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DISSERTATION TITLE :ARBITRATION OF MERGERS AND ACQUISITIONS

PROBLEM OF CONSENT IN PARALLEL PROCEEDINGS AND CONSOLIDATION OF PARALLEL PROCEEDINGS

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## ARBITRATION OF MERGERS AND ACQUISITIONS

### PROBLEM OF CONSENT IN PARALLEL PROCEEDINGS AND CONSOLIDATION OF PARALLEL PROCEEDINGS

#### I. ABSTRACT

Mergers and acquisition transactions continuous to increase rapidly around the world. According to Klaus Sachs, arbitration has emerged as the preferred method to resolve M&A disputes and today, mergers and acquisitions is one of the fields of international business law with the highest proportion of arbitration agreements.<sup>1</sup> Due to the fact that, rising capacity of M&A deals in the international business world and parties' hard effort to solve their disputes with the most harmless way, 'arbitration' in the field of mergers and acquisitions arouse interest and requires detailed analyses. Therefore this study undertakes to examine the complicated process of mergers and acquisitions transactions. Essentially this transaction has four main phases and each of them may pose different disputes. Under this study, these possible disputes will be explained. Afterwards, two main problems of the arbitration process of M&A transactions will be addressed. First of all problem of parallel proceedings will be examined with its possible solutions. Finally the problem of consent in arbitration will be explained in the scope M&A transactions. During this study the relevant cases will be addressed and the existing rules will be outlined.

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<sup>1</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 Comparative Law Yearbook of International Business, 287.

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## **II. INTRODUCTION**

### **II. 1. Increasing Number of M&A Transactions**

Today, without a doubt, we live in a time of significant economic change<sup>2</sup> and economic transactions are in our everyday practice. In the same way, mergers and acquisitions has become common in today's economic environment; companies are expanding their geographic reach and grow.<sup>3</sup> Therefore the field of mergers and acquisitions continues to experience dramatic growth.<sup>4</sup> In general, under these transactions, a company acts as a seller or a buyer for each transactional exchange and represents their interests depending on their position in a deal and these transactions can vary in size from very small businesses to enterprise corporations.<sup>5</sup>

According to Gaughan, a merger is a combination of two corporations ultimately only the acquiring company survives, the merged corporation goes out of existence. Besides that the acquiring company takes over the assets and liabilities of the merged company.<sup>6</sup> And according to DePamphilis, an acquisition occurs when one company takes a controlling ownership interest in another firm, a legal subsidiary of another firm, or

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<sup>2</sup> Rima Tamosiuniene, Egle Duksaite 'The Importance of Mergers and Acquisitions in Today's Economy' (2009) KSI Transactions on Knowledge Society, 11.

<sup>3</sup> Ibid.

<sup>4</sup> Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings* ( Fourth Edition, John Wiley&Sons, 2007) 11.

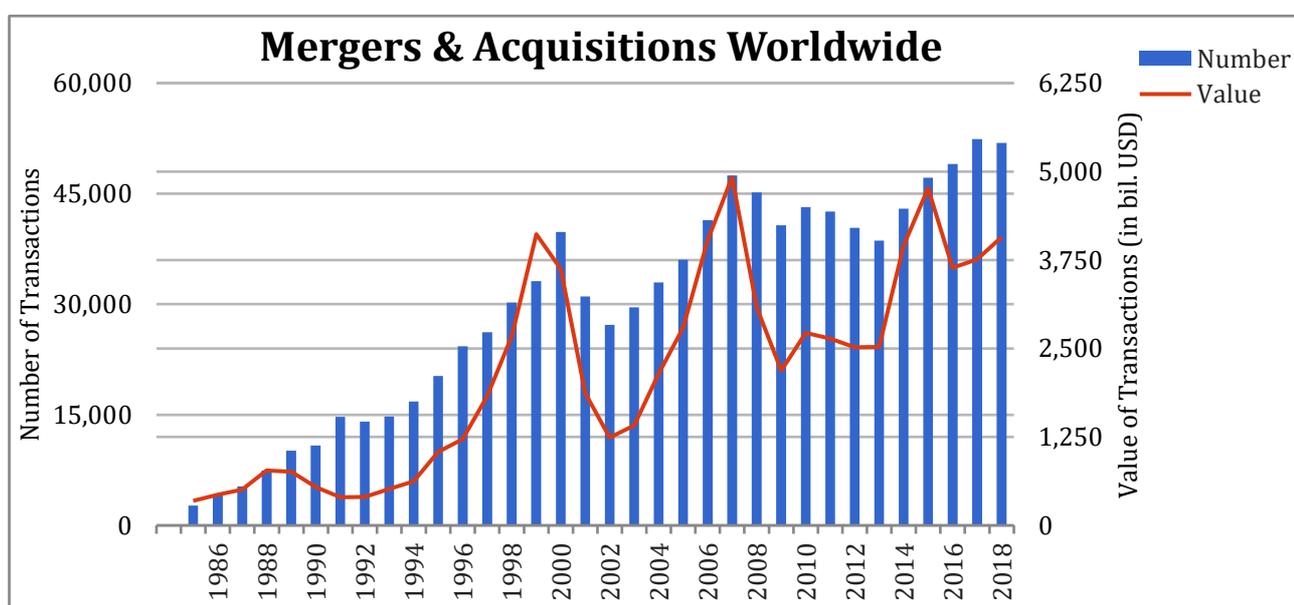
<sup>5</sup> Kathleen Grave, Demos Vardiabasis, Burhan Yavas ' The Global Financial Crisis and M&A' (2012) 7 International Journal of Business and Management, 56.

<sup>6</sup> Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings* ( Fourth Edition, John Wiley&Sons, 2007) 12.

selected assets of another firm such as a manufacturing facility.<sup>7</sup> An acquisition may be part of a diversification program that allows the company to move into other lines of business.<sup>8</sup>

Basically in the transaction of merger, a company absorbs another one with all the assets and liabilities and in the end of the transaction the merged company no longer survives. However the acquisition is actually 'purchasing'. In other words, purchasing some assets of a company is the transaction of acquisition but the same outcome with merger does not have to occur. In the act of acquisition, the buyer company's aim is the gain 'controlling ownership interest' in the target company.

As it is mentioned before, the field of mergers and acquisitions continues to experience a dramatic growth. According to the Institute of Mergers, Acquisitions and Alliances (IMAA)<sup>9</sup>, since 2000, more than 790'000 transactions have been announced worldwide with a known value of over 57 trillion USD.<sup>10</sup> Despite the fact that the number of deals has decreased by 8% to about 49'000 transactions in 2018, their value has



increased by 4% to 3.8 trillion USD. Considering the same database, between 2015 and 2018 the number of mergers and acquisitions almost remained stable however the value of the transactions rapidly increased in 2018, in Europe. The worldwide statistics can be seen in the chart below.<sup>11</sup> As it can be clearly seen from the chart, mergers and acquisitions market remained strong in 2018, and M&A activity is expected to remain strong in 2019.

<sup>7</sup> Donald M. DePamphilis, *Mergers, Acquisitions and Other Restructuring Activities: An Integrated Approach to Process, Tools, Cases, and Solutions* (Ninth Edition, Academic Press, 2018).

<sup>8</sup> Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings* ( Fourth Edition, John Wiley&Sons, 2007) 14.

<sup>9</sup> IMAA is an acknowledged and a recognized institute, which pursues research and provides world-wide statistics in the field of mergers and acquisitions.

<sup>10</sup> As Gaughan clarifies in *Mergers, Acquisitions and Corporate Restructurings*; the number of mergers and acquisitions transactions briefly decreased in 2001, due to the global economic crisis. Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings* ( Fourth Edition, John Wiley&Sons, 2007) 3.

<sup>11</sup> <<https://imaa-institute.org/mergers-and-acquisitions-statistics/>> accessed 21 July 2019.

## II. 2. The Importance of Arbitration in the Field of Mergers and Acquisitions

During a complicated and difficult to manage procedure such as a merger or an acquisition transaction, it is a high possibility to encounter a controversy. In other words, it is inevitable that some deals result in disputes, the more so as there is regularly a considerable amount of money at stake.<sup>12</sup> In such a case, since all parties defend their own interests during an economic transaction, it is more than normal for them to foresee the possible disagreements and adopt the most convenient way to resolve their disputes in order to protect their own interests in the most secure way.

In the field of international business, arbitration is an alternative dispute resolution procedure by which the parties agree to submit their dispute to a private forum, where an arbitrator, or a panel of arbitrators, decides claims after hearing testimony and evaluating evidence. With its efficiency and facility, it allows the parties to avoid the litigation procedure.<sup>13</sup> Furthermore, it is vital to mention that, nowadays arbitration agreements in international and national M&A transactions are rather the rule than exception.<sup>14</sup>

Parties value arbitration over litigation for a variety of reasons, including inter alia, greater party autonomy, greater efficiency in terms of both, money and time, greater predictability as to applicable law, the forum in which the dispute will be heard and jurisdictional issues and greater ability to enforce the resulting decision in foreign countries.<sup>15</sup> The contractual foundations of arbitration constitute the fundamental difference between

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<sup>12</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 287.

<sup>13</sup> Donggen Xu, Huiyuan Shi, 'Dilemma of Confidentiality in International Commercial Arbitration' (2011) *Frontiers of Law in China*, 403.

<sup>14</sup> Klaus Sachs, 'Schiedsgerichtsverfahren über Unternehmenskaufverträge - unter besonderer Berücksichtigung kartellrechtlicher Aspekte' (2004) *German Arbitration Journal*, 123.

<sup>15</sup> Cindy G. Buys 'The Tensions Between Confidentiality and Transparency in International Arbitration' (2003) 14 *The American Review of International Arbitration*, 121.

arbitration and litigation.<sup>16</sup> With an arbitration agreement, parties are free to; select arbitrators, determine a language for the possible arbitral procedure, pick a jurisdiction or set of rules<sup>17</sup> to solve their disputes. Thus this contractual foundations provides the party autonomy which is one of the most important reasons for parties to choose arbitration. Besides that the confidentiality of the arbitration process has traditionally been perceived as being a cornerstone of arbitration law.<sup>18</sup> Unfortunately the litigation procedure provides the parties neither confidentiality nor privacy. Usually, parties to an M&A deal, tend to keep their disputes unspectacular therefore it is important to avoid publicity.<sup>19</sup> Hence 'confidentiality' is just another reason for parties to agree on an arbitration agreement to solve their disputes, during an M&A transaction. According to Alice Broichmann, its swiftness renders arbitration attractive as a conflict resolution instrument for M&A cases.<sup>20</sup> Besides all those reasons to choose arbitration as a dispute resolution mechanism for M&A disputes, the reason above all which enables the international commercial arbitration functional, is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. By the virtue of this convention, an arbitral award has the worldwide enforceability.

With the above mentioned-reasons arbitration is an attractive and highly preferred dispute resolution way in the field of mergers and acquisitions. However the 'contractual foundations' of the arbitration, the autonomy of it, causes the the issues about consent which will be examined under this study.

### **III. THEORETICAL FOUNDATIONS**

#### **III. 1. Phases of M&A Transactions**

Fundamentally, mergers and acquisitions transactions consist of three phases; negotiation phase, signing phase and finally the post-closing phase.

Since mergers and acquisitions are complex business transactions, it is important to examine each step, in order to estimate the possible disputes which may occur between the parties. Thus, it might be possible to create a well structured and functional arbitration agreement for M&A disputes.

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<sup>16</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 16.

<sup>17</sup> Such as ICC, Swiss Rules and VIAC Rules.

<sup>18</sup> Andrew Tweeddale, Karen Tweeddale, *Arbitration of Commercial Disputes; International and English Law and Practice* ( Second Edition, Oxford, 2007) 349.

<sup>19</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 287.

<sup>20</sup> Alice Broichmann, 'Disputes in the Fast Lane: Fast Track Arbitration in M&A Disputes' (2008) 4 *International Arbitration Law Review*, 143.

### III. 1. a. Negotiation Phase (Pre- Signing)

Despite the number of articles over the past two decades mentioning the importance of the negotiation stage in the M&A process, there has been very limited theoretical development and empirical analysis emphasizing multiple factors critical to M&A negotiations.<sup>21</sup>

Pruitt defines the term of 'negotiation' as a process by which a joint decision is made by two or more parties.<sup>22</sup> When the term of negotiation is considered in the context of M&A process, it can be interpreted as the phase of 'verbalization'. In the negotiation phase of an M&A transaction, parties get to know each others' interests. Briefly, M&A transactions usually begin with initial exploratory talks<sup>23</sup> and the preliminary contracts follows it. In the step of preliminary contracts, parties put their verbalized intentions in writing. It is generally understood that the transaction will only be consummated on the basis of fully negotiated and signed contracts, but it is important to the business people driving the deal that their initial understanding be set down.<sup>24</sup> In other words parties, almost always, execute a letter of intent (LOI), sometimes called as memorandum of understanding (MOU). In addition to these, parties to an M&A process usually participate a due diligence process which is basically an investigation with regard to financial, legal and other aspects of the target company such as possible environmental liabilities.<sup>25</sup> These different steps of the negotiation phase will be examined in more detail below.

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<sup>21</sup> Heather Parola and Kimberly M. Ellis 'M&A Negotiation Stage: A Review and Future Research Directions' (2014) *Advances in Mergers and Acquisitions*, 33.

<sup>22</sup> Dean G. Pruitt, *Negotiation Behavior* ( First Edition, Academic Press, 1981) 1.

<sup>23</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 287.

<sup>24</sup> Frederick R. Fucci, 'Arbitration in M&A Transactions: Laws of New York and Delaware' (2016) 71 *Dispute Resolution Journal*, 1.

<sup>25</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 287.

- **Preliminary Contracts**

Preliminary agreements mark the moment when parties have resolved most deal uncertainty and are likely to do a deal together, whether or not they sign a preliminary agreement. Instead of causing parties to behave well, preliminary agreements merely mark the moment when parties were already primed to behave well, with or without an agreement.<sup>26</sup>

There are different views about why do parties need preliminary agreements. According to Alan Schwartz and Robert Scott<sup>27</sup>, parties use preliminary agreements when substantial deal uncertainty makes it impossible for parties to agree to the specific terms of an intended deal. On the other hand Albert Choi and George Triantis<sup>28</sup> defends that complex deals are entered into in stages; first a preliminary agreement, then a definitive contract, because some deals are “practically impossible for the parties to execute . . . in a single meeting or over a very short period of time”. In other words, preliminary agreements make these complex deals easier to cope.<sup>29</sup> The process usually starts when the management of one firm contacts the target company’s management.<sup>30</sup>

Most of the times, M&A transactions include the trade/company secrets of the target company. Furthermore, during the negotiation process, from the perspective of the parties, there is a tremendous amount of money at the stake. Under these circumstances, naturally, parties will work for the achievement of their own interests however they will also try to protect their future business transactions and their reputations. And the way of achieving this ‘long-term’ aim is to keep things ‘confidential’ during this phase. It is very possible for a transaction, which is very arduous, such as M&A to be dead and buried in the phase of negotiation. Hence, a confidentiality agreement may be executed between the parties during the initial part of process. This confidentiality agreement allows the parties to exchange confidential information that may enable the parties to

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<sup>26</sup> Cathy Hwang, ‘Deal Momentum’ (2018) 65 U.C.L.A. Law Review, 376.

<sup>27</sup> Alan Schwatz, Robert E. Scott ‘ Precontractual Liability and Preliminary Agreements’ (2007) 120 Harvard Law Review, 661.

<sup>28</sup> Albert Choi, George Triantis ‘The Design of Staged Contract’ (2019) 3, <<https://www.semanticscholar.org/paper/The-Design-of-Staged-Contracting-Choi-Triantis/26dd9cc48c6cb92e5c02c3e534813fabbe7b19ed>> accessed 2 August 2019.

<sup>29</sup> Cathy Hwang, ‘Deal Momentum’ (2018) 65 U.C.L.A. Law Review, 376.

<sup>30</sup> Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings* ( Fourth Edition, John Wiley&Sons, 2007) 19.

better understand the value of the deal.<sup>31</sup> Rarely, under M&A transactions, these confidentiality agreements are accompanied by arbitration clauses. Therefore, confidentiality agreements and confidentiality clauses in M&A agreements should be drafted in a way so as to cover the various aspects of confidentiality in arbitral proceedings. When choosing a set of arbitration rules, preference may be given to those that provide for a strict duty of confidentiality.<sup>32</sup>

Exclusivity agreements are another example for preliminary agreements. In case of one of the parties require to negotiate exclusively, an exclusivity agreement can be made for a given period.

The most common preliminary agreement is the letter of intent (memorandum of understanding) and will be examined in more detail.

- **Letters of Intent**

Most M&A transactions begin with some sort of initial expression of the parties' understanding – a letter of intent or a memorandum of understanding which is a similar form of a preliminary agreement.<sup>33</sup> Parties sign a letter of intent when they agree on the essential terms of transaction in order to set a framework to envisaged deal structure.<sup>34</sup> In other words, in the M&A context, a letter of intent is designed to provide an outline of the essential terms under which two (or more) parties are willing to proceed with negotiating a definitive agreement, such as a merger agreement, purchase agreement, etc.<sup>35</sup> According to Sherman, a letter of intent, which includes a set of binding terms and non binding terms as a roadmap for the transaction, is a necessary step in virtually all mergers and acquisition transactions.<sup>36</sup> Letter of intent is often considered as a sine qua non condition of any merger or acquisition.<sup>37</sup> Ralph B. Lake and Ugo Draetta define letters of intent and other precontractual instruments as a precontractual written instrument that reflects preliminary agreements and understandings of one or more parties to a future contract.<sup>38</sup>

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<sup>31</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 49.

<sup>32</sup> Ibid 51.

<sup>33</sup> Frederick R. Fucci, 'Arbitration in M&A Transactions: Laws of New York and Delaware' (2016) 71 *Dispute Resolution Journal*, 3.

<sup>34</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 291.

<sup>35</sup> Karla L. Reyerson, 'Letters of Intent: Getting on the Same Page' (2015) *Frederick&Byron's Bank &Finance Newsletter*, 1.

<sup>36</sup> Andrew J. Sherman, *Mergers and Acquisitions from A to Z* ( Third Edition, Harpercollins Focus, 2011) 49.

<sup>37</sup> Henry M. Peter, Jean Christophe Liebeskind, 'Letters of Intent in the M&A Context' (2005) 24 *ASA Special Series*, 265.

<sup>38</sup> Ralph B. Lake, Ugo Draetta, *Letters of Intent and Other Precontractual Documents: Comparative Analysis and Forms* ( Second Edition, Butterworth Legal Publishers, 1994) 6.

Usually letters of intent are non-binding documents, in other words 'feel good' documents. However the 'binding' character of the letter of intent actually depends on the parties intentions and consent. There is no codified meaning of letter of intent therefore its content can be various and again, it depends on parties intentions. In other words, according to Agaoglu, in a letter of intent, rights and obligations are established to the extent intended by the parties.<sup>39</sup>

As it is mentioned above, letters of intent usually carry 'non-binding' character. Furthermore letter of intent can be binding or hybrid documents. Judge Laval in *Teachers Insurance & Annuity Association of America v Tribune Company* developed distinguishing parameters in order to specify 'binding' and 'non-binding' letters of intent.<sup>40</sup> According to another judgement, *Vacold LLC v. Cerami* ; fully binding agreements are, created when the parties agree on all the points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document.<sup>41</sup> In practice, parties rarely sign fully binding letters of intent<sup>42</sup> however in case of they sign one, which means that they have to fulfill their obligations which arise from that even that they never sign the M&A agreement. On the other hand according to the case of *Per Winston v. Mediasfare Entertainment Corp.*, other type of preliminary documents are binding on the parties only to a certain degree because the parties agree on certain major terms, but leave other terms open for further negotiation.<sup>43</sup> In other words, with an agreement like that<sup>44</sup>, parties have a 'negotiate with good faith obligation'. In an M&A transaction's negotiation process, if parties to a letter of intent ( type II ) act with good faith during the process, no further obligations will arise.

As it is mentioned above, there is no specific rule for the content of the letter of intent. There are different opinions about the legal status of the letter of intent. Whether it constitutes a contract, is it just a promise to a contract or simply is it just an offer?

When the nature of letter of intent considered in the mergers and acquisitions context; it mostly has non-binding clauses and it is mostly a 'feel good' document, most of the time its aim is describing an envisaged transaction, not to confirm an agreed one.<sup>45</sup> According to Cathy Hwang, letters of intent which often create

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<sup>39</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 53.

<sup>40</sup> *Teachers Insurance & Annuity Association of America v Tribune Company*, 670 F.Supp. 491 (S.D.N.Y. 1987).

<sup>41</sup> *Vacold LLC v. Cerami*, 545 F.3d 114, 124 (2d Cir. 2008).

<sup>42</sup> Type I agreements.

<sup>43</sup> *Per Winston v. Mediasfare Entertainment Corp.*, 777 F.2d 78 (2nd Cir. 1985).

<sup>44</sup> Type II agreements.

<sup>45</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 61.

non-binding obligation under the law, these agreements are 'signposts'; they mark a moment in the deal's lifecycle when enough uncertainty and complexity has been resolved.<sup>46</sup>

Letters of intent help the parties to focus on the M&A transaction, it is really helpful to create a structure for the transaction. Thus, it will be more appropriate to approach to letters of intent (and other preliminary agreements) not as contracts. Since, parties encounter a letter of intent to show their good faiths and during the negotiation process parties bring only 'intentions' and not 'decisions'. It would be inexpedient to define the letter of intent as a contract and therefore an ancillary agreement to an M&A agreement. Letters of intent are changeable and because of that interpreting the M&A deal with the letter of intent would cause ambiguities. Therefore it is better to interpret the letter of intent as signposts in deal's lifecycle.

- **Due Diligence**

Due diligence process is where the buyer company investigate the target company in more detail. Just like the negotiation of representations and warranties, due diligence arises from a very fundamental principle of economic and legal system; 'caveat emptor' in other words 'let the buyer beware'.<sup>47</sup> Therefore, the aim of the due diligence process is, with regard to buyer company, obtaining more information about the target company's financial, legal and social status. On the other hand this process has advantages also for the target company. During the due diligence process, target company has a chance to present its situation in the most consistent way to make the deal more desirable.

Once the future buyer gathered the relevant information, typically by the seller making target company documents available for consultation for the buyer in a data room, a written due diligence report is then prepared. This report forms the basis of further negotiation between the parties. Preferably and mostly full due diligence is performed before the signing of the purchase agreement.<sup>48</sup> In theory, in the process of resolving uncertainty through due diligence, parties should sometimes discover information that scuttles a deal by revealing that the deal is not economically worthwhile, or that the other party is not an ideal partner.<sup>49</sup> This is how the due diligence will designate the future of M&A deal.

The due diligence process enables the buyer to better understand the target, that is how the buyer company realize the different angles of the deal. Thus this process also inevitably has a direct effect on the

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<sup>46</sup> Cathy Hwang, 'Deal Momentum' (2018) 65 U.C.L.A. Law Review, 382.

<sup>47</sup> Douglas Godfrey, Charles Fox, 'Transactional Skills Training: All About Due Diligence' (2009) 10 Transactions: The Tennessee Journal of Business Law, 358.

<sup>48</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 Comparative Law Yearbook of International Business, 292.

<sup>49</sup> Cathy Hwang, 'Deal Momentum' (2018) 65 U.C.L.A. Law Review, 393.

terms and conditions of the purchase agreement. It is, in fact, only once the buyer company 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.<sup>50</sup> Furthermore, the due diligence process may serve a better structured arbitration agreement by revealing the weakest sides therefore the most disputable areas of the target company.

### **III. 1. b. SIGNING PHASE ( PURCHASE AGREEMENT )**

After parties entered into the letter of intent, completed the due diligence process, if they still interested in the M&A deal the next phase will be the purchase agreement; the signing phase. This phase takes different names in different scenarios, share purchase agreement (SPA) in the case of share deal, as opposed to an asset deal. One also encounters merger agreements (in the case of a merger as opposed to a plain acquisition) or share swap agreements (if consideration is paid through shares of another entity).<sup>51</sup>

According to Jonathan Barnett, there is a clear demarcation between the negotiation period, in which there is no risk of contractual liability, and the performance period, in which there is clear contractual liability.<sup>52</sup> Essentially, this statement asserts the main difference between the negotiation phase and the signing phase. As it is explained above, the negotiation process does not contain bindingness in most of the cases. On the other hand, in respect of the M&A transaction, things get a much more serious dimension in the phase of purchase agreement; since this agreement has an actual, identified meaning in the eyes of law on the contrary of the letter of intent.

It is also important the mention that the majority of M&A arbitrations occur after parties have signed the merger or the purchase agreement.<sup>53</sup>

### **III. 1. c. CLOSING PHASE ( POST SIGNING )**

During an M&A process the signing phase is followed by the closing phase, in other words the post signing process. After parties signed the purchase agreement and meet the closing conditions, they “close” the deal by, for instance, exchanging consideration for stock or assets.<sup>54</sup> Notwithstanding that, there is no one

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<sup>50</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 70.

<sup>51</sup> Henry Peter, ‘M&A Transactions: Process and Possible Disputes’ (2005) 24 ASA Special Series, 1.

<sup>52</sup> Jonathan M. Barnett, ‘Hollywood Deals: Soft Contracts for Hard Markets’ (2015) 64 Duke Law Journal, 605-608.

<sup>53</sup> Bernd. D. Ehle, ‘Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions’ (2005) 27 Comparative Law Yearbook of International Business, 293.

<sup>54</sup> Cathy Hwang, ‘Deal Momentum’ (2018) 65 U.C.L.A. Law Review, 386.

standard structure and timeline to the closing process, and details will vary and must be adapted to the nature of the business being sold, the needs of the parties, and often the regulations that apply<sup>55</sup>, this moment can be described as 'when the acquisition actually occurs'.<sup>56</sup>

Often, there is a gap between the signing of the agreement and the closing phase. This gap allows parties to complete a number of 'closing conditions', such as obtaining regulatory approval or financing, reorganizing their corporate structures to maximize the deal's tax benefits, or completing due diligence of the target company.<sup>57</sup> Which means that signing the purchase agreement does not always mean that the M&A deal is settled, it may still require fulfillment of the missing requirements.

### **III. 2. ARBITRATION IN M&A TRANSACTIONS**

After the detailed explanation of the M&A process during the previous chapter, it is clear that such a complicated transaction gives rise to conflicts between the parties frequently and arbitration may arise at any of the different phases of an M&A transaction.<sup>58</sup> It is important to mention that, most of the times, the general disputes clause of a merger or acquisition agreement calls for some form of arbitration.<sup>59</sup>

This chapter of the dissertation will focus on the most common disputes which arise from M&A transactions and how can arbitration resolve them in the most effective way. Hereby the benefits of drafting the arbitration clauses and how these clauses reveal the boundaries of the parties' consents and intentions in the most accurate way, will be presented.

#### **III. 2. a. ARBITRATION IN PRE-SIGNING DISPUTES**

Pre-signing phase of an M&A process covers, preliminary contracts, letter of intent and the due diligence process. This part of the paper will examine the analyses the most frequent disputes which arise from these stages.

As it is clearly explained above, the pre-signing is a highly stressful and difficult stage for both of the parties. That is why conflicts are inevitable. In other words pre-signing disputes typically arise during one of

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<sup>55</sup> Michael E. S. Frankel, *Mergers and Acquisitions Basics: The Key Steps of Acquisitions, Divestitures and Investments* ( First Edition, John Wiley and Sons, 2005) 265.

<sup>56</sup> Lou R. Kling, Eilen Nugent Simon, Michael Goldman, ' Summary of Acquisition Agreements' (1997) 51 University of Miami Law Review, 779.

<sup>57</sup> Cathy Hwang, 'Deal Momentum' (2018) 65 U.C.L.A. Law Review, 386.

<sup>58</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 78.

<sup>59</sup> Frederick R. Fucci, 'Arbitration in M&A Transactions: Laws of New York and Delaware' (2016) 71 Dispute Resolution Journal,1.

the most hectic phases of an M&A transaction, when the parties are struggling to prepare all the necessary documents and striving to comply with all the conditions to be met for the closing.<sup>60</sup> Such disputes are generally related to the breach of confidentiality or exclusivity provisions agreed in pre-contractual documents, or to other provisions and obligations arising out of the letter of intent.<sup>61</sup>

- **Conflicts Arising Out of a Letter of Intent**

In order to disputes which arise from letter of intent to be resolved with arbitration, this agreement should contain an arbitration clause or a subsidiary arbitration agreement. However, as it is mentioned in the previous chapter, the core provisions of a letter of intent usually carry a non-binding character but they usually require the fulfillment of the 'good faith' obligation. Furthermore where an explicit "non-binding clause" is absent, the tribunal will have to determine the parties' intent based on the specific situation, circumstances, negotiations, purpose of the contract, and past communications of the parties.<sup>62</sup> Which means that in case of a conflict, there is a possibility that the tribunal will decide whether the conflicted clause intended to be binding one or not. In other words, the arbitral tribunal may need to interpret the clauses of the deal.

For example in an unpublished case<sup>63</sup>, the parties had acquired joint ownership of a company and entered into a shareholders' agreement governing their relations. After a while because of the derogation of their business relations, they noticed that either of them can acquire %100 shares of the company. Afterwards one of the parties contacted to other and offered to buy the remain shares for a specified price, the other party agreed on this offer and they entered into a letter of intent which sets out the main points of this agreement. However when one of the parties refused to sign the purchase agreement, the other one started to arbitral proceedings. The arbitral tribunal held that the confirmation letter (the letter of intent) constituted a valid share purchase agreement. The seller's subsequent refusal to sign the full share purchase agreement was considered to be anticipatory breach of the obligations stated in the confirmation letter. Specific performance, i.e. the sale at the price stated, was ordered by the tribunal.<sup>64</sup>

- **Conflicts Arising Out of Due Diligence Process**

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<sup>60</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 79.

<sup>61</sup> Nahila Cortes, 'M&A Arbitration: Pre-Closing Disputes and Letter of Intent' (2017) <<http://arbitrationblog.kluwerarbitration.com/2017/11/21/ma-arbitration-pre-closing-disputes-letter-intent/>> Accessed 11 August 2019.

<sup>62</sup> Georg Von Segesser, 'Arbitration Pre-Closing Disputes in M&A Transactions' (2005) 24 ASA Special Series, 24.

<sup>63</sup> Decided under the UNCITRAL rules, 26 February 2002, T. v. C.

<sup>64</sup> Georg Von Segesser, 'Arbitration Pre-Closing Disputes in M&A Transactions' (2005) 24 ASA Special Series, 24.

As it is mentioned above, due diligence is where the buyer company investigate the target company in more detail. The outcome of any due diligence is critical to the parties' further negotiations and generally has far-reaching consequences for the deal. The due diligence process therefore frequently gives rise to disputes.<sup>65</sup> In other words, obtaining further information about the target company, increases the possibility of disputes.

Questions that frequently come up concern the completeness of the information provided by the seller in the data room and the obligation of the seller to disclose sensitive information or certain difficulties at that early stage, without being expressly asked to do so by the buyer.<sup>66</sup> On the other hand, the seller might argue that the buyer conducted the due diligence only cursorily or not at all, the latter thereby having waived its right to notification of defects in the target company that it could have discovered in the data room, according to Ehle.<sup>67</sup>

### III.2. b. ARBITRATION IN POST-SIGNING DISPUTES

When the importance and the binding effect of the purchase agreement is considered, it is not surprising that the majority of M&A arbitrations occur after the parties have signed the merger or purchase agreement and closed the deal by the transfer of assets, that is post M&A.<sup>68</sup>

Signing a deal means that the two parties execute a binding agreement to do the deal, subject to certain closing conditions. Closing a deal is the act of executing the final documentation that causes the deal to take effect.<sup>69</sup> As it is mentioned before, most of the times there is a gap between signing and the closing (execution) of the deal and in this period, disputes may arise if certain conditions have not been fulfilled or, for example, the buyer has negotiated for a force majeure clause and suddenly seeks to exit the deal.<sup>70</sup> Furthermore, the validity of the merger or purchase agreement might be the source of a conflict.

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<sup>65</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 84.

<sup>66</sup> Klaus Sachs, 'Schiedsgerichtsverfahren über Unternehmenskaufverträge - unter besonderer Berücksichtigung kartellrechtlicher Aspekte' (2004) German Arbitration Journal, 126.

<sup>67</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 Comparative Law Yearbook of International Business, 292-293.

<sup>68</sup> Klaus Sachs, 'Schiedsgerichtsverfahren über Unternehmenskaufverträge - unter besonderer Berücksichtigung kartellrechtlicher Aspekte' (2004) German Arbitration Journal, 125.

<sup>69</sup> Michael E. S. Frankel, *Mergers and Acquisitions Basics: The Key Steps of Acquisitions, Divestitures and Investments* ( First Edition, John Wiley and Sons, 2005) 265.

<sup>70</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 Comparative Law Yearbook of International Business, 293.

During the period between signing and the closing of the deal, parties work for fulfill the missing requirements and conditions to close the deal. These conditions might be governmental, regulatory and similar authorisations, correctness of representations, warranties, guarantees etc.<sup>71</sup> The ambiguities about these conditions and failure to fulfillment of the requirements may give rise to conflicts.

Under this part of the dissertation the most common post-signing disputes such as price adjustment, expert arbitration, representation and warranties will be examined.

- **Purchase Price Adjustment Arbitration**

Purchase agreements regularly state only a provisional price and, in addition to that, provide for open ended adjustment mechanisms and procedures.<sup>72</sup> Parties employ a “purchase price adjustment” mechanism in order to address the possibility that the target company’s performance may differ from the parties’ expectations between the date of signing and the closing date. Such adjustments typically relate to the difference between a target company’s “working capital, net assets or net worth” as estimated on a certain date prior to or as of closing and as calculated after closing.<sup>73</sup> In other words, parties usually agree on a price with the purchase or the merger agreement however during the period between signing and the closing of the deal there might be some changes with the status (legal, financial etc.) of the target company and these changes may cause fluctuations in the value of this company. For this reason parties frequently add a ‘purchase price adjustment’ clause to the agreement.

Without a doubt, such a clause has benefits for both of the parties. Earn-out clauses provide for an additional purchase price that the seller will receive, based on the future earnings of the target over a stipulated

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<sup>71</sup> Georg Von Segesser, ‘Arbitration Pre-Closing Disputes in M&A Transactions’ (2005) 24 ASA Special Series, 25-26.

<sup>72</sup> Wolfgang Peter, ‘Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes’ 19 (2003) Arbitration International, 494.

<sup>73</sup> Kenneth Mathieu, Vincent (Trace) P. Schmeltz III, ‘Dispute Resolution as a Part of Your Merger or Your Acquisition Agreement’ (2012) 1 Michigan Business & Entrepreneurial Law Review, 64.

period (earn-out period). These clauses may engender dissention between the parties when the future performance needs to be assessed objectively.<sup>74</sup> Earn out clauses can be the source of disagreement amongst the parties, particularly when the contract does not clearly define the accounts that the parties intend to include in calculating revenue and expenses.<sup>75</sup> Furthermore, other typical issues concern the type of performance indicator that is to be taken into consideration or the seller's contention that the buyer tried to manipulate earnings, for example, by changing the accounting policies or by altering the operations of the business after the purchase, making it difficult to prepare accurate earn-out calculations consistent with the terms of the agreement. In an international setting, the parties' different cultural backgrounds and accounting or reporting practices may produce additional complications.<sup>76</sup>

In an international arbitration which is regulated under Zurich Chamber of Commerce, the claimant company had sold its shares to the defendant and its holding company under a contract subject to German Law. The defendant then changed its Articles of Association and increased its share capital by issuing new shares to a third company. The arbitral tribunal, appointed to interpret the price increase clause included in the share purchase agreement, ruled that, although the clause did not expressly cover the increase of the share capital, such increase – which was to be considered under Swiss Law – nevertheless constituted a betterment improvement that came within the scope of application of the price increase clause. Thus, the tribunal ordered the defendants to pay the claimant additional amounts to the purchase price plus interest. The defendants' motion to set the award aside was denied by the Swiss Federal Tribunal. In the facts section of the decision the Federal Tribunal cites the definition of a price purchase adjustment clause (*Besserungsabrede*) used by the arbitral tribunal in its award:

“...provision based on which the purchaser pays to the seller an (additional) purchase price depending on the occurrence of certain events after the closing of the purchase agreement for the acquisition of a company or shares in a company”.<sup>77</sup>

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<sup>74</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 295.

<sup>75</sup> Kenneth Mathieu, Vincent (Trace) P. Schmeltz III, 'Dispute Resolution as a Part of Your Merger or Your Acquisition Agreement' (2012) 1 *Michigan Business & Entrepreneurial Law Review*, 69.

<sup>76</sup> Wolfgang Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes' 19 (2003) *Arbitration International*, 494.

<sup>77</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 295.

- **Expert Arbitration**

Expert determination is a tool for solving disputes such as those arising in connection with mergers and acquisitions.<sup>78</sup>

Most purchase or sale agreements, particularly cross border transactions, contain valuation or purchase price adjustment clauses providing for a two-stage dispute resolution mechanism.<sup>79</sup> Especially during an M&A transaction, 'purchase price adjustment' might be really difficult to manage, clauses may contain specific criterias and procedures. Therefore in M&A transactions, the contract frequently provides for an expert who, in the event of a price adjustment dispute or a conflict about valuation, will determine the adjustment by reviewing the situation.<sup>80</sup> At the expert determination system, if the parties cannot agree upon a valuation or the adjustment, an independent third party (forensic) accountant will be retained to determine the resolution of certain specific questions that are well circumscribed and generally fact-based.<sup>81</sup> These individuals may be retained by either a bidder or a target to determine the value of a company (in case of a valuation conflict), these values may vary depending on the assumptions employed.<sup>82</sup>

The most important point in regard to expert determinations is that 'experts' does not act like an arbitrator. This person neither tries to achieve a resolution of the disputes as a whole nor does he render an award that could be enforced against an uncooperative party.<sup>83</sup>

As it is stated above, expert determination provides a two-staged dispute resolution mechanism for mergers and acquisitions. Thus resolution of the valuation or purchase price adjustment disputes by an expert constitutes the first stage of the dispute resolution mechanism. However, the expert's determination does bind the arbitral tribunal dealing with the same case, in the sense that, the latter will not have the right to revisit the

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<sup>78</sup> Anke Sessler, Corina Leimert, 'The Role of Expert Determination in Mergers and Acquisitions under German Law' 20 (2004) <<https://academic.oup.com/arbitration/article-abstract/20/2/151/226698?redirectedFrom=PDF>> Accessed 19.08.2019.

<sup>79</sup> Ibid 297.

<sup>80</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 97.

<sup>81</sup> Anke Sessler, Corina Leimert, 'The Role of Expert Determination in Mergers and Acquisitions under German Law' 20 (2004) <<https://academic.oup.com/arbitration/article-abstract/20/2/151/226698?redirectedFrom=PDF>> Accessed 19.08.2019.

<sup>82</sup> Patrick A. Gaughan, *Mergers, Acquisitions and Corporate Restructurings* ( Fourth Edition, John Wiley&Sons, 2007) 16.

<sup>83</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 298.

factual outcome settled on by the expert.<sup>84</sup> For example, a typical provision for resolving purchase price adjustment disputes “is to designate a firm of independent accountants to review the closing date financial statements”. After designation, the parties must then consider and address a number of issues.<sup>85</sup> Thus, parties create a frame for the experts to work in and resolve the conflicts.

After the first stage, the arbitration stage, the dispute is resolved as a whole, in a binding legal determination, proceeding on the facts established by the expert.<sup>86</sup> In some cases, however, the arbitrators may have to determine the content and signification of a certain balance sheet item impacting upon an evaluation, before the expert can determine the correctness of a financial statement.<sup>87</sup> In other words, on the contrary of the first stage (expert determination), in the stage of arbitral proceeding, conflicts is approached as a unity.

Moreover the arbitrators are frequently called upon to resolve disputes arising when one of the parties obstructs the expert determination process, for example, by appointing the expert or a new expert if the first has been challenged. As the determination of the expert is often crucial to the outcome of the dispute, the resolution of such preliminary issues is very important.<sup>88</sup>

Under an agreement to merge *American Medical Electronics, Inc. (AME)* with *Othello* to form *Orthofix, Inc.*, the determination of the amounts payable to the shareholders pursuant to the contractually specified formulae was entrusted to a Review Committee, the decision of which would be final and binding. If the Review Committee was unable to agree by a majority decision on the correct pay-out, the matter could be submitted by the Committee to binding arbitration. The Review Committee decided that the appropriate pay-out was US \$6 million. As part of its decision, the Committee specified that its pay-out determination would be conditional upon submission to and approval by an arbitrator. An arbitrator was appointed and rendered a “consent award”, adopting the settlement in its entirety. Dissatisfied with the pay-out, AME shareholders filed a suit in Colorado against the Committee’s members and against *Orthofix*, asserting inter alia, claims for breach of fiduciary duty and breach of contract. The AME shareholders also filed a motion in the Southern District of New York to

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<sup>84</sup> Bernardo M. Cremades, ‘Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration’ *Arbitration International* 14/2 (1998) 163, footnote 9.

<sup>85</sup> Kenneth Mathieu, Vincent (Trace) P. Schmeltz III, ‘Dispute Resolution as a Part of Your Merger or Your Acquisition Agreement’ (2012) 1 *Michigan Business & Entrepreneurial Law Review*, 74.

<sup>86</sup> Wolfgang Peter, ‘Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes’ 19 (2003) *Arbitration International*, 503-504.

<sup>87</sup> Klaus Sachs, ‘Schiedsgerichtsverfahren über Unternehmenskaufverträge - unter besonderer Berücksichtigung kartellrechtlicher Aspekte’ (2004) *German Arbitration Journal*, 124.

<sup>88</sup> Bernd. D. Ehle, ‘Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions’ (2005) 27 *Comparative Law Yearbook of International Business*, 298.

vacate the award. The Colorado Case was transferred to United States District Court for the Southern District of New York and the proceedings were consolidated.<sup>89</sup>

The first interpretation of this case is that, the conclusion of the expert determination does not constitute the main and final award, it is only the first stage. Furthermore it can be interfered by arbitrators. Secondly, this first outcome opens another significant subject; consent of the parties. In the present case, parties agreed on an arbitration clause and identified their consents, nevertheless, in the end, they still had a conflict which caused a longer litigation process which is time consuming and more expensive. In other words it is advantageous to create the arbitration clauses more clearly and carefully in order to identify the parties' consent in a better way and avoid an onerous litigation process.

- **Representation and Warranties**

Representations and warranties are intended to be confirmatory and to allocate the risk between the parties. They are confirmatory to the extent they verify the buyer's understanding of the target company's business.<sup>90</sup> And during an M&A process, parties make a variety of representation and warranties.<sup>91</sup> A seller can be asked to make a representation and warranty about the nature and quality of financial statements, the lack of undisclosed liabilities, and about any number of issues about the target's business.<sup>92</sup> According to Agaoglu, the clauses dealing with representations and warranties are the most debated clauses in an M&A transaction.<sup>93</sup>

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<sup>89</sup> Albert Jan van den Berg, 'Clarence Frere, et al. v. Orthofix, Inc. Et al., United States District Court for the Southern District of New York, Decision of 6 December 2000, 99 Civ. 4049, 0 Civ. 1968' 26 (2001) Yearbook Commercial Arbitration 1042.

<sup>90</sup> Kenneth Mathieu, Vincent (Trace) P. Schmeltz III, 'Dispute Resolution as a Part of Your Merger or Your Acquisition Agreement' (2012) 1 Michigan Business & Entrepreneurial Law Review, 70.

<sup>91</sup> Roman L. Weil, Michael J. Wagner, Peter B. Frank, *Litigation Services Handbook: The Role of the Financial Expert* (Forth Edition, Wiley, 2007) 6-13.

<sup>92</sup> Ibid 3.

<sup>93</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 102.

'Representation and warranties' has an opposite characteristic than the due diligence process. During a due diligence process the buyer company makes further investigations about the target company, in relation to its legal and financial status. However seller company's declarations about the situation of the company constitutes the representation and warranties. In other words, representation and warranties are statements of the seller concerning the state of the target at the time of the execution of the acquisition agreement and many post M&A arbitrations result from claims of the acquiring company based on contractual representations and warranties.<sup>94</sup>

Many of these "snapshot" statements concern the correctness of the company's financial statements, the absence of liabilities other than those reflected in its latest balance sheet, the seller's title to the assets part of the sale and compliance with applicable laws.<sup>95</sup>

Due diligence and representation and warranties are important to create a clear and realistic picture of the target company from the buyer company's view. Especially the authenticity of the representation and warranties is vital because it forms the basis of the consent of the buyer company for the future of the M&A transaction.

There are two important points about representation and warranties which should be explained. The first is whether the seller has to make absolute warranties about the truthfulness of its representations or whether the seller can qualify its warranties based on its actual knowledge.<sup>96</sup> As a rule, statements of the seller, about the target company's financial and legal status must reflect the truth. In order to avoid a conflict, seller's representation and warranties shouldn't be drafted vaguely, ambiguously or incompletely. Otherwise the buyer may more easily claim that the seller is liable for breach of contract and/or (negligent) misrepresentation.<sup>97</sup> Further, representations and warranties are closely linked to the purchase price as they reflect the target's guaranteed qualities.

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<sup>94</sup> Klaus Sachs, 'Schiedsgerichtsverfahren über Unternehmenskaufverträge - unter besonderer Berücksichtigung kartellrechtlicher Aspekte' (2004) German Arbitration Journal, 126.

<sup>95</sup> Wolfgang Peter, 'Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes' 19 (2003) Arbitration International, 492-493.

<sup>96</sup> Kenneth Mathieu, Vincent (Trace) P. Schmeltz III, 'Dispute Resolution as a Part of Your Merger or Your Acquisition Agreement' (2012) 1 Michigan Business & Entrepreneurial Law Review, 71.

<sup>97</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 Comparative Law Yearbook of International Business, 294.

The second important point is that whether any breach of warranty allows the buyer to obtain indemnification or, prior to closing, to walk away from the transaction.<sup>98</sup> If any warranted qualities of the target turn out to be groundless, such as the existence of certain assets on the balance sheet, the purchaser will often claim an adjustment of the price.<sup>99</sup> For example, in a 1997 arbitration case before the Geneva Chamber of Commerce, the buyer, S. Compagnie S.A., found grave errors and gaps in the balance sheet of the target company S. Créations S.A.S. Compagnie S.A. argued that these misrepresentations had led to a substantive over-valuation of the share price and claimed the breach of contractual warranties entitling it to a reduction in the purchase price.<sup>100</sup>

### III. 3. CONCLUSION FOR THEORETICAL FOUNDATIONS OF M&AS

Under this part of the dissertation, the first aim was to reveal the increasing number of M&A transactions around the world and showing that nowadays arbitration agreements in international and national M&A transactions are rather the rule than exception.<sup>101</sup> The choice of arbitration rather than litigation as a dispute resolution mechanism has many reasons such as right to choose an arbitrator, shorter timelines, options of confidentiality and privacy, right to pick a jurisdiction, cheaper process etc.

In addition to that; this part, the theoretical foundations, puts forward the further analyses of the phases of M&A transactions in order to make these phases clearer, chronologically. Especially the pre-signing phase is significant for the future of the transaction; particularly, the phase of the letter of intent which can create binding obligations between the parties.<sup>102</sup> And the purpose of this analyses is to indicate that M&A transactions are complicated and difficult to handle. Thus, these transactions are very likely to cause conflicts.

Afterwards, the most common disputes which may occur during an M&A transaction, are explained in detail. For the pre-signing phase the most available part for conflicts is the letter of intent and in respect of the post-signing phase, price adjustment disputes and representation and warranties.

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<sup>98</sup> Kenneth Mathieu, Vincent (Trace) P. Schmeltz III, 'Dispute Resolution as a Part of Your Merger or Your Acquisition Agreement' (2012) 1 Michigan Business & Entrepreneurial Law Review, 71.

<sup>99</sup> Ibid.

<sup>100</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 Comparative Law Yearbook of International Business, 294. Unfortunately the outcome of this case not publicly known, it remained confidential.

<sup>101</sup> Klaus Sachs, 'Schiedsgerichtsverfahren über Unternehmenskaufverträge - unter besonderer Berücksichtigung kartellrechtlicher Aspekte' (2004) German Arbitration Journal, 123.

<sup>102</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 117.

From the foregoing, the conclusion can be drawn that, despite certain procedural particularities and pitfalls to look out for when drafting arbitration clauses, arbitration is an effective dispute resolution mechanism in mergers and acquisitions at every stage of the transaction with features that make it an attractive alternative to court litigation.<sup>103</sup> The carefully and clearly drafted arbitration clauses provides a more smooth process however what is meant by 'carefully and clearly' drafted clauses is an arbitration agreement which represents the parties' intentions and consents in the most accurate way. As it is indicated during this part of the dissertation with examples, even there is an arbitration agreement, the dispute and possible solutions may spread to many different directions. There might be more than one dispute in an M&A transaction or there might be different two disputes which are somehow connected. In other words, during such a complicated deal like M&A, conflicts may occur in different forms. Hence to solve these disputes by protecting mutual interests, the first step should be determine the boundaries of parties' consent and intentions.

The next part of the dissertation will examine more complicated type of arbitral proceedings such as multiple proceedings and parallel proceedings. Afterwords the consolidation process with its advantages and disadvantages will be explained. And finally the issue of consent in arbitration of M&A process will be enlightened.

#### **IV. MULTIPLE PROCEEDINGS AND PARALLEL PROCEEDINGS IN M&A TRANSACTIONS**

This part of the dissertation will explain the multiple and parallel proceedings which take place in different M&A phases and the possible conflicts and risks which may arise from them, while making this analysis the knowledge about the usual M&A process will be used. In this respect the consolidation of the proceedings will be clarified in the scope of applicable institutional rules. Further, during the next part the 'consent' of the parties will be examined as a solution to these risks and conflicts just like the consolidation.

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<sup>103</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 Comparative Law Yearbook of International Business, 309.

In cases where agreements provide for different dispute resolution means such as arbitration and court proceedings in different phases of M&A transactions, it should be taken into consideration whether they are from the same dispute or from related disputes. In both instances, the problems of parallel proceedings may occur, and where parallel proceedings concern the same dispute, mechanisms of *lis pendens*<sup>104</sup> or *res judicata*<sup>105</sup> are often used.<sup>106</sup> Therefore, when the problems of parallel proceedings occur, the first step to solve this problem should be designate the parties' consents; whether they decided to consolidate the proceedings in case of multiple proceedings. In order to designate the consents and intentions of the parties, finding out the scope of arbitration clause might be helpful. That is why under this part of the dissertation the scope of the arbitration agreement will be examined. Afterwards multiple and parallel proceedings will be discussed. And finally the doctrine of consolidation will be explained with its advantages and disadvantages.

#### IV. 1. THE SCOPE OF ARBITRATION AGREEMENTS

In view of the multitude of sources for M&A related disputes and the procedural particularities addressed above, the drafting of 'water-tight' arbitration agreements that meet the standards required for an efficient dispute resolution mechanism takes a fair amount of skill.<sup>107</sup> The scope and ambit of the power of an arbitral tribunal emanates from the arbitration agreement.<sup>108</sup> Although arbitration has achieved wide acceptance as the preferred alternative to litigation in disputes between international parties, it gets disadvantaged when disputes arise between multiple parties, if the arbitration agreement does not provide for their common adjudication.<sup>109</sup>

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<sup>104</sup> The principle of *lis pendens* refers to pending proceedings. It is a procedural mechanism which serves to avoid conflicting decisions when the same dispute, between the same parties, regarding the same subject matter or relief ( *petitum* ) and the same legal grounds ( *causa petendi* ) is brought to another forum. Bernardo M. Cremades, Ignacio Madalena, 'Parallel Proceedings in International Arbitration' 24 (2008), *Arbitration International*, 507.

<sup>105</sup> The term *res judicata* refers that, an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called triple-identity criteria). Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* ( First Edition, Kluwer Law International, 2005) 239.

<sup>106</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 121.

<sup>107</sup> Bernd. D. Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions' (2005) 27 *Comparative Law Yearbook of International Business*, 307.

<sup>108</sup> Arjun Gupta, Sahil Kanuga, Vyapak Desai, 'Blessed Unions in Arbitration - An Introduction to Joinder and Consolidation in Institutional Arbitration' (2016) *Indian Journal Arbitration Law*, 134.

<sup>109</sup> Edwin Tong Chun Fai, Nakul Dewan, 'Drafting Arbitration Agreements with 'Consolidation' in Mind' 5 (2009) *Asian International Arbitration Journal*, 70.

Once the parties' consent to arbitrate has been established, the arbitration agreement is deemed to cover all disputes between the parties, provided that they are arbitrable and originate from the relationship referred to by the arbitration agreement.<sup>110</sup>

From the beginning of this dissertation the importance of being careful and clear while drafting the arbitration clauses is mentioned since it is an important step to resolving the conflicts. And the borders of the arbitration clause is important too, due to the same reason. It should cover all disputes between the parties but it should not meant to be ambiguous or unclear. The wording of "all disputes in connection with the contract" is suggested in this respect, in addition to contractual claims, those based on tort, culpa in contrahendo, etc.<sup>111</sup> Although the meaning of this clause appears to be relatively clear, practical experience has shown that even these broadly worded standard clauses contain some ambiguity as to the scope of their application.<sup>112</sup>

Furthermore, for the accurate interpretation of the arbitration clause, consideration of the applicable law, including the proper approaches to interpretation is frequently necessary.<sup>113</sup> It has long been recognized that under the doctrine of separability, an arbitration agreement may have a different applicable law to the balance of any contract within which it is found.<sup>114</sup> In other words, it is accepted in the doctrine that an arbitration agreement can be interpreted by a different applicable law than the contract which it is connected or included (as an arbitration clause). When it comes to, what is the right approach in respect of the applicable laws, there are different views among the scholars. According to Blessing there are nine possible laws that could apply in such circumstances.<sup>115</sup> And some other scholars defend that the right applicable law is the *lex arbitri*. This might be justified on the basis that this is the law expressly referred to in Art. V(1)(a) of the New York Convention, in the context of one of the discretionary bases for refusing enforcement.<sup>116</sup>

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<sup>110</sup> Georg Von Segesser, 'Arbitration Pre-Closing Disputes in M&A Transactions' (2005) 24 ASA Special Series, 36.

<sup>111</sup> Jean François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* ( Second Edition, Sweet and Maxwell, 2007) para 304.

<sup>112</sup> Irene Welser, Susanne Molitoris ' The Scope of Arbitration Clauses - or "All Disputes Arising Out of or in Connection with this Contract..." ' in Christian Klausegger and others (eds) *Austrian Yearbook of International Arbitration* ( First Edition, MANZ'sche Wien, 2012) 18.

<sup>113</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 122.

<sup>114</sup> Michael Pryles, Jeff Waincymer 'Multiple Claims in Arbitration Between the Same Parties' 14 (2009) ICCA International Arbitration Conference, ICCA Congress Series, 441.

<sup>115</sup> Marc Blessing, 'The Law Applicable to the Arbitral Clause and Arbitrability, in Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention' (1999) 168.

<sup>116</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 122.

Furthermore while some scholars suggest that the most appropriate law to apply is the law of the seat of arbitration since it has the best connection with the conflicts. And finally some other scholars such as Lew, Mistelis and Kröll, and Redfern and Hunter stand for that the law governing the subject matter might best apply.<sup>117</sup>

During an M&A transaction, disputes may arise in different phases of the process as it is explained in the previous part of the dissertation. And parties should take in consideration this fact while they are drafting arbitration agreements/clauses. Which means that the arbitration agreements should cover different phases of the transaction and all sorts of conflicts which may arise from them. The ideal arbitration agreement should contain the phases from the preliminary agreements till the end of the closing of the deal. And if several documents contain arbitration clauses, they should be coordinated, or consolidated, so as not to be in conflict with one another. Earlier clauses should be replaced by subsequent ones with an extended scope.<sup>118</sup>

However, problems may arise if parties agree on different dispute resolution mechanisms for different stages of the M&A deal. The subject gives rise to significant theoretical and practical questions arising at the stage of commencement of arbitration procedure.<sup>119</sup> In order to make these problems clear the next part of the dissertation will examine multiple and parallel proceedings and afterwards the doctrine of consolidation will be analyzed as a possible solution.

## IV. 2. MULTIPLE AND PARALLEL PROCEEDINGS

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<sup>117</sup> Ibid 123.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

In an UNCITRAL award of 17 November 1994, the arbitral tribunal pointed out that;<sup>120</sup>

Contrary to litigation in front of state courts where any interested party can join or be adjoined to protect its interests, in arbitration only those who are parties to the arbitration agreement expressed in writing could appear in the arbitral proceedings either as claimants or as defendants. This basic rule, inherent to the essentially voluntary nature of arbitration, is recognized internationally by virtue of Article II of the New York Convention.<sup>121</sup>

This basic rule of arbitral proceedings based on the principle of confidentiality, privacy, the autonomy of the arbitration and the most fundamental one; the principle of privity of contract. Although this rule applies to the arbitral tribunals in theory, usually the practice is not that simple. Where a dispute arises that involves more than two parties, a series of contracts and multiple issues, complex arbitrations are in question. These complex contractual relationships may give rise to parallel arbitrations, and to situations in which the unity of the arbitral proceedings may be affected by the multiplicity of issues, agreements, or parties involved in a certain dispute.<sup>122</sup>

When the subject is complex arbitrations, a methodological distinction should be made between the issues arising from the fact that the project at the centre of the dispute has been negotiated and performed by one or more companies that belong to a group, some of which are not signatories<sup>123</sup> to the arbitration clause (this situation usually requires an extension to the third parties, which will be discussed in the following parts of the paper) and the issues arising from the fact that the dispute involves or concerns a variety of problems originating from, or in connection with, two or more agreements entered into by the same and/or different

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<sup>120</sup> Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* ( First Edition, Kluwer Law International, 2005) 7.

<sup>121</sup> Article II of New York Convention regulates that ;

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. <[http://newyorkconvention1958.org/index.php?lvi=cmspage&pageid=12&menu=682&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvi=cmspage&pageid=12&menu=682&opac_view=-1)> Accessed 26 August 2019.

<sup>122</sup> Philippe Leboulanger, Multi-Contract Arbitration, *Journal of International Arbitration* (1996) 43.

<sup>123</sup> A signatory to an arbitration agreement is someone who has signed some form of an arbitration agreement; a non-signatory is someone who has not. Anthony M. DiLeo, 'The Enforceability of Arbitration Agreements by and Against Non-signatories' 2 (2003) *Journal of American Arbitration* 33.

parties and which do not all contain the same or at least compatible arbitration clauses.<sup>124</sup> The latter scenario, in a more clear way, involves multiple contracts arose from a mutual economic transaction which include drafted arbitration agreements.

In the international business world, a contractual relationship between two or more parties may involve a multi-contract situation.<sup>125</sup> Contracts between the same parties but arise from one economic transaction's different parts (group of contracts) and unrelated contracts which have same parties, constitute the multi-contract situation. When the connection between 'group of contracts' and M&A transaction (which includes different parts and different contracts for these parts, between same parties) the doctrine of group of contracts should be discussed.

According to F.X. Train, a fundamental distinction should be made between contracts that are linked one to other and those that are not. Contracts are linked one to the other when they are united in a relationship of economic or functional dependence. They fall into two categories. The first category includes group of contracts that coexist to attain a common goal: a framework agreement and implementation agreements; a main contract and an accessory agreement for the financing of the main transaction; or a group of contracts of equal importance united by a common cause or goal. The second category covers contracts united in a relationship of substitution or, in other words, group of contracts consisting of two successive agreements between the same parties, where the second one impacts upon the first to amend it or to terminate it: the original agreement and a contract providing for its amicable termination; a novation; or a settlement. Contracts that do not fall in either category are not linked. This is the case, for example, in successive agreements of the same nature between the same parties.<sup>126</sup> Hanotiau defends that, in all these cases, one must start by asking whether, in the case of a dispute originating from several of these contracts, all the disputes may be decided together, in one and the same arbitration proceeding. In continental Europe, national courts and arbitral tribunals are often confronted with the issue of whether it is possible to join and decide together all the disputes arising from inter-related contracts in one single set of proceedings.<sup>127</sup> Therefore the issue of group of contracts is dealt with under the heading of consolidation by courts and arbitral tribunals. It often arises before arbitral tribunals which

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<sup>124</sup> Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* ( First Edition, Kluwer Law International, 2005) 4.

<sup>125</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 126.

<sup>126</sup> François Xavier Train, *Les Contrats liés devant l'Arbitre du Commerce International* ( L.G.D.J., 2003) No 17 to 25.

<sup>127</sup> Philippe Leboulanger, Multi-Contract Arbitration, *Journal of International Arbitration* (1996) 64-65.

are asked to extend their jurisdiction to one or more connected agreements.<sup>128</sup> Since the act or process of uniting several independent proceedings which are pending or initiated into one single case; is consolidation, it will be explained later on this paper.<sup>129</sup>

#### IV. 2. a. PARALLEL PROCEEDINGS IN M&A TRANSACTIONS

Parallel proceedings are becoming prevalent in international commercial arbitration due to the proliferation of arbitral and judicial tribunals, the parties' desire to pursue all avenues of dispute resolution and the lack of guidance arbitrators in addressing parallel proceedings.<sup>130</sup> It has been identified as a problem because such proceedings can result in conflicting awards by different tribunals arising out of the same set of facts. This could seriously undermine the very existence of the arbitral process.<sup>131</sup>

Minnie Ma mentions that, it is useful to begin by outlining separate but related questions that pervade the persistent debate on parallel proceedings;

- Can the issue of parallel proceedings (specifically parallel arbitral and judicial proceedings) arise in arbitration ?
- Depending upon the answer of the first question; should the rules governing parallel proceedings litigation apply to arbitration? For instance, in what circumstances should arbitrators decline jurisdiction by staying their proceedings?<sup>132</sup>

With regard to the first question, the parties' desire to pursue all avenues of dispute resolution may end up with parallel proceedings because when the same dispute or two closely related disputes come before different arbitral tribunals or one before an arbitral tribunal and other one before a national court, it may cause

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<sup>128</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 128.

<sup>129</sup> Philippe Gillieron, Luc Pittet, ' Article 4 - Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties' in Tobias Zuberbuhler and others (eds), *Swiss Rules of International Arbitration: Commentary* ( First Edition, Kluwer Law International, 2005) Note 3.

<sup>130</sup> Winnie (Jo-Mei) Ma, 'Parallel Proceedings and International Commercial Arbitration: The International Law Association's Recommendations for Arbitrators' 2 (2009) *Contemporary Asia Arbitration Journal*, 51.

<sup>131</sup> Norah Gallagher, 'Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions' in Loukas A. Mistelis, Julian D.M. Lew (eds), *Pervasive Problems in International Arbitration* ( First Edition, Kluwer Law International, 2006) 329.

<sup>132</sup> Winnie (Jo-Mei) Ma, 'Parallel Proceedings and International Commercial Arbitration: The International Law Association's Recommendations for Arbitrators' 2 (2009) *Contemporary Asia Arbitration Journal*, 51-52.

conflicted awards and decisions.<sup>133</sup> In other words, parallel proceedings may arise from the same dispute (same dispute but different dispute resolution mechanisms) or it may arise from related disputes.

Arbitration has an exclusive jurisdiction effect. Which means that; the arbitration agreement prevents national courts from hearing the dispute unless they find the arbitration agreement null and void. This is also known as the negative effect of the arbitration agreement.<sup>134</sup> However, the exclusive jurisdiction effect of the arbitration agreement does not always prevent a party from bringing the same dispute (or two closely related disputes) simultaneously before different forums (parallel proceedings).<sup>135</sup> Parallel proceedings may occur between different arbitral tribunals, or between national courts and arbitral tribunals. Parties may start parallel proceedings for different reasons, including seeking the widest legal proceedings.<sup>136</sup>

As it is clear from this explanation, the answer of the first question is positive, parallel proceedings may occur during an arbitral proceeding. Accordingly the answer of second question requires further discussions. There are certain procedural mechanisms to avoid or mitigate the undesirable effects of parallel proceedings. In this context doctrines of 'lis pendens' and 'res judicata' will be addressed.<sup>137</sup> The rationale for taking such steps is threefold: to avoid conflicting judgments; to prevent costly parallel litigation; and to protect parties from oppressive litigation tactics. These justifications are very similar both in the doctrine of res judicata and lis pendens.<sup>138</sup>

- **Lis Pendens**

The principle of lis pendens refers to pending proceedings. Lis pendens literally means a "law suit pending" (and lis alibi pendens, which is the phrase more often used in Common Law jurisdictions, means a "law suit pending elsewhere").<sup>139</sup> It is a procedural mechanism which serves to avoid conflicting decisions

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<sup>133</sup> Bernardo M. Cremades, Ignacio Madalena, 'Parallel Proceedings in International Arbitration' *Arbitration International* 24 (2008) 507.

<sup>134</sup> The exclusive jurisdiction effect of the arbitration agreement is recognized and regulated under the New York Convention Article II (3); The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Accessed < <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>> 27.08.2019. Furthermore

<sup>135</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 128.

<sup>136</sup> Bernardo M. Cremades, Ignacio Madalena, 'Parallel Proceedings in International Arbitration' *Arbitration International* 24 (2008) 508.

<sup>137</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 129.

<sup>138</sup> Filip DeLy, Audley Sheppard, 'ILA Final Report on Lis Pendens and Arbitration' 25 (2009) *Arbitration International*, 2.

<sup>139</sup> *Ibid.*

when the same dispute, between the same parties, regarding the same subject matter or relief (petitum) and the same legal grounds (causa petendi) is brought to another forum.<sup>140</sup>

James Fawcett in his authoritative, defines the lis pendens as; a situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time.<sup>141</sup>

During an M&A transaction, when a dispute occurs, one of the parties may start to litigation process in order to solve it, and the other party may start to arbitration process with regard to same dispute. As it is explained above, this is the definition of a 'parallel proceeding'. In such a scenario, the issue of 'lis pendens' automatically arises. That is why the principle of lis pendens should be considered in the scope of M&A transactions.

As it is mentioned above, arbitration agreement has an exclusive jurisdiction effect, however the question of 'does an arbitral tribunal have legitimate jurisdiction' should be answered in order to find a solution for parallel proceedings by applying the doctrine of lis pendens. According to ILA's<sup>142</sup> final recommendations on lis pendens and arbitration which relies on the principle of competence-competence, provides the general rule for arbitrators who consider themselves to be 'prima facie competent' pursuant to the relevant arbitration agreements to determine and exercise their jurisdiction, subject to any annulment applications.<sup>143</sup> Thus, this recommendation gives priority to arbitrators to determine their jurisdiction. Furthermore the same report remarks that according to the principle of competence-competence, arbitral tribunals have the power to rule on their own jurisdiction, and domestic courts should defer considering the question of the tribunal's jurisdiction until after the tribunal has made an award on that issue.<sup>144</sup> In other words the well-accepted principle competence-competence, is one of the principles which may apply to the determination of whether the arbitral tribunal has the legitimate jurisdiction or not. It is important to mention two effects of competence-competence principle. Positive effect of the principle gives the power of deciding their own jurisdiction to the arbitrators, on the other hand negative effect of the principle requires state courts to decline their jurisdiction in deference to arbitration.<sup>145</sup>

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<sup>140</sup> Ibid 129.

<sup>141</sup> James Fawcett (ed), *Declining Jurisdiction in Private International Law, Report to the XIVth Congress of the International Academy of Comparative Law, Athens 1994* ( First Edition, Oxford University Press, 1995) 27.

<sup>142</sup> International Law Association

<sup>143</sup> Winnie (Jo-Mei) Ma, 'Parallel Proceedings and International Commercial Arbitration: The International Law Association's Recommendations for Arbitrators' 2 (2009) *Contemporary Asia Arbitration Journal*, 54.

<sup>144</sup> Filip DeLy, Audley Sheppard, 'ILA Final Report on Lis Pendens and Arbitration' 25 (2009) *Arbitration International*, 4.

<sup>145</sup> Winnie (Jo-Mei) Ma, 'Parallel Proceedings and International Commercial Arbitration: The International Law Association's Recommendations for Arbitrators' 2 (2009) *Contemporary Asia Arbitration Journal*, 54.

For example French Civil Procedure Code<sup>146</sup> have endorsed a progressive approach to negative competence-competence, providing strong support to arbitration and leaving minimal opportunities for parallel court proceedings. Furthermore, Article 1458 of the Code regulates that;

- If a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court it shall declare itself incompetent.
- If the dispute is not yet before an arbitral tribunal, the State court shall also declare itself incompetent, unless the arbitration agreement is manifestly null and void.
- In neither case may the state court declare itself incompetent at its own motion.<sup>147</sup>

Furthermore there are reflections of negative effect of competence-competence principle in the UNCITRAL Model Law on International Commercial Arbitration, Article 8 (1) of the model law indicates that;

- A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.<sup>148</sup>

Additionally, Section 9 of the English Arbitration Act supports the same principle;

- A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
- An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

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<sup>146</sup> Richard Kreindler, 'Lis Pendens – Who Defers To Whom?' ( Kiev Arbitration Days, November 2013) Article 1448 of the French Civil Procedure Code provides that, before the tribunal is constituted, the national court undertakes only a prima facie review of the arbitration agreement. National courts have no power to examine the validity of an arbitration agreement once the dispute has been brought before an arbitration tribunal. <[https://uba.ua/documents/doc/richard\\_kreindler.pdf](https://uba.ua/documents/doc/richard_kreindler.pdf)> Accessed 31 August 2019.

<sup>147</sup> The Code of Civil Procedure, Book IV (Arbitration), 1981.

<sup>148</sup> UNCITRAL Model Law on International Commercial Arbitration, 2006.

- An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
- On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
- If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.<sup>149</sup>

Acceptance of the negative effect of competence-competence does not mean that the arbitral tribunal is the sole judge of its jurisdiction, but rather merely that it is the first in time.<sup>150</sup> When there is a lack of jurisdiction in a court proceeding in the presence of a valid arbitration agreement, this lack of jurisdiction must be raised in proper form and within the applicable time limits according to Cremades.<sup>151</sup> In such a scenario, the arbitration agreement will serve as the legal base to challenge the jurisdiction of the courts.<sup>152</sup> And the party who is introducing the 'stay of litigation' as a demand should be alleged in due time and proper form. The term of 'due time' refers to 'not later than when submitting his first statement on the substance of the dispute' according to UNCITRAL and according to English Act 'the time after the applicant has taken any step in those proceedings to answer the substantive claim'.<sup>153</sup> Failure to do so may result in a tacit submission to the jurisdiction of the national court and may be interpreted as the parties' waiver of the arbitration previously agreed.<sup>154</sup> If parties will not follow the certain procedures in accordance with the timeline, this may cause a parallel proceeding situation and therefore conflicted decisions.

A good example of *lis pendens* situation with regard to arbitration of M&A conflicts is the case of *Compania Minera Condesa SA and Compania de Minas Buenaventura v. BRGM- Peru SAS*. The Peruvian mining company, Buenaventura, and the French state company, Bureau de Recherches Géologiques et Minières (BRGM) were parties to an agreement; the acquisition of of a stake in Cedimin SA, a subsidiary in Peru of BRGM by Buenaventura. A memorandum of understanding is signed between BRGM-Peru, Cedimin and Buenaventura. And both memorandum of understanding and amended bylaws of Cedimin included an arbitration clause.

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<sup>149</sup> The Arbitration Act, 1996.

<sup>150</sup> Richard Kreindler, 'Lis Pendens – Who Defers To Whom?' ( Kiev Arbitration Days, November 2013) <[https://uba.ua/documents/doc/richard\\_kreindler.pdf](https://uba.ua/documents/doc/richard_kreindler.pdf)> Accessed 31 August 2019.

<sup>151</sup> Bernardo M. Cremades, Ignacio Madalena, 'Parallel Proceedings in International Arbitration' 24 (2008), *Arbitration International*, 511.

<sup>152</sup> *Ibid.*

<sup>153</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 133.

<sup>154</sup> *Ibid.*

Whereby any disputes arising between the parties regarding the agreement or bylaws should be submitted to arbitration in Switzerland, in accordance with the ICC Rules. When disputes arose, Buenaventura started court proceedings notwithstanding the arbitration allegedly agreed. Both parties undertook a number of procedural steps before the national courts, the filing of different claims. BRGM-Peru objected and claimed that the disputes should be before an arbitral tribunal including. Subsequently, when BRGM-Peru initiated arbitration proceedings in Switzerland regarding the same dispute, the other requested the Swiss courts to stay the arbitration on grounds of *lis alibi pendens*. Afterwards Buenaventura claimed that the dispute was already pending in Peru and requested the arbitral tribunal to stay the arbitration and grounded on the Article 9 of the PIL Act which provides that;

When an action having the same subject matter is already pending between the same parties in a foreign country, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognized in Switzerland.

The Court of Appeal in Lima rejected the respondents' objection that the dispute should be submitted to arbitration, because not all the parties involved in the court proceedings had signed the arbitration agreement. However, in the meanwhile arbitral tribunal find that it had jurisdiction ( the principle of competence-competence applied) since the arbitration agreement is a valid one which covers the conflicted matters. Buenaventura subsequently attempted to annul the award on jurisdiction grounds before the Swiss courts, which was dismissed by the Federal Court. The court recognized as controversial the issue of whether Article 9 of the PIL Act also applied between courts and arbitral tribunals. However, in the present case, the Federal Court considered that no real *lis pendens* existed between the litigation in Peru and the arbitration in Switzerland, as the decision of the Peruvian courts would not in any case be enforceable in Switzerland. The Swiss Federal Court reasoned that the Peruvian courts breached their duty under Article II(3) of the NY Convention, to refer the parties to arbitration.<sup>155</sup>

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<sup>155</sup> Bernardo M. Cremades, Ignacio Madalena, 'Parallel Proceedings in International Arbitration' 24 (2008), *Arbitration International*, 511 and <[http://newyorkconvention1958.org/index.php?lvl=notice\\_display&id=1421&opac\\_view=6](http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1421&opac_view=6)> Accessed 1 September 2019.

- **Res Judicata**

The term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called "triple-identity" criteria).<sup>156</sup> The *res judicata* doctrine has existed for many centuries<sup>157</sup> and in different legal cultures and this fact makes this doctrine a principle of international law.<sup>158</sup>

In practice the doctrine of *res judicata*'s execution area is not extensive as the doctrine of *lis pendens* (in the context of M&A transactions) however it is vital to elucidate it in the meaning of parallel proceedings. Furthermore, it is important to mention that as to the limits of *res judicata*, it is well established that a judicial decision is only *res judicata* if it is between the same parties and concerns the same question as that previously decided. According to Hanotiau, views expressed by the arbitral tribunal in its judgement which are not relevant to the actual decision on the question at issue have no binding force and not *res judicata*.<sup>159</sup>

The doctrine of *res judicata* has two effects. First effect of *res judicata* is the 'positive/formal' one which refers to that a decision is final between the parties and may not be appealed or challenged. Therefore, a final judgment or award will be binding in subsequent proceedings.<sup>160</sup> ILA Interim Report mentions that the positive effect of the doctrine is largely uncontroversial.<sup>161</sup> Secondly, the negative/material effect<sup>162</sup> of the *res judicata* refers to 'res judicata is final'. In other words once a case has been decided by a valid and final judgement, the same issue may not be disputed again between the same parties, so long as the judgement stands.<sup>163</sup>

It is commonly excepted that arbitral awards have *res judicata* effect. It is indeed so provided in the New York Convention and in national statutes. In the scope of parallel proceedings, it is high likely to encounter

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<sup>156</sup> Filip DeLy, Audley Sheppard, 'ILA Interim Report on Res Judicata and Arbitration' 25 (2009) *Arbitration International*, 2.

<sup>157</sup> *Ibid.*

<sup>158</sup> Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* ( First Edition, Kluwer Law International, 2005) 239.

<sup>159</sup> *Ibid* 241.

<sup>160</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 139.

<sup>161</sup> Filip DeLy, Audley Sheppard, 'ILA Interim Report on Res Judicata and Arbitration' 25 (2009) *Arbitration International*, 2.

<sup>162</sup> The negative effect of the *res judicata* can be defined with the principle of 'non bis in idem'. This principle implies that, the subject matter of the judgment or award cannot be re-litigated a second time, in this context. *Ibid.*

<sup>163</sup> Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* ( First Edition, Kluwer Law International, 2005) 241.

same claims in different forums in relation to same M&A deal. Furthermore, unlike its recommendations on parallel proceedings, International Law Association agrees that the triple identity test ( namely, identity of parties, causes of action and relief) should apply to res judicata .<sup>164</sup>

### IV. 3. CONSOLIDATION OF THE PROCEEDINGS

In the previous part of the dissertation, the parallel proceedings and why they are significant to mention in the context of arbitration of M&A transactions' is analyzed. Furthermore the doctrines of 'lis pendens' and 'res judicata' are explained since they are certain procedural mechanisms to avoid or mitigate the undesirable effects of parallel proceedings.<sup>165</sup> Since parallel proceedings are one of the most common problems in the field of arbitration of merger and acquisition transactions, it is significant to discuss other possible solutions which will be efficient and beneficial for the parties. In brief, expressed at the most basic level, dispute resolution employs a variety of procedural tools to decide claims collectively, rather than in parallel or successive two-party disputes and one of these procedural tools is the consolidation.<sup>166</sup> Thus, in this part of the dissertation the doctrine of consolidation will be explained.

#### IV. 3. a. Definition and Purposes of Consolidation

In the most basic senses the term of consolidation refers to the amalgamation of different arbitral proceedings which are pending or initiated into a single proceeding.<sup>167</sup> And according to Gillieron and Pittet consolidation is the act or process of uniting into one single case several independent proceedings which are pending or initiated.<sup>168</sup> This definition is important because it encompasses all situations possible under the ICC and Swiss Rules.<sup>169</sup> In other words ICC and Swiss Rules (institutional rules) include provisions about consolidation on the contrary of UNCITRAL (ad hoc rules). In international arbitration, generally there are at least three situations in which consolidation has been considered:

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<sup>164</sup> Winnie (Jo-Mei) Ma, 'Parallel Proceedings and International Commercial Arbitration: The International Law Association's Recommendations for Arbitrators' 2 (2009) Contemporary Asia Arbitration Journal, 69.

<sup>165</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 129.

<sup>166</sup> Lara Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (First Edition, Eleven International Publishing, 2012) 11.

<sup>167</sup> Arjun Gupta, Sahil Kanuga, Vyapak Desai, 'Blessed Unions in Arbitration - An Introduction to Joinder and Consolidation in Institutional Arbitration' 4 (2016) Indian Journal of Arbitration Law, 138.

<sup>168</sup> Philippe Gillieron, Luc Pittet, ' Article 4 - Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties' in Tobias Zuberbuhler and others (eds), *Swiss Rules of International Arbitration: Commentary* ( First Edition, Kluwer Law International, 2005) Note 3.

<sup>169</sup> Lara Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (First Edition, Eleven International Publishing, 2012) 10.

- Two arbitration proceedings between the same parties under the same contract and arbitration agreement;
- Two arbitration proceedings between the same parties under different arbitration contracts and arbitration agreements; and
- Two arbitration proceedings between different parties and based on different contracts and arbitration agreements.<sup>170</sup>

Claims arising out of the same transaction or occurrence appear from a layman's perspective as a natural whole artificially torn asunder by two-party dispute resolution. To maintain the connection between the claims and parties, procedural tools are used to alleviate the seemingly fragmented approach, allowing separate (two-party, one-claim) cases to be treated as one.<sup>171</sup>

This inclusive approach of combining all connected (two-party one-claim) cases into one case is based on the assumption that each aspect of an event affects another. Procedurally separate (two-party one-claim) cases affect each other because they all are connected. Treating one case at a time does not take into account the remaining cases. And according to Lara Pair, this constitutes the main reason of the consolidation. In other words, influences exerted by the other cases will not be perceptible, potentially resulting in the adjudicators missing crucial details or the bigger picture. Furthermore, missing crucial details and the bigger picture by treating one case at a time may cause unjust results also time and money consuming. Thus the act of consolidation appears to be an adequate solution for this risks.<sup>172</sup>

Consolidation of the parallel proceedings has aims other than these. First of all when the fact of 'consistent judgements increase faith in adjudicative system' is considered, it is clear that consolidation of the proceedings is an appropriate way to avoid contradictory judgements. Another factor which contributes the reliability of a system is the predictability of it. According to King, in respect of parallel proceedings, contradictory results offend the sensibilities and reduce faith in system hence these results should be avoided.<sup>173</sup> And

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<sup>170</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 150-151.

<sup>171</sup> Lara M. Pair, Paul Frankenstein, 'The New ICC Rule on Consolidation: Progress or Change' 25 (2011) *Emory International Law Review*, 1062.

<sup>172</sup> *Ibid.*

<sup>173</sup> Brian King, Consistency of Awards in Cases of Parallel Proceedings, in Philippe Pinsolle, Anne Veronique Schlaepfer, Louis Degos (eds) *Towards a Uniform Arbitration Law?* (First Edition, JurisNet, 2005) 294.

since deciding all related cases in one adjudication eliminates contradictory judgments, consolidation serves to avoid contradictions.<sup>174</sup>

As it is mentioned above, treating each case one by one is a money and time consuming way especially when it is considered that in arbitration parties are consuming their own money. On the contrary consolidation of these proceedings provides efficiency in the meaning of money and time.<sup>175</sup>

According to Alvarez, in arbitration, fairness requires some measure of efficiency, since justice too long delayed becomes justice denied.<sup>176</sup> Consolidation fosters fairness and one truth by determining the possibility of different determinations.<sup>177</sup>

#### **IV. 3. b. Consolidation in Institutional Arbitration**

Consolidating connected arbitrations may be cost efficient and may also avoid inconsistent results. However, if the envisaged arbitration is an institutional arbitration, consolidating into one procedure two or more already-initiated arbitration proceedings presupposes that these different proceedings are administered by the same institution. On one hand the parties may decide that notwithstanding their expressed intentions in the arbitration agreement, they are agree to the joinder of proceedings. On the other hand, consolidation may be ordered in certain cases, by the arbitral institution.<sup>178</sup>

There are numerous institutions for international arbitration<sup>179</sup> however not all of them includes rules for consolidation. The main institutions which regulates consolidation are the International Chamber of Commerce and the Swiss Chamber of Commerce.

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<sup>174</sup> Lara Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (First Edition, Eleven International Publishing, 2012) 12.

<sup>175</sup> Ibid.

<sup>176</sup> Henri Alvarez, 'Autonomy of International Arbitration Process' in Loukas A. Mistelis, Julian D.M. Lew (eds) , *Pervasive Problems in International Arbitration* (First Edition, Kluwer Law International, 2006) 144.

<sup>177</sup> Lara Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (First Edition, Eleven International Publishing, 2012) 13.

<sup>178</sup> Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* ( First Edition, Kluwer Law International, 2005) 180.

<sup>179</sup> Marc Blessing, 'Comparison of the Swiss Rules with the UNCITRAL Rules and Others' 22 (2004) ASA Special Series, 1.

- **International Chamber of Commerce - ICC Rules**

The ICC rules are widely used, also contains a provision on consolidation.<sup>180</sup> The ICC rule on consolidation (the old article 4(6) ) is changed in September 2011 furthermore the new ICC rule has a wider scope. The Article 10 of ICC;

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

- a) the parties have agreed to consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.<sup>181</sup>

- **Swiss Chambers of Commerce - Swiss Rules**

Swiss Court of Arbitration are offered discretionary power in many instances, including the question of consolidation. Also, the Swiss Rules contain the broadest clause on consolidation currently in use. The Article 4 of Swiss Rules;

Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral

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<sup>180</sup> Lara Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (First Edition, Eleven International Publishing, 2012) 20.

<sup>181</sup> International Chamber of Commerce Rules of Arbitration, Article 10, <[https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_10](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_10)> Accessed 3 September 2019.

tribunal already constituted for the existing proceedings. The Chambers may proceed likewise where a Notice of Arbitration is submitted between parties that are not identical to the parties in the existing arbitral proceedings. When rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings. Where the Chambers decide to refer the new case to the existing arbitral tribunal, the parties to the new case shall be deemed to have waived their right to designate an arbitrator.

Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.<sup>182</sup>

ICC and Swiss Rules are the most common institutional rules in respect of the arbitral proceedings. However when it comes to 'consolidation' both of the rules are inadequate to address all important issues for consolidation. Besides that according to John Martin, the ICC Rules work 'tolerably well' in practice.<sup>183</sup> Neither institution provides specifically adjusted rules for costs, procedural adjustments, secrecy or language but the Swiss Rules are much more inclusive than the ICC Rules and can accommodate many more situations. Even the ICC Rules are the oldest one and works well in the practice, the wide-angle of the Swiss Rules may render it more appealing.

Both of the institutional rules are insufficient to solve parties problems when they encounter parallel proceedings and consider to solve this issue by consolidating the proceedings. And during a complicated transaction such as M&A, not predicting the possibility of parallel proceedings therefore the possibility of consolidation may cause even more problems for the parties. According to Fai and Dewan, such disputes often arise in projects which typically involve more than two parties. And an M&A transaction is a basic example for those projects. In order to prevent such problems, parties may draft their arbitration agreements with 'consolidation mind'. In case parties expressly set out their intention on the consolidation of arbitral proceedings or multi-party arbitrations of all related disputes in their arbitration agreements, the issue would typically be governed by the terms of their agreement.<sup>184</sup>

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<sup>182</sup> Swiss Rules of International Arbitration, Article 4, <[https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA\\_EN\\_2017.pdf](https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf)> Accessed 3 September 2019.

<sup>183</sup> John Marrin 'Multiparty Arbitration in the Construction Industry' in Permanent Court of Arbitration (ed) *Multiple Party Actions in International Arbitration* (First Edition, Oxford University Press, 2009), note 17.29.

<sup>184</sup> Edwin Tong Chun Fai, Nakul Dewan, 'Drafting Arbitration Agreements with 'Consolidation' in Mind' 5 (2009) *Asian International Arbitration Journal*, 72-73.

As it is indicated during the previous part of the dissertation, 'well-drafted' arbitration agreements/clauses are life saving in context of the M&A transactions. Since one of the reasons why parties choose arbitration as dispute resolution mechanism during an M&A agreement is the autonomy, it is more than normal for parties to draft clauses in case of consolidation.

#### **IV. 3. c. Advantages and Disadvantages of Consolidation**

Even the act of consolidation is an appropriate solution for parallel proceedings, it is not a 'risk-free' way.

The aims of the consolidation of parallel proceedings are explained above. These aims; avoidance of contradictory judgements, efficiency and fairness can be considered as advantages of the consolidation at the same time.

Consolidation of the parallel proceedings is a good way to avoid wasting time. However, efficiency in the meaning of time actually depends on the stages that the arbitrations have already undergone and the stages which have to be repeat. That is why a number of scholars suggest limiting consolidation to cases in their earliest stages.<sup>185</sup> For example according to Hanotiau, cases should only be consolidated until they have entered the pleading stage.<sup>186</sup> Otherwise, if cases are consolidated after they are proceeded individually it will cause repetition and eventually waste of money and time. Which will be totally incompatible with the fundamental aims of the consolidation.

During an M&A agreement the disputes moreover parallel proceedings are inevitable and parties' perspective should be solve these issues in the most efficient way for their own interests. Without a doubt, parties will consider the 'money' situation while they are solving these disputes. Even though consolidation of the proceedings may cause additional costs, it will be cheaper than proceeding cases one by one.

On the other hand, especially in M&A arbitrations the consolidation of related proceedings is likely to raise the problem that confidential information, such as trade secrets, cost margins, or general financial information, is exposed to risk of being disclosed to parties from which this information was normally to be kept secret.<sup>187</sup> Thus this possibility will create a contradictory situation with the fundamental principles of arbitration. Other than four situations which constitutes the exceptions of the duty of confidentiality, the confidential informations cannot be disclosed. These exceptions are<sup>188</sup>;

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<sup>185</sup> Lara Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (First Edition, Eleven International Publishing, 2012) 172.

<sup>186</sup> *Ibid.*

<sup>187</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 154.

<sup>188</sup> *Ali Shipping v. Shipyard Trogir* (1998) 2 All ER 136 (K.B.).

- Where a party consents to the disclosure, in other words parties' autonomy with regard to the confidentiality (any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves and not on third parties)<sup>189</sup>,
- If the courts makes an order or grants leave for disclosure of such documents or evidence,
- When it is reasonably necessary to protect the legitimate interests of the party to the arbitration (application of *Hassneh Insurance v Stuart J Mew* which is mentioned above) and
- Where the interests of justice or public interest require disclosure.

Consolidation of the cases may also raise difficulties for the effective administration of the case, when two proceedings have been filed under different mechanisms.<sup>190</sup> However several non-exhaustive cumulative conditions might be useful to decide whether it is efficient to consolidate cases or not. These conditions are<sup>191</sup>;

- A high degree of connection between the proceedings, so that the decision reached in one of them will have direct effects on the other;
- When the consolidation is in the interests of both parties and of a fair and effective resolution of the claims;
- When all the parties have granted their consent, if the applicable law or arbitration rules so require; and
- When the consolidation is possible within the framework of the different applicable dispute resolution mechanisms.

With all the advantages and disadvantages of the consolidation, it is significant to mention that the main point is balancing the purposes of consolidation against the principle of arbitration while deciding whether to solve problem of parallel proceedings by consolidating the cases.<sup>192</sup> It is unreasonable to consolidate cases with losing the principles of arbitration such as privacy and confidentiality. These principles gain even more importance in the field of M&As because of the parties' interests on confidential company informations and

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<sup>189</sup> Gary B. Born, *International Arbitration, Law and Practice* (First Edition, Kluwer, 2012) 196.

<sup>190</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 157.

<sup>191</sup> Bernardo M. Cremades, Ignacio Madalena, 'Parallel Proceedings in International Arbitration' 24 (2008), *Arbitration International*, 534.

<sup>192</sup> Lara Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (First Edition, Eleven International Publishing, 2012) 35.

trade secrets. Therefore if consolidating the cases puts these interests in danger parties should avoid it. Which means that each case should be evaluated separately. And it should be remembered when parties choose the arbitration as a dispute resolution mechanism, they will always have the benefits of party autonomy. While they are entering an arbitration agreement, they should consider the possible scenarios and draft the arbitration clauses in a comprehensive way.

## VI. ISSUE OF CONSENT IN ARBITRATION OF M&A TRANSACTIONS

‘Arbitration is strictly a matter of consent’, and the task for courts and arbitrators is ‘to give effect to the intent of the parties’ according to the court decision in *Lamps Plus Inc. v. Valera*.<sup>193</sup>

Consent is the foundation of arbitration, and in general a court or an arbitral tribunal will refuse to treat a person or entity as a party to the contract, or at least to the arbitration clause if it has not expressly or implicitly consented to it. Consent in most – but not all – cases will be expressed by the signature or by conduct of the person or entity concerned on a contractual document. But, on the other hand, as will be seen below, it is possible to become party to a contract without having signed the instrumentum and, on the contrary, the fact that a party has affixed its signature on the contract does not necessarily mean that it has consented to become a party to the agreement.<sup>194</sup>

A fundamental aspect of arbitration is that it is a consent-based dispute resolution mechanism.<sup>195</sup> The reflection of this fact is that parties are free to agree on their method and procedure of dispute resolution.<sup>196</sup> This is called as the ‘party autonomy’ and it is one of the vital principles of arbitration and parties’ reason to choose arbitration during an M&A transaction.

In general, disputes which arise from an M&A agreement can be arbitrated only in the presence of the consent of the parties. According to Born, consent in international commercial transactions is usually evidenced by written instruments, typically with the execution of a formal contract by a corporate officer's signature.<sup>197</sup> Which means that solving a dispute by arbitration takes more than drafting an arbitration agreement

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<sup>193</sup> *Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 U.S. LEXIS 2943 (U.S. Apr. 24, 2019).

<sup>194</sup> Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* (First Edition, Kluwer Law International, 2005) 32.

<sup>195</sup> Richard Garnett, Henry Gabriel, Jeff Waincymer and Judd Epstein, *A Practical Guide to International Commercial Arbitration* (First Edition, Oceana Publications, 2000) 3.

<sup>196</sup> Markus A. Petsche, *The Growing Autonomy of International Commercial Arbitration* (First Edition, Sellier European Law Publishers, 2005) 16.

<sup>197</sup> Gary Born, *International Commercial Arbitration* (First Edition, Kluwer Law International, 2009) 640.

negligently without considering the necessary elements. Furthermore it is also important to distinguish between the “written” form requirements applicable to arbitration agreements under many international conventions and national arbitration statutes, and the question whether a party has consented to an arbitration agreement. It is possible for applicable “written” form requirements to be satisfied but for the extant documents to fail substantively to establish the existence of an arbitration agreement as a substantive matter. Thus, in order to establish a valid arbitration agreement, both applicable form requirements and substantive consent requirements must be satisfied.<sup>198</sup>

In case of an implied consent for the arbitration agreement, assertion of an implied consent should be taken seriously by arbitral tribunals and national courts. And this assertion requires and interpretation within the scope of general principles of contractual interpretation such as the principle of interpretation in good faith and the principle of effective interpretation. Furthermore it is significant to mention that this interpretation must reveal the “intention to arbitrate” with a degree of certainty, rather than probability.<sup>199</sup>

## **VI. 1. Issue of Consent in the Extension of the Arbitration Agreement to Non-Signatories**

The issue of consent becomes more of an issue when the extension of arbitration agreements to third parties is necessary. Because, lawyers dealing with M&A arbitrations are frequently confronted with the issue of extension of the proceedings to third parties who have not signed the arbitration agreements.<sup>200</sup> In other words it is one of the most common issues in the field of arbitration of M&A agreements.

One would not dispute that an arbitration clause in writing is necessary to give jurisdiction to an arbitral tribunal. But by definition, if one wishes to join a non-signatory, it means that this particular company has not signed the arbitration clause. Afterwards Prof. Hanotiau asks that, can one say that there is therefore no arbitration clause in writing in relation to this particular company and that therefore it may not be joined to arbitration?<sup>201</sup> On the contrary, The Swiss Federal Supreme Court mentioned in its landmark decision of 16 October 2003, from the moment there is an arbitration clause, the issue of extension to a non-signatory may be considered. The fact that the clause or the contract containing the clause was not signed by the ‘non-signatory’ is not a formal bar to extension.<sup>202</sup>

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<sup>198</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* ( First Edition, Seckin Publishing, 2016) 196.

<sup>199</sup> Ibid 196-197.

<sup>200</sup> Bernd. D. Ehle, ‘Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions’ (2005) 27 *Comparative Law Yearbook of International Business*, 305.

<sup>201</sup> Bernard Hanotiau, *Complex Arbitrations; Multiparty, Multicontract, Multi-issue and Class Actions* ( First Edition, Kluwer Law International, 2005) 53.

<sup>202</sup> Ibid 53.

The issue of extension of the arbitration clause to non-signatories (third parties) is sometimes reduced by commentators to the issue of 'groups of companies' but this reduction is 'unfortunate' according to Hanotiau. Because the issue of extension of the arbitration clause to non-signatories, does not only arise in relation to companies but in relation to individuals and states too. Hence it is probably better to avoid restricting oneself to the formula 'group of companies doctrine' as a tool for legal reasoning in the determination of extension. Actually, in most cases, courts and arbitral tribunals require, to allow the extension, the existence of consent or of a conduct amounting to consent. Express consent or conduct as an expression of implied consent, is still the basis on which most courts and arbitral tribunals reason to decide on the extension.<sup>203</sup>

Prof. Stavros Brekoulakis brings a different approach to this issue; even though its contractual nature made arbitration a very flexible and popular method for resolving disputes especially in linear bilateral transactions (such as M&A transactions), often the contractual and bilateral nature of arbitration is unable to accommodate modern business transactions that are typically multifaceted and multiparty.<sup>204</sup> In other words, the contractual nature of the arbitration, its autonomy makes the arbitration attractive for the parties of complicated transactions. However the same 'consent-based' nature of the arbitration, incapacitates it for the modern, more complicated, multi-partied economic transactions. Brekoulakis tries to create a new perspective which is more consistent, intellectually more honest approach to non-signatories. Such an approach would require us to focus not on putative consent of non-signatories, but on the boundaries of the dispute submitted for arbitration and the scope of the original arbitration clause.<sup>205</sup> To put it another way; Brekoulakis's approach depends on the dispute itself which means that in each case, the scope of the arbitration clause should be considered with the connection between the parties and non-signatories. Because if we except the consent as the sole requirement for the extension of the arbitration agreement, this may cause unjust results for the third parties who are related to the conflict.

## **VI. 2. Issue of Consent in Consolidation of the Parallel Proceedings**

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<sup>203</sup> Ibid 50.

<sup>204</sup> Stavros Brekoulakis, 'Parties in International Arbitration: Consent v. Commercial Reality' (30th Anniversary School of International Arbitration, London, April 2015) <[https://www.academia.edu/21963131/Consent\\_vs\\_Commercial\\_Reality\\_in\\_International\\_Arbitration](https://www.academia.edu/21963131/Consent_vs_Commercial_Reality_in_International_Arbitration)> Accessed 05.09.2019.

<sup>205</sup> Ibid 6.

As it is explained in detail above, arbitration is a consent-based dispute resolution mechanism. And when parties started to considering consolidation of the proceedings as a solution for parallel proceedings, 'consent' for consolidation becomes an issue since this process is a part of arbitration agreement.

Naturally, the complexity arises when the arbitration clause is silent on the issue of consolidation. Even though a generalized statement of the law is that if not founded on the consent, the law has not stepped in to enforce consolidation, it is possible for parties to be subject to consolidation if the governing law, the arbitral rules or the applicable law in the seat of arbitration allow for consolidation or if the courts in a particular jurisdiction direct consolidation even without the consent of parties.<sup>206</sup>

According to Swiss Law, consent need not only be present, but also legally permissible. Article 178(2) of the SPILA regulates that;

As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law.

Which means that, when parties choose the Swiss Law to apply to their arbitration agreement, in order to consolidate proceedings their 'present' consent is required. And it should not be incompatible with the mandatory provisions of Swiss Law.<sup>207</sup>

English Law about this issue is not very different than Swiss Law. According to Section 35 of English Arbitration Act;

The parties are free to agree—that the arbitral proceedings shall be consolidated with other arbitral proceedings, or that concurrent hearings shall be held, on such terms as may be agreed.

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<sup>206</sup> Edwin Tong Chun Fai, Nakul Dewan, 'Drafting Arbitration Agreements with 'Consolidation' in Mind' 5 (2009) Asian International Arbitration Journal, 74.

<sup>207</sup> For example, if consent to consolidation constitutes a violation of Article 27 of Swiss Civil Code, this consent will be invalid. Article 27 of Swiss Civil Code regulates that;

1-No person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act.

2-No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals. <<https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>> Accessed 05.09.2019.

Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.<sup>208</sup>

As it is clear from the language of this section, under English Law 'compelling' parties to consolidation is not allowed and therefore consent of the parties is necessary.

Under the ICC rules, Article 10 requires the request one of the parties for consolidation. However ICC practice brings some other conditions in order to consolidate the cases. According to Article 10 (c);

Where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.<sup>209</sup>

## VII. CONCLUSION

This dissertation has three major aspects to demonstrate about arbitration in M&A agreements. First of all, to show the frequency of M&A agreements around the world and explain why arbitration is an appropriate dispute resolution mechanism for those transactions is explained. Afterwards phases of M&A transactions explained chronologically with the most common disputes which may arise from those phases. The purpose of this part is to indicate that mergers and acquisition transactions are highly risky. Since there are lots of interest on the stake (such as an immense amount of money) for all parties, it is significant to solve the problems both arise from the transaction itself (pre-signing disputes, post-signing disputes etc.) and arbitration process (such as parallel proceedings) in the most efficient way. Therefore, the later part of the dissertation aimed to explain one of the most common issues which may arise from an arbitration process of M&A agreement; parallel proceedings. Thus the problem of parallel proceedings and possible solutions for this issue is discussed. And finally the issue of consent is explained because it is the most important feature of the arbitration.

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<sup>208</sup> Arbitration Act, 1996, Section 35.

<sup>209</sup> ICC Rules of Arbitration, 2017, Article 10 <[https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_10](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_10)> Accessed 05.09.2019.

M&A arbitrations are not typical examples of multi-contract arbitration owing to the lack of definition of connection which is required for such rules to apply.<sup>210</sup> Therefore solving M&A disputes by arbitration is only possible with interpretation of the existing rules and the scope of the arbitration agreements between parties. And this dissertation is focused on the parallel proceedings particularly. The doctrines of *lis pendens* and *res judicata* are discussed as solutions for the risks of parallel proceedings. However, from my point of view, application of these doctrines to the arbitration process may disrupt the parties' motivations (such as party autonomy and confidentiality) to pick the arbitration as a dispute resolution mechanism in the beginning. Additionally, as it is explained, a merger and acquisition transaction consists of several phases. When there is a dispute during the beginning of the transaction (like pre-signing disputes) parties give a start to the arbitration process and an award will be issued finally. Parties' usual behavior after this will be to modify their agreement suitably to the award. However while applying the doctrines of *lis pendens* and *res judicata*, earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings. In this case, what is going to happen when parties changed the terms in accordance with their interests and the award is based on the old terms? How can this award be applicable to the future disputes?

Under these conditions, in my opinion, consolidation of the proceedings is the most proper solution for the issue of parallel proceedings. The main aim of the consolidation is to make the arbitration process a lot easier for the parties. However in order to achieve this goal, parties of an M&A deal should draft their arbitration agreement wisely. The scope of the agreement should be broad and it should contain possible disputes which may arise. Besides that, the agreement should include the possibility of consolidation since parallel proceedings are very common during the arbitration of M&A transactions. Because the principle of party autonomy imposes that any consolidation necessarily depends on the agreement of all the parties involved.<sup>211</sup> In other words, in order to consolidate proceedings, parties' consent is essential and the best way to express this consent is to draft clauses about consolidation.

It is inevitable to notice that there is a lack of overarching, detailed body of rules about arbitration and consolidation of proceedings in the field of M&As. That is why an arbitration agreement and M&A agreement itself always requires interpretation. Thus the possibility of making mistakes, possibility of unjust results increases. Even the parties draft arbitration clauses in the best way and express their consents clearly; this field of law still requires a guideline.

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<sup>210</sup> Cahit Agaoglu, *Arbitration in M&A Transactions; Problem of Consent in Parallel Proceedings and in the Transfer of Arbitration Agreements in M&A Agreements* (First Edition, Seckin Publishing, 2016) 249.

<sup>211</sup> *Ibid* 251.

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