performance is an important and difficult topic in the M&A environment, the main question being whether the actual implementation of the deal can be ordered by a judge or arbitral tribunal. The answer is likely to depend on the circumstances and stage at which the issue arises\(^\text{23}\).

With regard to the pre-signing phase, it is difficult to imagine cases where a court could issue an order to sign, especially if the terms and conditions of the (often complex) purchase agreement have not been at least substantially agreed upon\(^\text{24}\).

At the post-signing but pre-closing stage, specific performance can be envisaged\(^\text{25}\), but not without carefully taking into account the nature of the transaction. Ordering the assignment of 100% of the shares of a holding company could, for instance, not be too problematic. On the other hand, ordering parties to set up and manage a joint venture might prove impossible or at least unreasonable.

Finally, ordering specific performance through interim relief should be admitted only in very exceptional cases\(^\text{26}\).

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\(^{20}\) See Klaus Sachs, *The interaction between expert determination and arbitration*, § 1 and § 3.

\(^{21}\) See Nicholas Fletcher, *Case Management and advocacy in the arbitration of merger and acquisition disputes*, § 2.13.2.

\(^{22}\) See Nicholas Fletcher, *Case Management and advocacy in the arbitration of merger and acquisition disputes*, § 2.13; Georg von Segesser, *Arbitrating pre-closing disputes in merger and acquisition transactions*, § 5.5.


\(^{24}\) One can think, for instance, about the fact that the – essential - reps. and warranties clauses have not yet been finalised.

\(^{25}\) See for instance the case mentioned by Georg von Segesser, *Arbitrating pre-closing disputes in merger and acquisition transactions*, §2.3.4 in fine; see also § 5.6.

\(^{26}\) Georg von Segesser, *Arbitrating pre-closing disputes in merger and acquisition transactions*, 5.5.2.
3.2. Merit

3.2.1 Pre-signing issues

Sometimes disputes concern the behaviour of one of the parties before the purchase agreement has been signed, e.g.:

(i) Disputes sometimes arise with respect to breaches of pre-signing confidentiality or exclusivity provisions, giving rise to the delicate questions of proof of the breach and of the resulting damages\(^{27}\).

(ii) Disputes based on alleged breaches of letters of intent are relatively common and, in most cases, complex\(^{29}\). They often address the issue of whether and to what extent the relevant "letter" is binding and, if it is not binding, what then are the pre-contractual obligations of the parties deriving from the letter of intent. This raises the question of a possible *culpa in contrahendo*, in other words whether and to what extent the parties have an obligation to act and negotiate in good faith even before any binding instrument has been executed. In that respect, several authors consider that qualified (i.e., increased) obligations exist once a letter of intent has been executed\(^{29}\), including possible obligations to inform the counterpart if the relevant party (whether the buyer or the seller) is also negotiating with a third party or if it does not seriously intend to enter into the envisaged agreement.

3.2.2 Disputes based on the terms and conditions

However, most controversies are based on the terms and conditions of the (purchase) agreement, whether expressed or implied. They include:

(i) whether all conditions precedent have been met and are still satisfied at the time of closing\(^{30}\);

(ii) whether a party has done what it was reasonably supposed to in order to make sure that the condition(s) precedent would be fulfilled\(^{31}\);

(iii) breaches of confidentiality and/or exclusivity provisions;

(iv) the existence and construction of MACs, i.e. "no material adverse changes" clauses\(^{32}\). The issue can probably be said to be the equivalent in the M&A environment of the well-known "force majeure" or, probably even more so, *clausula rebus sic stantibus* concepts\(^{33}\);

(v) cases where post-signing audits (or due diligences) do not prove satisfactory to the purchaser;


\(^{28}\) Georg von Segesser, *Arbitrating pre-closing disputes in merger and acquisition transactions*, § 3.3.1.


\(^{31}\) Georg von Segesser, *Arbitrating pre-closing disputes in merger and acquisition transactions*, § 3.4.1.

\(^{32}\) Rudolf Tschäni, *Post-closing disputes on representations and warranties*, § 2.4.

\(^{33}\) Georg von Segesser, *Arbitrating pre-closing disputes in merger and acquisition transactions*, § 3.4.1.4.
(vi) competition law issues: is there, and to what extent, a duty by both parties to actively collaborate in order to obtain clearance\textsuperscript{34}? Should the competent authority delay its decision, to what extent can either party be required to postpone the closing date which was initially foreseen or agreed? If the competent authority gives clearance subject to certain conditions (for instance the dismissal of part of the target's business) are the parties still obliged to proceed with the (limited) implementation of the deal\textsuperscript{35}? How should the revised price be set?;

(vii) breaches of covenants\textsuperscript{36};

(viii) controversies regarding post-closing adjustments\textsuperscript{37};

(ix) disputes surrounding the representations and warranties and related indemnification; these are, as Rudolf Tschäni puts it, often the "most hotly debated clauses in an M&A transaction"\textsuperscript{38};

(x) the effect thereon of the due diligence, of the information memorandum and of the disclosure letter\textsuperscript{39};

(xi) divergences regarding the earn out adjustments;

(xii) with respect to several of these issues, questions relating to consequential price increases or decreases. Often difficult problems will have to be resolved in the absence of a clear price formula and/or definition of key concepts, such as "working capital" or "financial debt", and/or whenever the parties have not specified which set of accounting standards will apply (IFRS, US or other (national) generally accepted accounting principles ("GAAPs"))\textsuperscript{40}.

3.2.3 Disputes regarding the termination of the agreement

One of the most difficult and important issues is often whether or not a signed M&A agreement can actually be terminated (with an \textit{ex nunc} or \textit{ex tunc} effect). This question arises not only if the agreement is silent in such respect, but also, as often occurs, when the right to terminate has been excluded (expressly or even implicitly). In such a case, indeed, it might be alleged that termination remains in any event possible in particular circumstances, for instance in case of error, at least if it is fundamental ("Grundlagenirrtum"), or in the presence of fraud\textsuperscript{41}.

The answer to the query will, here as well, be different depending on whether the question arises pre-signing, post-signing but pre-closing, or post-closing. The practical implications of any decision in this respect should never be underestimated. Indeed, the more time has

\textsuperscript{34} Georg von Segesser, \textit{Arbitrating pre-closing disputes in merger and acquisition transactions}, § 5.9.

\textsuperscript{35} Georg von Segesser, \textit{Arbitrating pre-closing disputes in merger and acquisition transactions}, § 5.9.

\textsuperscript{36} Rudolf Tschäni, \textit{Post-closing disputes on representations and warranties}, § 2.1.

\textsuperscript{37} Wolfgang Peter, \textit{Arbitrating pre-closing disputes in merger and acquisition transactions}, § 9.

\textsuperscript{38} Rudolf Tschäni, \textit{Post-closing disputes on representations and warranties}, § 1; he probably refers to the drafting as well as to the implementation of such clauses.

\textsuperscript{39} Rudolf Tschäni, \textit{Post-closing disputes on representations and warranties}, § 3.4.1, § 3.4.2 and § 4.6.3.

\textsuperscript{40} Rudolf Tschäni, \textit{Post-closing disputes on representations and warranties}, § 2.3.

\textsuperscript{41} Rudolf Tschäni, \textit{Post-closing disputes on representations and warranties}, § 4.6.
elapsed since the closing, the less possible or at least reasonable it will be to invalidate an M&A transaction. Because of its nature, the taking over of any business has consequences that once performed and implemented can hardly be undone. Conversely, it is as inappropriate to accept the invalidation of an M&A deal as it is to order its (specific) performance. Assuming that an M&A deal has been terminated or not implemented, for whatever reason, the question usually arises as to the compensation that should be awarded to the non-defaulting party, if any. The answer to this question can also have very substantial economic consequences.

The solution can theoretically be:

- the granting of "positive" damages, where the party that has breached the agreement will indemnify the other by paying damages sufficient to put the latter in the situation in which it would have been if the agreement had been complied with, including loss of profits;
- alternatively, "negative" damages may be granted: the non-defaulting party shall be put in the situation in which it would have been, had it never started negotiating. In such cases, the damages will include the amount which has been paid, if any, the expenses suffered and perhaps even the loss of other opportunities;
- "punitive" damages might be claimed under some laws, but not under Swiss law;
- "liquidated" damages or penalties can be agreed on and are probably sometimes advisable, but are usually subject to review;
- last but not least, complex issues can derive from the necessity to wind up all or part of the business, in particular where the transaction led to setting up a joint-venture, whether contractual or corporate. This is a yet very much unexplored and controversial area of the law.

4. Conclusion

The M&A process is complex and the sources and nature of possible disputes are numerous, yet not unusually difficult to resolve. Because of the peculiarities of M&A transactions, there is often no clear answer, at least under Swiss law. Different answers may be given to the same queries, inter alia depending on when the issue arises in the process. Time is usually of the essence.

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42 See above, § 2.1.4.
43 See also Georg von Segesser, Arbitrating pre-closing disputes in merger and acquisition transactions, § 6.
44 This is the only remedy under Swiss law whenever a claim is based on "culpa in contrahendo", i.e. of a precontractual nature, see i.a. Georg von Segesser, Arbitrating pre-closing disputes in merger and acquisition transactions, § 6.3.4.
46 See in this respect Alain, Hirsch, La rupture d'un contrat de "Joint venture", in Mélanges offerts à Pierre Van Oommerslaghe, Bruxelles (Bruylant) 2000, p. 511ss ; Marcel Fontaine, Droit des contrats internationaux, analyse et rédaction de clauses, Paris (Forum européen de la communication) 1989, p. 45 and 329ss; Claude Reymond, Le contrat de "Joint Venture", in Innominatverträge, Zürich 1988, p. 383ss.
Submitting M&A disputes to arbitration is probably often the most appropriate way to deal with these many difficult, specialised, sensitive, urgent, multinational and highly controversial problems. This is undoubtedly why most M&A agreements contain an arbitration clause and why such a high proportion of arbitration awards concern M&A disputes.

47 Nicholas Fletcher, Case Management and advocacy in the arbitration of merger and acquisition disputes, § 1; Rudolf Tschäni, Post-closing disputes on representations and warranties, § 1; Georg von Segesser, Arbitrating pre-closing disputes in merger and acquisition transactions, § 4 and § 7 in general and § 4.4 in particular.

48 Rudolf Tschäni, Post-closing disputes on representations and warranties, § 1.
Schedule 1
Schedule 2

Sign:  
Pre-signing  
Post-signing  

Close:  
Pre-closing  
Post-closing  
Post-signing and pre-closing