

BETTO PERBEN PRADEL FILHOL

Avoiding false starts and other pitfalls

Expert determination and multi-tier dispute resolution clauses

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EXPERT DETERMINATION AND MULTI-TIER DISPUTE-RESOLUTION CLAUSES

MULTI-TIER DISPUTE-RESOLUTION CLAUSE

. *“Contractual provisions whereby the parties agree that, if a dispute arises, they will, prior to commencing arbitration, seek to settle their dispute through other ADR mechanisms, ranging from negotiation, conciliation or mediation, adjudication or expert determination”*

D. Baizeau in *“Arbitration in Switzerland: The Practitioner’s Guide”* (2018)

EXPERT DETERMINATION CLAUSE

. In M&A arbitrations, expert determinations are *“commonly provided for in transaction agreements to resolve post-closing purchase price adjustment disputes”* Global Arbitration Review, *“The Guide to M&A Arbitration”* (2018)

. The expert will determine the adjustment by reviewing the situation on the basis of a procedure and criteria defined in the clause.

First pitfall - Know the distinction with arbitration

SWISS LAW

- . Expert determination is defined by Swiss law and distinguished from arbitration >> **Art. 189 Swiss Civil Procedure Code**
- . Expert determines a **specific factual or legal question**

FRENCH LAW

- . The case law distinguishes arbitration and expert determination >> **criterion: the purpose of the mission entrusted to the third party** by the parties:
 - The **arbitrator** decides the points of **law**
 - The **expert only** determines **factual** questions

IN BOTH LEGAL SYSTEMS

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| <ul style="list-style-type: none">. Only the arbitral award:<ul style="list-style-type: none">- has a res judicata effect- can be declared, after exequatur, enforceable | <ul style="list-style-type: none">. The expert must :<ul style="list-style-type: none">- satisfy the guarantees of independence and impartiality- observe the fundamental rules of fair process |
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Second pitfall - Be careful with drafting

DRAFTING TIPS

- **Determine the competent court to appoint the expert**

>> see Obergericht (Cantonal Court) of the Canton of Aargau, 10 September 2019

- **Phrase the obligation to engage in the pre-arbitration steps in mandatory language**

>> see Court of Cassation, 6 February 2007

- **Include specific time limits for the commencement and conclusion of each pre-arbitral step**

- **Clarify the purpose of the mission entrusted to the third party**

>> It must be determined whether the parties want the third party:

- to settle the dispute
- or to provide an opinion on a specific issue of the case

- **Use language that reflects a clear intent**

>> For expert determination, use the terms “expert”, “appraiser” or “expert determination”, do not use the term “mediator”

Third pitfall - Check the applicable statute(s) of limitation

SWISS LAW

- . **Prior mediation proceedings does not interrupt** statutory limitation periods
- . **Amicable conciliation does not interrupt** statutory limitation periods
- . Where possible, the parties should :
 - **waive the right to rely upon the statute of limitation** for the duration of the ADR process
 - **or take all other appropriate legal steps to preserve their rights**

FRENCH LAW

- . The case law specified that amicable mediation or conciliation suspended **the statutory limitation until the end of the mediation or conciliation**
>> see **Court of Cassation, 14 February 2003**
- . Since 2008, **this principle has been codified**
>> **Article 2238 of the French Civil Code**

Fourth pitfall - Know the consequences of non-compliance

Type of clause	SWISS LAW	FRENCH LAW
Mediation and conciliation clauses	<ul style="list-style-type: none"> . Case law clarified that the sanction for non-compliance consists in : <ul style="list-style-type: none"> - the stay of the arbitration pending completion of the pre-arbitral procedure - and the setting of a time limit for the parties to complete that process <p>>> see Federal Supreme Court of Switzerland, 16 March 2016</p>	<ul style="list-style-type: none"> . Case law ensures the respect of these clauses by deciding that they constitute a cause of inadmissibility of the claim “as it is” <p>>> see Court of Cassation, 14 February 2003</p>
Expert determination clauses	<ul style="list-style-type: none"> . Case law stated that non-compliance with an expert determination clause affects the jurisdiction of the arbitral tribunal <p>>> see Federal Supreme Court of Switzerland, 16 May 2011</p>	<ul style="list-style-type: none"> . The sanctions for non-compliance with expert determination clauses mirror those devised for mediation and conciliation