Global Arbitration Review

The Guide to M&A Arbitration

Editor
Amy C Kläsener

Third Edition

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Editor

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For further information please contact Natalie.Clarke@lbresearch.com

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Bevan Woodhouse

Editorial Coordinator
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Production and Operations Director
Adam Myers

Head of Content Production
Simon Busby

Copy-editor
Katrina McKenzie

Proofreader
Claire Ancell

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to M&A Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the third edition of this guide on mergers and acquisitions within the world of arbitration. It is a practical know-how text in two parts. Part I identifies the most salient issues in M&A arbitration, while Part II surveys substantive principles from select regional perspectives.

We are flattered to have worked with so many leading firms and individuals to produce *The Guide to M&A Arbitration*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, mining, challenging and enforcing awards and (soon) IP, in the same practical way. We also have books in the series on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). Our thanks to the Editor, Amy C Kläsener, for her vision and energy in pursuing this project and to our colleagues in production for achieving such a polished work.

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Part I

Key Issues in M&A Arbitration

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Managing Expert Determinations

Gerald M Hansen[1]

This Guide focuses primarily on various aspects of the resolution of M&A disputes through arbitration. A formal arbitration process, however, is not the only method of resolving certain M&A disputes. An expert determination is an additional alternative dispute resolution process often included in transaction agreements, one that is commonly utilised in resolving post-closing purchase price adjustment disputes or closing accounts disputes. This chapter discusses a variety of topics focused on assisting transaction parties, their advisers and their counsel in managing the expert determination process, including how an expert determination differs from an arbitration and the types of M&A disputes that are most often appropriately resolved through an expert determination. This chapter also discusses and describes a variety of factors related to expert determinations, including defining and documenting the process in the relevant transaction agreement, the content of submissions to the expert that can have a direct impact on the determination, and the critically important selection of the expert.

Expert determination versus arbitration

Before discussing how to manage the process, we should first differentiate between an expert determination and an arbitration. While the two processes are often procedurally very similar, there are some key differences and considerations for transaction parties.

There are two primary differences between arbitrations and expert determinations. The first is that an expert determination is most commonly conducted by a single expert, typically an accounting or other relevant industry expert, whereas many arbitrations involve an arbitral tribunal comprising attorneys. The second key difference is that, generally speaking, there are no formal rules governing an expert determination other than what may be provided in the transaction agreement (or otherwise agreed between the parties

1 Gerald (Jerry) M Hansen is a partner at Forensic Risk Alliance.

and possibly the expert) and licensing standards for professional certifications held by the expert. By contrast, arbitrations are governed by a variety of rules, laws and treaties that can apply depending on the venue or the parties' agreement.

It is important to be aware of these differences when selecting the dispute resolution process to include in transaction agreements. There are different types of M&A disputes, some of which are best served by arbitration, others by expert determination. This is why many transaction agreements contain both dispute resolution methods, with each applicable to different disputes. (See Chapter 3 on conflicts between expert determination and arbitration clauses.)

Types of disputes frequently resolved through expert determinations

M&A disputes relate to a variety of transaction provisions, such as representations and warranties, indemnities, transaction fraud, leakage and purchase price adjustments. Not all M&A disputes are appropriate for expert determination. In addition, there is a marked difference between an expert who determines an M&A dispute and a quantum expert or other subject-matter expert witnesses. This chapter is only concerned with the expert determination, not other experts that may be retained to assist a party in presenting its position in the arbitration or expert determination.

Expert determinations are commonly provided for in transaction agreements to resolve post-closing purchase price adjustment disputes. Such disputes are also referred to as net working capital disputes, closing accounts disputes or completion accounts disputes. Many transaction agreements contain post-closing purchase price adjustment mechanisms based on a predetermined metric – commonly net working capital – but it could be some other metric, such as earnings before interest and tax.

How a purchase price adjustment dispute can arise is based on the provisions of the transaction agreement. Most agreements with purchase price adjustment provisions allow a buyer to review the books and records of the acquired entity and thereafter propose adjustments (within a specified limited time period) to the price if the buyer believes certain financial statement items (e.g., net working capital items) reflected at the closing date are not representative of the actual amounts received or are otherwise recorded contrary to the applicable accounting guidance (e.g., in violation of International Financial Reporting Standards (IFRS) or US Generally Accepted Accounting Principles). The types of items most commonly at issue are those requiring some level of estimation or subjective judgement on the part of management, which allows for differences of opinion. Examples of such items would include allowance for doubtful accounts, inventory reserves, warranty reserves, contingent liabilities and similar accounts. If the seller disagrees with the buyer's proposed adjustments, the parties may negotiate and settle their differences, or the disagreement may persist, resulting in a contractually agreed dispute resolution process, typically an expert determination.

Outside the United States there can be a perception that contractually provided for purchase price adjustments and resulting disputes have decreased in frequency. This is because the use of locked-box transactions to avoid purchase price adjustment calculations and disputes is increasingly common in the United Kingdom and some other European countries. Locked-box transactions commonly establish the purchase price based on a review of the most recent audited financial statements and, once agreed, the purchase price is locked and not subject to adjustment post-closing. This may prove successful, but further discussion is

outside the scope of this chapter. What is important to note is that cross-border transactions involving US-based counterparties still commonly include net-working-capital-based purchase price adjustments and dispute resolution provisions. As a result, purchase price adjustment disputes and expert determinations are still relevant in the cross-border context, even if not prevalent in some intra-country transactions.

Other types of M&A disputes can involve a variety of contractual, legal and damages issues that are typically more appropriately handled through commercial arbitration involving an attorney or a tribunal of attorneys versus an expert determination by a single accounting or industry expert. Expert determinations can be utilised for other types of M&A disputes, such as indemnity claims that are related to net working capital items; for example, taxes, but this is relatively infrequent. More commonly, quantum or valuation experts would assist client counsel with such disputes in an arbitration.

Identifying the types of M&A disputes that most frequently involve expert determinations is a good starting point, but managing the overall expert determination process requires an understanding of the common expert determination framework and how to document the process in the transaction agreement. Not only will such steps assist in smoother dispute resolution, they can also help avoid a protracted negotiation, or even a dispute, regarding the process itself.

Defining the expert determination process

An important aspect of managing expert determinations is understanding and defining the dispute resolution process in the transaction agreement. This section addresses this topic from two perspectives: first by describing and defining the common expert determination process, and second by describing how to sufficiently document (define) that process in the transaction agreement.

What does an expert determination look like?

If a post-closing purchase price adjustment dispute does arise, the resolution process should be about resolving the items in dispute, rather than a protracted negotiation about the process itself. In some cases, the negotiation about the process becomes a dispute in itself, separate from the substantive issues. If the transaction agreement adequately provides for the dispute resolution process, this negotiation can be streamlined.

The expert determination for a purchase price adjustment dispute would commonly include the following steps.

- The parties agree on the expert to resolve the dispute.
- A schedule is agreed that provides specific due dates for the various activities described below.
- The parties provide simultaneous submissions (initial submissions) to the expert in support of their positions on the items in dispute.
- The parties provide simultaneous rebuttal submissions to the expert, restricted to addressing arguments raised by the opposing party in their respective initial submission.
- The expert has the opportunity to submit interrogatories or document requests to the parties regarding the items in dispute or the parties' submissions.
- The parties respond to the expert.
- The expert provides the written determination to the parties.

The expert determination process in most cases is not bound by formal rules or procedures as is arbitration. The common process outlined above is only a guide and may be altered in any way the parties agree. For example, the parties may wish to provide for a hearing in person or via teleconference to present their positions live to the expert; or the parties may wish to forgo the rebuttal submissions. The overall goal should be a fair process designed to provide the expert with sufficient information to reach a fully informed determination.

Depending on the nature and magnitude of the items in dispute, this may involve more or fewer steps. The effort required for each activity and the timeline depend on the number and complexity of the items in dispute.

Defining the expert determination process in the transaction agreement

Armed with a basic understanding of what is involved in an expert determination, the parties and their counsel can better manage the process by incorporating various aspects into the transaction agreement. Doing so will assist in focusing the parties' efforts on resolving the dispute, should one arise, rather than on the process itself. By the time a dispute is imminent, the parties are most likely not on good terms, which can create difficulties when negotiating the procedures. Therefore, the time to include such items is during the drafting of the agreement.

In practice, the importance of clarity in the implementation of some post-closing related provisions, such as purchase price adjustments, representation and warranty claims, leakage and potential disputes related to such issues, is sometimes overlooked (or considered less important) when drafting. Obviously (and understandably), the parties would rather focus on the excitement surrounding a transaction and other perceived weightier matters such as agreeing a purchase price, the due diligence results or the prospect of adding a new product or service. After all, a post-closing dispute may not actually happen, right?

Rather than viewing them as less important, defining the expert determination provisions sufficiently in the transaction agreement can actually have a double benefit: (1) they will clearly spell out the overall process the parties should follow if a dispute arises, thereby streamlining the process, and (2) they will add clarity that may actually assist in preventing all or part of a dispute that may otherwise arise. A failure to sufficiently attend to post-closing dispute resolution provisions, especially for complicated or heavily negotiated transactions, can create an opportunity for post-closing issues to arise or be magnified. Such issues often originate in avoidable ambiguities or omissions in the transaction agreement. A crafty counterparty may attempt to exploit them if left unaddressed.

While it is important to include some guidelines regarding the dispute resolution process, a great level of procedural detail is not warranted or even possible in most cases. Failing to include any procedural details in the transaction agreement, however, is also not an appropriate option. So, where should the parties focus their efforts? The transaction parties should allocate time to the post-closing provisions of the transaction agreement that could be susceptible to varying interpretations or negotiation several months after the closing. These provisions include, but are not limited to, those related to post-closing purchase price adjustments, as well as any related dispute resolution provisions. Clarity in provisions describing the implementation of the post-closing purchase price adjustment methodology, calculation and dispute resolution process is important, and will prove a valuable reference should a dispute occur.

Following are a few key items to consider including in the transaction agreement.

- Specify a firm, individual or list of individuals to serve as the expert. Failing to do so can lead to a protracted search and negotiation (and potentially a dispute) about selection. This does not guarantee that the firm or the individual named in the purchase agreement will not have a conflict when a dispute arises, but if chosen carefully the odds of this occurring are greatly reduced. The transaction agreement should also specify the process to select an alternate expert if the firm or individual named has a conflict. For example, the agreement could state that if the nominated firm is conflicted, an alternate firm that is an international public accounting firm with operations in the United Kingdom will be selected (considerations in the selection of the specific expert to serve are discussed below).
- Specify the general procedures. These could be similar to those in the example provided above or could include a provision for a hearing, additional submissions, fewer submissions, etc. Setting out the process will eliminate the need to obtain agreement between the parties later, when the parties are contemplating a dispute. Many transaction agreements only generally refer to the process. For example, the agreement may state that the parties will provide submissions to the expert who will rely exclusively on such information to determine the disputed items. Such a general reference to the process leaves much open for interpretation by the parties and the expert.
- Specify the applicable provisions, calculations, methodologies, etc., that have an impact or relation to the post-closing purchase price adjustment and dispute resolution process. In this regard, any calculation impacting the determination of the relevant price adjustment metric (e.g., net working capital) and the purchase price adjustment itself should have an example calculation included in the transaction agreement. Specificity in the example calculation is necessary to mitigate opportunities for differing interpretations. For example, for a net-working-capital-based purchase price adjustment mechanism, the example calculation of net working capital should not simply list the balance sheet accounts that are to be included because balance sheet accounts are often consolidated amounts of several sub-ledger accounts. The example calculation should include detail of the sub-ledger components to avoid subsequent misinterpretation. Months later in a dispute process, when this example may need to be referred to, memories become vague because one interpretation of a provision negatively impacts a party's position on a disputed item, while an alternative interpretation supports the position. Adding such rigour to the transaction agreement will provide the expert an easy-to-follow guide in reaching a determination on the items in dispute. It could also help avoid certain disputes due to the clarity of the example.

Alternative dispute resolution processes are often less expensive than litigation, but that does not mean they are inexpensive. Post-closing disputes can be very costly to resolve. By paying attention to a few key post-closing provisions in the transaction agreement, parties can often mitigate (i.e., manage) the nature and magnitude of post-closing disputes. The time invested in defining the expert determination process before closing can result in time and cost savings after closing.

Assess your strength of position

Prior to moving forward with an expert determination process, an additional step the transaction parties can take is to assess the relative strength of position on each of the items in dispute. A good tool to use for this assessment is a resolution matrix. The matrix is an analytical tool for the assessment of the strength of position and likelihood of prevailing on each of the items in dispute. The assessment-of-strength spectrum can be useful with either three or five 'strength-of-argument' classifications. For example, a five-class spectrum would include these categories: strongly favours seller, favours seller, neutral, favours buyer, strongly favours buyer.

The overall goal of the resolution matrix is the identification of certain disputed items that might make sense to attempt to negotiate away prior to commencing the expert determination. The items with the lower likelihood of success in the expert determination might be settled through negotiation. Another objective could be to resolve or settle less significant items beforehand so the parties do not incur costs from advisers and the expert to resolve items with less significant monetary impact. Further, the results of the resolution matrix may provide a party with information that can be used to its benefit even before the expert determination process begins. For example, if a party identifies an item in dispute that the resolution matrix indicates it is likely to lose, that party can attempt to negotiate a 50/50 split on the item with the other party. If successful, it could be considered a win of 50 per cent on an item it assessed as having a low likelihood of success.

If both parties utilise a strength-of-argument assessment, such as a resolution matrix, an expert determination process focused solely on the significant issues in dispute can often be achieved. A note of caution: the resolution matrix process is an imperfect estimation of the outcome in an expert determination. It can be useful in assessing strength of position and in indicating items for potential negotiation, but it should not be relied on as an infallible predictor of the expert's ruling for each item in dispute.

Submissions to the expert should be robust

If a dispute does occur that is submitted for an expert determination, such a determination will ultimately be reached based on the information provided to the expert. In an expert determination process, each party will be required to provide information to the expert in support of its respective positions on the disputed items. Many expert determinations are conducted solely in writing and, as a result, the parties will typically have only two opportunities to provide information to the expert: the initial and rebuttal submissions. Sometimes a third opportunity is available through providing responses to the expert's interrogatories or requests, but only if the expert makes such requests. The limited opportunities to provide information to the expert in support of a party's positions heightens the importance of the completeness and quality of the submissions.

The initial submission is each party's first opportunity to provide detailed information to the expert supporting their positions. Beyond a detailed discussion of the disputed items, there are a few other categories of information that each party should cover to provide context.

Background information

The parties have been dealing with this transaction, which has now proceeded to a dispute, for many months, or longer. It can be easy for the parties to forget that the expert most likely knows very little, if anything, about the parties, the target entity, the transaction agreement or the disputed items. While such information is often not determinative of disputed items, it provides necessary background information to more fully understand them.

Company and industry specifics

Similarly, the expert may or may not have significant experience in the specific industry of the target company. While a lack of industry experience typically has no bearing on the expert's ability to appropriately resolve the dispute, the parties would be well advised to provide any industry- or company-specific information to aid the expert's understanding. These specific facts and circumstances of the business can be important as they provide context to certain disputed items and potentially impact the ultimate resolution. For example, describing that the company commonly stocks higher than normal levels of inventory at certain times of the year because it has seasonal sales, can provide information to the expert relevant to rebutting a proposed adjustment to inventory for excess inventory levels. Another example could be describing specific economic factors that have impacted the business operations or the industry temporarily or in the long term. Other accounting considerations can include, for example, the methodology used to determine the allowance for doubtful accounts. Under IFRS, there are multiple acceptable methods for determining this, including those based strictly on the ageing of receivables and others based on specific identification of accounts with potential collection issues. All of this information is useful to the expert in understanding the business and can have an impact on the determination of certain items.

Detailed disputed item discussion and support

Finally, the submissions should include very detailed discussions of the disputed items and, importantly, sufficient supporting documentation. The detailed disputed item sections should describe and quantify the disputed item, reference the applicable accounting guidance, refer to specific applicable transaction agreement provisions, discuss why one party is correct and the other is not, and give a conclusion that links back to the transaction agreement (e.g., consistent with historical accounting practices). All of this information is necessary to provide the expert with sufficient information regarding each disputed item to make an informed determination. The supporting documentation is also key. It is especially critical to provide supporting documentation that may not be obvious. An expert will typically request accounting-related information if not provided with a party's submission, but he or she may not be aware of certain information relevant to a disputed item. For example, for disputed items related to excess inventory, typical supporting documentation would include historical sales or usage of the inventory items in dispute. While useful, such information may be incomplete when considered in isolation because there may be additional information such as a product improvement or a new sales channel that would provide the expert with a better understanding of the future expected inventory usage. If this additional information is not provided (or not requested because the expert was unaware of its existence), the expert could unknowingly make a determination that is not fully informed.

Selecting the right expert

A final key consideration for transaction parties and their counsel in managing the determination process is the selection of the expert. In contrast to an arbitration tribunal, an expert determination is almost always provided by a single expert – commonly an accounting or relevant industry expert, typically referred to in the transaction agreement as the accounting expert, neutral accountant or similar term – selected by the parties in accordance with the transaction agreement.

Selecting the right expert can assist in obtaining a more accurate and supportable determination. This is important because most expert determinations are final and binding on the parties. Some transaction agreements specifically name an individual or a firm to act as the expert. In others, a general reference to a nationally recognised accounting firm is all that is included. Knowing that in the event of a dispute an expert will need to be engaged (regardless of whether one was named in the transaction agreement), there are some important factors for transaction parties and their counsel to consider, including the following.

- The expert should be selected by the parties based on depth of experience. In considering the qualifications of potential experts, it is important that the expert be a licensed professional in the requisite profession (e.g., a certified public accountant). As noted earlier, many transaction agreements provide for the expert's determination to be final and binding on parties with only few and narrow grounds available for appeal. Therefore, in the case of a purchase price adjustment dispute involving net working capital items, the selection of an appropriately experienced accountant to serve in the capacity of the expert would be critical to the fair and complete resolution of the dispute.
- The parties should select someone experienced in the expert determination of M&A disputes. Without specific experience, the role and the process can be alien to the uninitiated, as it is often very different from the normal spectrum of engagements of, for example, a financial statement auditor. Experience with the role and process may also protect the parties against an expert overstepping their bounds and being persuaded by loosely related arguments that are irrelevant, potentially resulting in a determination outside the scope of the expert's specialist knowledge and possibly outside the scope of the transaction agreement.
- The parties should identify a firm or expert that has run a conflict check and is free of conflicts at the time it is selected to be included in the transaction agreement. Failure to do so can result in an extended delay in the dispute resolution process while the parties identify firms to consider, then agree on the specific firm, and agree on an individual from that firm. Much of this can be avoided by including the selected firm or expert in the transaction agreement.
- An expert's experience in the specific industry of the parties or the target entity is typically not required or necessary to consider. Owing to the nature of the disputed items in many post-closing purchase price adjustment claims, industry experience is often not relevant because the relevant professional accounting guidance is generally applicable across industries. This is not true, however, for every dispute. A few industries and disputed items would benefit from specific industry experience and knowledge, such as energy and agricultural claims, which can involve unique disputed items and accounting considerations.

Most of the considerations listed above are applicable regardless of whether the expert will be named in the transaction agreement or will be selected only in the event of a dispute. In the event of a dispute requiring an expert determination, the selection of the expert is clearly a key component of that process because of the finality of the determination. Selecting an inexperienced and underqualified expert can lead to a flawed process and possibly an unjust determination. The items described above can assist transaction parties and their counsel in managing the process in a way that results in a fair dispute resolution process. The parties are already enduring a dispute resolution process – extending this to include a post-determination challenge due to a flawed ruling adds more time and expense to an already intensive and expensive process.

Conclusion

Managing expert determinations involves planning that begins in the transaction agreement drafting stage, long before an M&A dispute is even contemplated by the parties. In this chapter we have discussed that an expert determination is not an arbitration, and as such it involves some unique considerations and planning. It is possible to actively manage the process by documenting the dispute resolution procedures in the transaction agreement, by objectively assessing the strength of argument on the items in dispute, by providing sufficient background and information to the expert and by selecting an appropriate expert. By applying the information in this chapter the expert determination process can be managed in a way that focuses on the substantive issues, not on the process itself, while providing for an equitable procedure for the transaction parties.

Appendix 1

The Contributing Authors

Gerald M Hansen
Forensic Risk Alliance

Gerald (Jerry) Hansen is a partner in the Dallas, Texas office of Forensic Risk Alliance. He is a CPA and forensic accountant with extensive experience across a variety of accounting, audit and financial forensics services, including M&A disputes (as a neutral expert and consulting expert), audit services, expert services, forensic due diligence and fraud investigations. He has served at one of the Big Four public accounting firms and a multinational consultancy, as well as global corporations, in a career spanning over 25 years. Mr Hansen previously served as the south-west region leader of Ernst & Young's transaction forensics practice, a specialty practice that focused on disputes, investigations and forensic due diligence services stemming from contemplated or completed merger and acquisition transactions.

Mr Hansen has provided services related to disputes, forensics and audits to clients in a wide range of industries, including real estate, professional services, financial services, technology, energy, transportation, manufacturing, software, food services, publishing, automotive, healthcare, retail, staffing services and advertising. He is a co-author of *M&A Disputes – A Professional Guide to Accounting Arbitrations* (Wiley 2017), and a contributing author to *The Litigation Services Handbook* as well as the American Institute of Certified Public Accountants book *The Guide to Investigating Business Fraud*. He holds a BBA in finance from Southern Methodist University and an MS in accounting from the University of Virginia.

Forensic Risk Alliance
1 Cowboys Way
Suite 470
Frisco, TX 75034
United States
Tel: +1 469 604 0925
jhansen@forensicrisk.com
www.forensicrisk.com

M&A disputes can be unique in their hostility and complexity. *The Guide to M&A Arbitration* – published by Global Arbitration Review – is a practical guide on what merger parties should think about when it comes to disputes. It pools the wisdom of specialists on how to prevent these disputes arising and how best to resolve them when it is too late. The guide is structured in two sections. Part I consists of eight chapters on planning and procedural issues, covering everything from drafting clauses to how to structure contracts to minimise the potential for disputes. Part II offers a geographical survey of important differences in national laws that may affect the outcome of a dispute. It is written by 38 specialists from a variety of backgrounds and takes a practical approach throughout.

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