CHAPTER 12

Expert Determination – Interaction with the Arbitral Tribunal and the Conflict of Competences Between Both: An International Perspective

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The majority of disputes arising out of the post-closing phase relate to determination or adjustment of the purchase price, which is done through an expert determination (ED) procedure. ED is recognized by various jurisdictions and is a well-known and frequently exploited legal feature in the commercial reality. The gist of the ED procedure consists of allowing a third party, usually an independent accountancy firm, to determine the level of the price adjustment or the final price itself. If any dispute between the parties pertaining to the outcome of the ED should arise, the same expert is involved in resolving such dispute by providing their own determination. Such determination is designed to be fact specific, based on financial documents only, fast and efficient. The parties agree that once the expert's procedure is completed, the ED's decision shall be final and binding. At the same time, it is not uncommon for the same M&A contract to include an arbitration agreement which stipulates that 'any dispute' arising out of said contract shall be solved by an arbitral tribunal. This duality often leads to these two proceedings overlapping which creates conflicts of competences between the arbitral tribunal and ED.

This chapter aims to focus on analysing what the interrelation between ED and arbitration is, what the possible conflicts of competences between both institutions are, and how such conflicts are and should be tackled from the international arbitration practice perspective.

§12.01 INTRODUCTION

According to the inventory of merger and acquisition (M&A) cases, '[t]he most common disputes arising out of the post-closing phase are those relating to the

determination or adjustment of the purchase price'.[1] Usually, the determination or adjustment of the purchase price in M&A contracts is done through an expert determination (ED) procedure. ED is recognized by various jurisdictions and is a well-known and frequently exploited legal feature in commercial reality. The gist of the ED procedure consists of allowing a third party, usually an independent accountancy firm, to determine the level of the price adjustment or the final price itself. If any dispute between the parties pertaining to the outcome of the ED should arise, the same expert is involved in resolving such dispute with its determination. Such determination is designed to be fact specific, based on financial documents only, fast and efficient. The parties agree that once the expert's procedure is completed, the ED's decision shall be final and binding. At the same time, it is not uncommon for the same M&A contract to include an arbitration agreement which stipulates that 'any dispute' arising out of the said contract shall be solved by an arbitral tribunal.

While the parties' 'view, or hope [is] that the two [the ED clause and arbitration agreement,] would not encroach on each other and lead their own lives',[2] the reality is that they do overlap more than one would have expected, creating conflicts of competences. It is said that '[e]very practitioner probably has at least an intuitive understanding of expert determination, but its precise limits are difficult to discern'.[3]

Unlike arbitrators, experts typically do not have the authority to interpret an M&A contract's language or address legal issues, such as liability for improper performance of the contract. Instead, experts are limited to deciding specific factual questions. Nevertheless, sometimes these legal issues may have an impact on the data which constitutes the basis for the answer to a specific factual question. Consequently, the scope of the expert's mandate overlaps with the jurisdiction of the arbitral tribunal (i.e., assessing whether a breach of the contractual obligations of one of the parties has reduced or increased the final price or value of the assets or had an impact on the level of an earn-out).

Indeed, drawing the demarcation line between the ED clause and arbitration agreement is not an easy task. This might be because, as some French scholars argue, ED is 'very fuzzy [and] … very difficult to handle'[4] or because 'many practitioners assume that the Purchase Process Adjustments Clause [i.e. ED] must be an arbitration agreement because, if it's not an arbitration agreement, then it is not clear what else it could be'.[5]

This chapter aims to focus on analysing what the interrelation between ED and arbitration is, what the possible conflicts of competences between both institutions are,

1. Andrea Carlevaris, *The Arbitration of Disputes Relating to Mergers and Acquisitions: A Study of ICC Cases*, 24 ICC Int. Court Arbitr. Bull. (2013).
2. *X v. S, case study presented by White & Case during the conference – M&A disputes in Warsaw (2019)*.
3. Martin Valasek & Frederic Wilson, *Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective*, 29 Arbitr. Int., 64 (2013).
4. Klaus Sachs, *The Interaction Between Expert Determination and Arbitration*, 24 ASA Spec. Ser., 240 (2005).
5. NYC Bar, *Report by the Committee on International Commercial Disputes 'Purchase Price Adjustment Clauses and Expert Determinations: Legal Issues, Practical Problems and Suggested Improvements'* 2 (2013).

and how such conflicts are and should be tackled from the international arbitration practice perspective.

§12.02 DEFINITION AND LEGAL IMPLICATIONS OF ED

[A] Definition of ED

The parties to commercial contracts frequently decide to include an expert determination clause (ED clause).[6] By virtue of this clause, the parties elect that an expert will deal with various factual controversies or determine some factual issues that may arise during the lifetime of the contract. Experts are called upon by the parties also to establish a fact or a limited set of facts. They may also be called upon to supplement, amend or replace the intentions of the parties.[7] The experts are rarely or even never lawyers, most often being accountants, engineers or other technical specialists.[8] Their qualifications depend on the type of contract and the potential issues to be solved or determined. The process will typically end with a final and binding decision. However, unlike in cases of arbitration or domestic litigation, the outcome of the ED does not result in an enforceable outcome in the form of an award.[9]

[B] Recognition of ED by Various Legal Systems

ED is recognized by various legal systems, both common and civil. As far as it is possible to agree on what ED is, procedural aspects, requirements and powers of an expert will vary in various jurisdictions.[10]

ED roots date back to Roman law.[11] For instance, ED has a long-standing tradition under English law going back for almost 250 years.[12] In other common law countries, like Canada, Australia, New Zealand or Singapore, ED is also commonly used and is accompanied by a wealth of case law.[13] In the United States (US), ED is also often called 'appraisal' and has been commonly used in a commercial context since at least

6. Gary B. Born, International Commercial Arbitration 259 (2nd ed. 2014).
7. Eliane Fischer & Michael Walbert, *Efficient and Expeditious Dispute Resolution in M&A Transactions*, Austrian Yearb. Int. Arbitr., 41 (2017), https://www.walbert.law/wp-content/uploads/2018/04/Efficient-And-Expeditious-Dispute-Resolution-In-MA-Transactions.pdf.
8. *Id.,* at 41. The ED mechanism has been used in various types of the contracts, such as: (i) the review of the amount of rent payable by the tenant under a long-term lease; (ii) the valuation of shares in a company whose shares are not listed on a stock exchange; (iii) disputes over certain representations and warranties, such as environmental issues; (iv) the value, quality or quantity of goods or commodities being sold; (v) disputes of a technical nature, in particular under the FIDIC Rules. *See also* NYC Bar, *supra* note 5 at 13.
9. Sachs, *supra* note 4 at 235.
10. Wolfgang Peter & Daniel Greineder, Conflicts between Expert Determination Clauses and Arbitration Clauses [in:] GAR: The Guide to M&A Arbitration (3rd. ed. 2021).
11. Born, *supra* note 6 at 259. Ali Yesilimak, *Expert Determination in Turkey*, 33 ASA Bull., 308 & fn. 8 (2015).
12. John Kendall, *Expert Determination: Its Use in Resolving Art and Antiquity Disputes*, 2 Art Antiq. Law, 325 (1997).
13. Valasek and Wilson, *supra* note 3 at 76.

the beginning of the twentieth century.[14] However, in some states, such as California or Nevada, the institution has been abolished 'altogether by introducing a concept of arbitration broad enough to include expert determination as a form of arbitration'.[15]

ED is also recognized in civil law countries. For instance, the wide use of ED in Germany – where it goes by the name of 'Schiedsgutachten' – has enabled the development of a substantial body of case law. There is however no separate legal provision that would govern it. The practice is to apply by analogy Article 317 of the German Civil Law which deals with the specification of performance by a third party.[16] Similarly, in Austria as well there is no legal provision which would be solely devoted to ED. The Austrian Supreme Court considers provisions of Austrian civil law – which deal with section 1056 of Austrian Civil Code (ACC) – as providing a legal basis for the ED.[17] Both Austrian case law and legal literature consider ED a permissible and acceptable tool routinely exploited by parties.[18]

Also, in Switzerland, there is no explicit provision in the Swiss Code of Obligations pertaining to ED; however, this institution is recognized as a contractual concept and references can be found in cantonal codes of civil procedure.[19] In Italy, ED is called 'arbitraggio' which might create some confusion. It does not however have any relation with arbitration.[20] It is also known in Denmark, where it is called 'bindend advices' (binding advice).[21] In Sweden, ED is recognized to constitute contractually binding procedure and not arbitration; however, as pointed by Elofsson, there is a lack of clear rules and practice.[22] Nevertheless, according to Elofsson, ED is a quite popular feature in the M&A contracts with surveys conducted in 2006/2010/2013 showing that more than one-third of the Swedish transfer agreements surveyed contained the ED clauses.[23]

On the other hand, there are two views as to the status of ED under French law. According to Sachs, ED in France is not only not recognized as a legal concept but is also criticized.[24] French scholars describe ED as 'very fuzzy' ('très floue') and 'very difficult to handle' ('fort peu maniable').[25] There is a similar institution under Article 1592 of the French Civil Code which deals with price determination by a third person

14. NYC Bar, *supra* note 5 at 10-11. One of the first US cases which deals with ED is City *of Omaha v. Omaha Water* from 1910.
15. Sachs, *supra* note 4 at 240.
16. Anke Sessler & Corina Leimert, *The Role of Expert Determination in Mergers and Acquisitions under German Law*, 2004 20 Arbitr. Int., 152.
17. However, neither the Austrian Code of Civil Procedures (ACCP) nor the Austrian Civil Code (ACC) contains express provisions on expert determination. Christian Klausegger, *The Arbitrator and the Arbitration Procedure, Ad Hoc Expert Determination – Useful Tool or 'Too Much of a Headache'*, 2013 Austrian Yearb. Int. Arbitr., 169.
18. *Id.,* at 169.
19. For instance, a reference can be found in Article 258 of the Zurich ZPO. Sachs, *supra* note 4 at 240.
20. Sachs, *supra* note 4.
21. *Id.,* at 235.
22. Niklas Elofsson, *Tvistlösningsklausuler i kommersiella avtal*, Juridisk Tidskrift 2014-15, p. 644-645.
23. *Id.,* at 644.
24. *Id.,* at 240.
25. *Id.,* at 240.

acting as price determiner. This is, however, different from ED as understood by German or Swiss law. This is because under French law, the third person acting as price determiner under Article 1592 is deemed to be their joint representative, whose task is to finalize the contract by determining the price. As explained by K. Sachs, '[w]ithout such price determination, the contract is null and void'.[26] A different position is presented by Besson, who equates German 'Schiedsgutachten' to French 'expertise amiable' and argues that ED is a concept recognized under French law.[27]

[C] ED in Price Adjustment Clauses

Despite many possibilities of application, nowadays the ED clause is most commonly used in cross-border commercial transactions in the adjustment of the final price payable under a share sale-purchase agreement. Under such a clause, the expert is authorized to calculate certain adjustments, either upward or downward depending on certain factors or to establish the final price based on the valuation of the net equity of the target company as a basis for calculating the purchase price or the company's future earnings in the context of EBIT (earnings before deducting interest and taxes) or EBITDA (earnings before interest, taxes, depreciation and amortization) guarantees or earn-out clauses.[28]

Given its inherent purpose, i.e., dealing with an issue of fact and not a legal dispute, the ED clause is typically inserted in the substantive part of a contract. Usually, the clause describes various procedural steps in a very detailed and systematic manner. It usually consists of two parts, which correspond to two phases.

The *first part* covers a process which allows for arriving at the necessary adjustment of the purchase price or determining the final price. This includes either submission of the parties' respective positions or exchange of accounting and/or financial documents between the parties and the expert, usually an independent accounting firm.[29] In this phase, the final purchase price is determined under the contract either by the parties themselves or via the expert. This allows for a final price to be adjusted upward or downwards so as to reflect the true value of the company.[30]

There are various reasons for the parties to include such a provision, in particular, the time between the execution of the contract and the closing, competition law issues or tax considerations that require more time to be resolved, the necessity of obtaining consent from third parties or from the board of directors, or the need for confirmatory due diligence.[31]

26. *Id.*, at 240.
27. Sebastien Besson & Jean-Francois Poudret, Comparative Law of International Arbitration 14 (2nd ed. 2007).
28. Sachs, *supra* note 4 at 235.
29. There is no requirement for an expert to be a person, the ED clause can also provide for an institution.
30. NYC Bar, *supra* note 5 at 1.
31. Wolfgang Peter, *Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Arbitrations*, 24 ASA Spec. Ser., 59 (2005). NYC Bar, *supra* note 5 at 1.

As explained by Peter:

> price adjustment provisions mitigate the buyer's risk of suffering from the target company's financial deterioration in the event that the seller should fail to manage the company efficiently until the closing of the transaction. Furthermore, the balance sheet, on the basis of which the provisional purchase price is determined, is obviously drawn up well before closing and unless the target company is a static enterprise, there will invariably be changes by the time of closing.[32]

In the case of price adjustment provisions based on future earnings of the company (earn-outs), the philosophy is different, as the buyer wants to ensure that the company's future income is in line with the projections.[33]

The *second part* is optional and is triggered when one of the parties disagrees with the determination (valuation) either proposed by the other party or prepared by the expert. Such a party usually submits a notice of disagreement, which describes the disputed issues. Typically, the parties agree to settle the dispute amicably. If a settlement is not reached, the disputed issues are directed to an expert for resolution. The ED clauses may differ here regarding the procedural steps on how the parties choose the expert. The expert usually has a limited period of time to solve the dispute. It is common practice not to hold a hearing or exchange the parties' positions as to their differences.

Finally, the expert issues a decision. Commonly, such decision is final and binding on the parties as the parties explicitly agreed that the expert decision would have such an effect. The contract usually stipulates that the expert does not act in the capacity of an arbitrator.[34] The parties either share the expert's costs or decide that the entire cost will be borne by the party whose position on adjustment was the furthest from the expert's decision.

The inclusion of ED clauses in M&A contracts seems to be a suitable solution. As explained by K. Sachs:

> [i]t particularly makes sense [to include an ED clause] in cases where the issue is a limited factual one and of such nature that an arbitral tribunal would also call in an expert, or hear party-appointed expert witness, to clarify the issue. This is true, for example, when the result of the valuation depends on the proper application of accounting rules, such as specified national Generally Accepted Accounting Principles (GAAP) or the International Financial Reporting Standards (IFRS). By choosing expert determination, the parties can thus rely on the specific know-how of the expert and avoid time-consuming and costly arbitration proceedings.[35]

32. Peter, *supra* note 31 at 59.
33. Peter and Greineder, *supra* note 10 at 34.
34. Gerald Hansen, Managing Expert Determinations [in:] The Guide to M&A Arbitration (1st ed. 2018).
35. Sachs, *supra* note 4 at 235. Sessler and Leimert, *supra* note 16 at 151.

§12.03 THE DISTINCTION BETWEEN ED AND ARBITRATION

A leading treatise on arbitration states that '[j]ust as arbitration is not litigation, so too arbitration is not expert determination or valuation'.[36] While the distinction between arbitration and ED is clear in theory, it is not so easy to distinguish both in practice. Nevertheless, the distinction even if 'uneasy [is] necessary':[37] depending on the qualification given to ED, different legal regimes will apply, producing different legal consequences.

Usually, under ED clauses, the parties authorize the expert to resolve all the disputes that may arise out of the price adjustment process. At the same time, the contract often includes a choice of forum clause under which the parties agree that all disputes arising out of the contract will be resolved either by an arbitral tribunal or by a court. In practice, the scope of disputes under the price adjustment process and general disputes arising out of the contract often overlap. While for one party determining the level of Working Capital might be a pure accounting issue that falls squarely under the expert's authority, for the other party it might be a case of contract interpretation that belongs to the jurisdiction of the arbitral tribunal.

The parties may further add to this confusion if they are not rigorous in drafting their ED clause. Sometimes, an ED clause may stipulate that disputes pertaining to the price adjustments shall be submitted to an 'expert arbitrator' or foresee that an expert who will not act as an arbitrator shall resolve 'any dispute aris[ing] out of [the] Agreement'.[38] Therefore, it might not be clear whether the parties intended these disputes to be solved by an expert in a final and binding ED procedure or by an arbitral tribunal. According to Fischer and Walbert, in the case of doubt 'it is the content of the agreement, i.e., the tasks entrusted upon and powers vested in the expert or arbitrator and not the terminology employed by the parties that determines whether the parties agreed on expert determination or on arbitration'.[39] The scope of the mandate entrusted to the expert also has a bearing. The narrower the scope of such mandate 'the more it is an indication that the parties intended the dispute to be decided by an expert rather than an arbitrator'.[40]

As pointed out by Peter and Greineder, the parties may also:

> provide for a tiered provision, where a matter must be referred to expert determination and then subject to review by an arbitral tribunal. It is also possible for a dispute resolution provision to leave the parties with a choice of referring a matter to either an expert or arbitral tribunal. In that case, an arbitral tribunal would have the authority to decide any matter that might equally be referred to expert determination, in addition to any other dispute arising under the M&A agreement and covered by the arbitration agreement.[41]

36. Born, *supra* note 6.
37. Frank Spoorenberg, *Expert Determination and Arbitration: An Uneasy but Necessary Distinction (blog post)* (2009).
38. Sachs, *supra* note 4 at 237-238.
39. Fischer and Walbert, *supra* note 7 at 41.
40. *Id.*, at 41.
41. Peter and Greineder, *supra* note 10.

Nevertheless, courts and arbitral tribunals also struggle with distinguishing ED and arbitration. In the United Kingdom, the jurisdiction where ED has been exploited for 'at least 250 years',[42] there are a plethora of cases that discuss the distinguishing features. In *Holt v. Cox*, judge Santow J explained that 'the distinction is that an arbitrator exercises a quasi-judicial function to whom is submitted for decision a formulated dispute to be decided between the competing contentions of the parties, while an expert determines matters from the expert's own experience and expert knowledge, making his or her own investigations'.[43] In the seminal case of *Barclays Bank v. Nylon Capital*, Thomas LJ found that in contrast to arbitration, ED 'is a very different form of dispute resolution to which neither the Arbitration Act 1996 nor any other statutory codes apply'.[44] In a subsequent case, *Wilky Property Holdings v. London & Surrey Investments,* Deputy Judge of the High Court, Richard Snowden QC added that '[a]s such, at least prima facie, parties who have, in a carefully drafted written agreement, expressly chosen to refer their disputes to an expert should not be taken to have intended a reference to arbitration'.[45] The English courts have also found the question of immunity to be a clear distinguishing factor between ED and arbitration.[46]

In the US, the close interrelation between both institutions has caused a lot of tension. Despite the enactment of the Federal Arbitration Act (FAA) in 1925 to provide clear guidelines on how to properly distinguish ED and arbitration, the courts have often confused them.[47] This chaotic landscape prompted the New York Bar association to prepare in 2013 a report on 'Purchase Price Adjustment Clauses and Expert Determinations: Legal Issues, Practical Problems and Suggested Improvements'.[48] The report provides an inventory of the case law and recommends clearly distinguishing ED from arbitration. It is however limited to one state only.

In more general terms, currently approx. twenty-four states in the US clearly recognize ED and arbitration as distinct legal institutions.[49] The same position is taken by the Restatement Third of the US Law of International Arbitration and Investor-State Arbitration.[50] Twenty-two states do not recognize any distinction between the two, and in four states the matter has been resolved ambiguously or not at all. At the federal level, the US Courts of Appeals are split on whether ED constitutes arbitration under the FAA.[51]

42. John Kendall, Expert Determination (4th ed. 2008).
43. Andrew Lacey, *How 'Final and Binding' Is An Expert Determination? (blog post)* (2017).(citing *Holt v. Cox* (1994) 15 ACSR 313).
44. Adham Kotb, *Alternative Dispute Resolution: Arbitration Remains a Better Final and Binding Alternative Than Expert Determination*, 8 Queen Mary Law J., 127 (2017).
45. *Id.,* at 127.
46. Besson and Poudret, *supra* note 27 at 17.
47. NYC Bar, *supra* note 5 at 11.
48. NYC Bar, *supra* note 5.
49. *Penton Business Media Holdings, LLC v. Informa PLC and Informa USA, INC (2018).*
50. Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration (Proposed Final Draft), 55 (2019).
51. *Penton Business Media Holdings, LLC v. Informa PLC and Informa USA*, INC, *supra* note 47.

In Switzerland, it was not until 2006 that the Swiss Federal Tribunal finally crystallized its distinction analysis, setting forth a long list of factors distinguishing arbitration from ED. In the judgment of 17 November 2006, the court found that:

> [t]he distinction between an arbitral award and an expert determination is that the former enjoys the formal and material authority of res judicata and may be modified if the requirements of a request for revision are met whilst the latter, even when it decides factual or legal issues in a way binding the parties, may be invalidated only in an ordinary proceeding, in which it must be established that the findings of the expert are manifestly inaccurate, arbitrary, faulty, gravely contrary to equity or relying on an erroneous factual statement, or affected by a failure to consent … Case law set forth various criteria allowing such a distinction; it suggests to take into consideration, among other things, the terms of the agreement of the parties, the scope of the powers given to the third party to be appointed according to that agreement, as well as the capacity of that third party's decision to be enforceable. … Moreover, arbitration and expert determination do not necessarily exclude each other, so that it is possible to encounter a combination of these two institutions. [52]

To summarize, 'two factors can usefully serve to distinguish arbitration from expert adjudication: the duty of an arbitrator to adjudicate between the competing arguments of the parties (without being able to rely on his or her own subjective opinion, as can an expert adjudicator) and the relate duty to comply with rules of procedural fairness'.[53]

§12.04 THE INTERACTION BETWEEN ED AND THE ARBITRAL TRIBUNAL

Most often, when the parties decide to include both an ED clause and an arbitration agreement in their M&A contract, their 'view, or hope [is] that the two would not encroach on each other and lead their own lives'.[54] In practice, however, both proceedings very often overlap, which in turn creates a conflict of competence. Depending on the forum selection clause in a particular M&A contract, these conflicts might be solved by either a state court or an arbitral tribunal. The discussion below focuses on conflict resolution by arbitral tribunals. However, since a plethora of case law on ED, in particular from England, pertains to the interaction between ED and the courts, for illustrative purposes, some reference to court cases is provided as well.

An arbitral tribunal may approach the conflict of competence in a number of ways. In particular, it can:

(i) dismiss a claim pertaining to price adjustment as inadmissible or premature;

52. Judgment in case no. 4A_428/2015 (2016), https://www.swissarbitrationdecisions.com/; Phillip Landolt, *SWITZERLAND: Expert Determination, or Arbitration?*, Global Arbitr. Rev. (2009).
53. Valasek and Wilson, *supra* note 3 at 69.
54. *X v. S*, case study presented by White & Case during the conference – M&A disputes in Warsaw, *supra* note 2.

(ii) stay the arbitration proceedings;
(iii) absorb the ED procedure into the arbitration proceedings;
(iv) issue an award which validates the ED's decision; or
(v) review the ED's decision.

[A] Possibility to Dismiss a Claim Pertaining to Price Adjustment as Inadmissible or Premature

The first scenario to consider is when one of the parties wishes to initiate arbitral proceedings but fails to undergo the ED process. Here the principal claim may be submitted as either:

(i) a claim for damages which overlaps with the price determination; or
(ii) a claim for determination by the arbitral tribunal of the purchase price.

If the arbitration agreement in the underlying contract grants the authority to the arbitral tribunal to hear 'any disputes', then such tribunal will have jurisdiction to hear all the claims, including the ones under (i) and (ii) above. However, one may argue that these claims should be dismissed as inadmissible. This is because in both cases, the claimant is requesting the arbitral tribunal to effectively disregard the parties' contractual agreement. The parties explicitly agreed in the contract to a particular sequence of events or that certain elements of their contractual relationship, such as the final purchase price, which were left open, should first be determined by an expert. Thus, submission of a claim that overlaps with the scope of the ED's mandate, without exhaustion of the ED process first, would not yet be due.

There are divergent positions on whether the obligation to undergo the ED affects the jurisdiction of the arbitral tribunal or the admissibility of a claim.

The first position considers that 'it is generally held in both civil and common law jurisdictions that to the extent a matter has been contractually referred to expert determination, the arbitral tribunal or state court lacks jurisdiction. Under German and Swiss law, this effect is referred to as "Ausschlusswirkung," and this effect of exclusion of competence is reciprocal between the two mechanisms'.[55] As explained by Frey and Müller, in Switzerland 'the arbitral tribunal must decide whether it may determine the subject-matter of the expert determination itself (e.g., by performing a new valuation or by appointing an expert for this task) or if the expert retains the exclusive jurisdiction for the determination of this subject-matter. The answer to this question depends on the specific distinction between the jurisdiction of the arbitral tribunal and the expert as agreed by the parties in the M&A contract'.[56]

A second view is that failure to refer to the ED is a matter of an admissibility issue since the objection goes to a claim which is premature. This is the position under Austrian and German law where the failure to obtain a binding ED affects the merits of the case rather than the tribunal's jurisdiction. The Austrian and German courts will

55. Sachs, *supra* note 4 at 236.
56. Harold Frey & Dominique Muller, Arbitration in Switzerland: The Practitioner's Guide 1137 (2nd ed. 2018).

find requests initiating court proceedings premature if the parties failed to go through ED.[57] Klausegger underscores that '[s]uch decision creates only a limited res judicata effect. The claimant can therefore refile the same claim once the expert determination has been obtained'.[58] Furthermore, as explained by K. Sachs who discusses the concept of ED in broader terms, not anchored in any particular jurisdiction:

> [I]f a party were to start an arbitration, in which it brought a claim based on facts that were the subject of contractually agreed expert determination (e.g. a claim for a reduction in the purchase price on grounds of an alleged shortfall in the target company's net equity), the request for arbitration would have to be dismissed as not admissible, or at least premature. It is only once the expert determination has been made that arbitration can be commenced, and only then with a request for the expert determination to be declared non-binding because of manifest errors.[59]

[B] Possibility to Stay the Arbitration Proceedings

Another possibility for the arbitral tribunal is to order a stay of proceedings and allow the ED to take its course.[60]

The practice of courts in common law countries in this respect is instructive. Freedman argues that if the parties agreed to include an ED clause in a contract and one of the parties disregards such clause and initiates proceedings, a court or arbitral tribunal will have the authority to stay the proceedings. The prerequisites for such a stay vary depending on whether the proceedings take place before a court or before an arbitral tribunal. In the case of a court, according to Freedman, a stay of proceedings might be granted only if the ED clause meets the following conditions:

> (i) the process must be sufficiently certain, in that there should not be the need for an agreement at any stage before matters can proceed;
> (ii) the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined;
> (iii) the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain.[61]

Nevertheless, even if the above conditions are met, the court, under its discretion, may still refuse to stay the proceedings. As explained by Freedman, '[t]he court may decide that having regard to the circumstances of the particular case, it would be better to allow court proceedings to continue, rather than expert determination'.[62] An example here might be *Thames Valley Power Ltd. v. Total Gas & Power Ltd*, where Justice Christopher Clarke declined to stay the proceedings on the grounds that the matter related to the interpretation of a contract between the parties, and that the issue

57. Klausegger, *supra* note 17 at 173.
58. *Id.*, at 172.
59. Klaus Sachs, *Solving Tensions Between Expert Determination and Arbitration Under M&A Contracts*, International Arbitration Under Review: Essays Honour John Beechy (2015), 3.3.
60. Kendall, *supra* note 12.
61. Filip J.M. De Ly & Paul A. Gelinas, *Dispute Prevention and Settlement Through Expert Determination and Dispute Boards*, 29 Kluwer L. Int. (2017).
62. *Id.*, at 29.

in dispute had been fully argued in the due course of the court proceedings.[63] Justice Christopher Clarke concluded that the position of one of the parties was unsustainable and that a reference to an expert would involve the duplication of effort and expense. Furthermore, the matter was urgent and reference to an expert would cause delay. Thus, the court proceeded to adjudicate the matter itself. Such position seems to be accepted only if the dispute between the parties in the ED procedure pertains to a legal issue. If the dispute is of a financial/accountancy character, it would be unacceptable for the court (the arbitral tribunal) to replace the expert, as such a decision would clearly be in violation of the parties' intentions.

The discretion of the court in cases of ED consists also in the possibility to decide that the dispute is unsuitable for ED. According to Freedman, 'the burden is on the party seeking to litigate in breach of the expert determination clause to show grounds for refusing a stay'.[64]

It seems that the grounds proposed by Freedman can be easily extrapolated to arbitration and used by arbitral tribunals for application when confronted with requests for the stay of proceedings.

[C] Possibility to Absorb ED Proceedings into Arbitration

Yet another solution is for the arbitral tribunal to 'absorb' the ED into the arbitration proceedings in such a way that the arbitral tribunal could use the ED as its own and treat the expert as a tribunal-appointed expert. According to Gross, '[i]f a request for arbitration is submitted before the terms of engagement of the expert are finally agreed, then the arbitral tribunal should be constituted before the expert determination proceedings continue. The expert then provides his determination within the arbitration proceeding, and holds a position that is similar to the position of a tribunal-appointed expert'.[65] Under this scenario, the arbitral tribunal may:

(i) appoint the expert if the person nominated in the agreement is unavailable and the parties disagree on who should be appointed in their place;
(ii) replace an expert who has become unavailable or unfit;
(iii) decide preliminary legal questions in connection with the establishment of the drawing up of the closing accounts;
(iv) assist in the preparation of the expert's report, in particular by:
  (a) giving guidance on procedural issues or conducting the proceedings;
  (b) requiring the parties to assist the expert, produce evidence or provide information;
  (c) deciding on the consequences of a party's refusal to comply with a request, in particular by making negative inferences.

63. *Thames Valley Power Ltd v. Total Gas & Power Ltd*, [2006] 1 Lloyd's Rep. 441,.
64. De Ly and Gelinas, *supra* note 61 at 30.
65. Blaz Gross, *M&A Disputes and Expert Determination: Getting to Grips with the Issues (blog post)* (2010).

(v) make the expert's mandate more precise, or even amend it if the parties' original agreement on ED no longer fulfils the needs of the parties; and/or
(vi) mitigate defects in an expert's determination by giving a party their right to be heard, have the parties provide additional facts, and so on.[66]

This proposition, however, puts into question whether the ED still enjoys the finality and binding force stipulated by the parties under the ED clause and whether the standard of conduct differs. It seems that once the arbitral tribunal treats the ED as a quasi tribunal-appointed expert, the ED loses its original character. Prado underscores that if the arbitral tribunal has the authority to change the ED's mission, the ED's decision issued during the arbitration proceedings losses its original independent character as it 'aims only to contribute to inform the Arbitral Tribunal about issues it considers … necessary or useful to support its decision'.[67]

[D] Possibility to Review the ED's Decision

If one of the parties does not agree with the ED's decision, they may challenge it before the arbitral tribunal under certain grounds such as excess of mandate fraud and material mistake.[68] From a formal point of view, a party seeking to challenge an expert decision should submit twofold relief. First, they should request a declaratory award finding that the ED's decision is not binding and final due to particular grounds (be it fraud or manifest error, etc.).[69] Second, they should request an award that would substitute ED's decision with a proper determination of the price adjustment or a final price. Such a twofold relief sought is practised in Germany.[70]

[E] Possibility to Validate the ED Decision in an Arbitral Award

Despite being final and binding, the ED's decision does not constitute an enforceable title. If one of the parties does not accept the ED's decision, the other party may ask the arbitral tribunal to confirm (validate) such decision in an arbitral award, which could then be enforced under the New York Convention.

An illustration of what such a validation process should look like is afforded by an London Court of International Arbitration (LCIA) case where the sole arbitrator issued an interim award found that an ED against Pakistan was final and binding and ordered Pakistan to pay USD 167 million to a group of nine local power companies pursuant to the ED's decision.[71] Similarly, in ICC Case 14691, the arbitral tribunal issued an award validating the ED's decision. In this case, the share purchase agreement provided for an additional price to be paid by the buyer to the seller in the

66. *Id.*
67. De Ly and Gelinas, *supra* note 61 at 44.
68. For detailed analysis of the ground for challenge *see Id.*, at 31.
69. Sachs, *supra* note 59.
70. Sessler and Leimert, *supra* note 16 at 164.
71. Lacey Yong, *LCIA Arbitrator Rules Against Pakistani State Entity,* Global Arbitr. Rev. (2017).

event that the target company met certain earn-out targets. The seller had received an advance on the earn-out portion of the price. In the arbitration initiated by the buyer, the seller raised several counterclaims with respect to the earn-out, in particular regarding: (i) the inclusion of certain recurring credits in the company's accounts; (ii) the time of payment of the earn-out sum; and (iii) the currency in which payment was to be made and the relevant exchange rate. The arbitral tribunal found that the ED, which had excluded the recurring credits for purposes of determining the earn-out, was final and binding. It further held that the buyer should have paid the earn-out amount immediately after sending the seller the notice containing their calculation of the amount due. Therefore, the seller was entitled to interest from such date until the date of actual payment. Finally, the advance on the earn-out had been paid in US dollars, while the earn-out was to be paid in Brazilian reais. The arbitral tribunal considered that the advance payment could only be credited at the time the main payment became due and payable, and based its decision on the exchange rate as of that date.[72]

[F] Practical Examples of Ways to Resolve Conflicts of Competence Between ED and Arbitral Tribunals

Three recent cases provide an interesting insight into how conflicts of competences between arbitral tribunals and ED are resolved in practice.

In the *first case*, a Dutch Holding ('X') concluded a share purchase agreement ('SPA') with a seller ('S'), owner of the target company ('Company'). The Company cooperated with X's subsidiary. The SPA contemplated a price consisting of three components, a Base Price (a percent of 7 x the Company's operating income (OI)); an Earn-Out (7 annual deferred payments of 7 x the Company's OI); and an Additional Payment. The SPA included an ED clause dealing with an Annual Determination, under which the expert was to determine, among other things, the Company's OI. The parties agreed that the expert 'shall act as an expert and not as an arbitrator' and that its decision 'shall be binding, final and conclusive upon all the parties'.[73] The SPA also included a broad arbitration agreement with arbitration under Vienna International Arbitral Center (VIAC) Rules, seated in Vienna, Austria.

The problems arose when the last deferred payment was to be calculated. X claimed that S allegedly manipulated the revenue in order to artificially increase the Company's OI and, at the same time, had increased the payments due under the earn-out. Consequently, X blocked the process of calculating the Annual Determination by refusing to disclose the Company's financial documents to S. X also refused to pay the Additional Payment. S initiated arbitration for payment of the Additional Payment only and sought X to engage in ED procedure. X continued to refuse to participate in the ED procedure. It brought, however, a counterclaim for determination by the arbitral

72. Carlevaris, *supra* note 1 at 29-30.
73. *X v. S*, case study presented by White & Case during the conference – M&A disputes in Warsaw, *supra* note 2.

tribunal of the final sale price, which included determination of the last year OI and determination of the impact of the alleged 'schemes' on previous earn-out payments.

S raised jurisdiction and admissibility objections, stating that the claim for determination is premature as X disregarded the ED procedure; and that determination of the Annual Determination was beyond the scope of the arbitral tribunal's jurisdiction. Furthermore, S claimed that ED was a precondition to arbitrate any disputes associated with the Annual Determination.

X's counterarguments regarding the jurisdiction and admissibility were that ED was not a precondition for arbitration, that ED did not limit the arbitral tribunal's jurisdiction, and that ED pertained to other issues than the counterclaim for determination of the price.

The arbitral tribunal issued an award on jurisdiction where it found that the contract 'itself contains an unrestricted arbitration clause' and that 'the Independent Expert's task is very specific and narrower than the tasks attributed to … the Arbitral Tribunal'.[74] The arbitral tribunal further noted that the:

> arbitration clause does not refer to the Independent Expert [ED] clause, nor does the latter mention the former. It appears to have been the Parties' view, or hope, that the two would not encroach on each other and lead their own lives. … The absence of any reference to the Independent Expert procedure as another prerequisite for arbitration supports the argument that [the ED clause] is not a prerequisite to arbitration and does not affect jurisdiction or admissibility of a claim. … Therefore, on whatever construction, [the ED clause] cannot affect jurisdiction or admissibility of the Respondent's counterclaims to the extent that they are broader than the Annual Determination.[75]

The arbitral tribunal, however, emphasized that the situation pertaining to the claims which rely on the Annual Determination, i.e., the scope of the Independent Expert's mandate, is different. With respect to those claims:

> the parties must obtain [an ED's decision] through the process set out in [the ED clause] in a first stage, i.e. before the Arbitral Tribunal decides the broader counterclaim. … The Arbitral Tribunal finds that [the ED clause] vests the Independent Expert with a priority right only, not with an unfettered one … The Parties cannot have meant in good faith that the result of a cursory review, in a process where no legal issues are decided, would have such far reaching effects without any safety net for either of them. … Irrespective of the applicable law and the degree and conditions of finality of the Independent Expert's decision, the Arbitral Tribunal considers that the Parties can be presumed to have wanted some restraints.[76]

In conclusion, the arbitral tribunal dismissed both jurisdictional and admissibility objections. At the same time, it stated that 'the Parties are required to conduct the Independent Expert procedure foreseen in [the ED clause] in order to establish the

74. *Id.*
75. *Id.*
76. *Id.*

Annual Determination to the extent that it has an impact on the claims or counterclaims in this arbitration'.[77]

Interestingly, although the arbitral tribunal did not dismiss the counterclaims as inadmissible (as it should have, it did honour the parties' intention to keep separate the mandates of the expert and the arbitrators), it de facto compelled X to honour its contractual obligation to direct all the issues arising out of the Annual Determination to the ED. Only once the ED decision had been issued, the tribunal would be able to assume the authority to hear X's claims.

The *second case*, *General Electric v. Alstom,* also confirms that in the end, the parties' intention to resolve factual disputes through the ED first, before the arbitral tribunal assumes its jurisdiction, will usually be respected.

In 2014, Alstrom agreed to purchase a rail-signalling business from General Electric (GE) for USD 800 million, subject to a post-closing purchase price adjustment process, including Final Positive (or Negative) Working Capital Adjustments.[78] The contract included the ED clause under which the parties foresaw a detailed procedure to 'determine whether they have any disputes as to the specific working capital adjustment items, and for working capital disputes to be decided by an Independent Accounting Firm' (IAF).[79] The parties agreed that 'any matters identified in [the] Dispute Notice that remain in dispute … shall be finally and conclusively determined by' an IAF and that the IAF was to function as 'an expert and not as an arbitrator'.[80]

The contract also provided for arbitration in New York under the ICC Arbitration Rules. The parties carved out from the jurisdiction of the arbitral tribunal all the issues to be dealt with by the expert under the ED clause.[81]

At the stage of the post-closing purchase price adjustment process, GE delivered its position as to possible adjustments of the purchase prices. Alstrom disagreed and submitted its own position, taking issue with thirty-eight items in GE's position. With the exact amounts not being public, it appears there was a substantial difference between the parties as to the scope of adjustment. Alstrom sought the IAF to determine the final purchase price. GE replied stating that while half of the items disputed by Alstrom should be decided by the IAF, the other half 'have little or no connection to accounting matters at all'[82] and 'challenged its business and engineering judgements rather than its application of accounting principles [that] were for'[83] the arbitral tribunal to resolve.

GE, instead of participating in the ED procedure, submitted a request for an emergency arbitrator followed by a request for arbitration to the ICC in May 2016.[84] In its request for arbitration, GE explained that it aimed to prevent Alstrom 'from abusing a "working capital adjustment" proceeding before an accounting firm to seek a … price

77. *Id.*
78. *General Electric v. Alstom et.al.*, Request for Arbitration (2016).
79. *Id.,* at 26.
80. *Alstom, et. al., v. General Electric*, Opinion and Order (2017).
81. *General Electric v. Alstom et.al.*, Request for Arbitration, *supra* note 78.
82. *Id.,* at 44.
83. *Alstom, et. al., v. General Electric*, Opinion and Order, *supra* note 80 at 44.
84. Ali Khan, *Amber Signal for GE-Alstom Rail Dispute,* Global Arbitr. Rev. (2016).

reduction on an $ 800 million sale of GE business … to Alstrom'.[85] The gist of the dispute was a distinction between 'working capital issues' which ought to be decided by an IAF and the legal claims which ought to be decided by the arbitral tribunal. The GE explained that Alstrom sought to 'disguise baseless legal claims as working capital adjustments and assert those claims in a forum that it considers advantageous to it'.[86] According to GE, Alstom tried to introduce claims relating to representations and warranties that it failed to obtain from GE during the contract negotiations.[87] Consequently, GE requested, among other things, that the arbitral tribunal 'declare[s] that an Independent Accounting Firm appointed under the [contract] would not have authority to render a binding determination concerning'[88] the final purchase price.

A few days later, Alstrom asked the New York City court to issue a summary judgment and compel ED procedure. GE requested the court to either stay the procedure pending arbitration before the ICC or compel such arbitration. [89] Initially, Alstom obtained a temporary restraining order that prevented GE from pursuing an ICC claim against Alstrom. The order was vacated a month later.[90] The judge however ordered the parties to promptly act for the limited purpose of constituting an arbitral tribunal before the ICC within the prescribed deadlines, and also to promptly and jointly appoint an IAF.[91] The parties were also ordered to refrain from presenting any substantive arguments to the ICC tribunal or the IAF pending their decision on which forum had jurisdiction.

In his order of 10 January 2017, the judge discussed first the arbitrability issue, and explained that the important question in the case was 'who should decide the very question of who decides', i.e., the tribunal or the court. In the course of the proceedings, GE argued that this question falls under the kompetenz-kompetenz principle squarely into the arbitral tribunal's jurisdiction. Alstrom was of the opinion that the arbitrability issue (under the US meaning of the institution) is for the court to decide.[92]

At the outset of his analysis, the judge first found that the ED clause is in 'itself an arbitration clause'. Second, he underscored that the existence of both the ED clause and an arbitration agreement 'creates an ambiguity'.[93] Consequently, the judge found that the question put by Alstrom should be decided by the court, and not the arbitral tribunal.

As to the central dispute between the parties, i.e., whether all or only some of the issues raised by Alstrom should be submitted to the IAF (ED), the judge found that the ED clause was a narrow one, as it was limited to certain disputes over the proposed

85. *General Electric v. Alstom et.al.*, Request for Arbitration, *supra* note 78 at 1.
86. *Id.*, at 1.
87. Ali Khan, *GE Gets Red Light for Claim Against Alstom*, Global Arbitr. Rev. (2016). *Id.*
88. *General Electric v. Alstom et.al.*, Request for Arbitration, *supra* note 78 at 70.
89. *Alstom, et. al., v. General Electric*, Opinion and Order, *supra* note 80 at 5.
90. Khan, *supra* note 84.
91. *Alstom, et. al., v. General Electric*, Stipulation and Order (2016).
92. It should be born in mind that the issues of arbitrability are differently understood in Europe and in US.
93. *Alstom, et. al., v. General Electric*, Opinion and Order, *supra* note 80 at 6.

Working Capital Statement and Net Debt Statements. Therefore, he agreed with Alstrom that the thirty-eight issues raised by it should be submitted to the IAF (ED), in the first instance.[94] The court paid attention to the language of the ED clause which stated that 'any matters identified in [the] Dispute Notice that remain in dispute … shall be finally and conclusively determined by the IAF'.[95]

Furthermore, the court found that the ED clause 'do[es] not substantively limit the kinds of disputes to be delegated to the IAF; [it] require[s] only that a dispute be included in the Dispute Notice and remain unresolved'. However, the court cautioned that this does not mean that:

> any claim would be subject to resolution by the IAF simply because Alstom chose to include it in the Dispute Notice … Although GE contends that the disputed items impermissibly challenge its engineering and business judgments …, the issues raised by Alstom are not merely collateral to the determination of the Final Working Capital; to the contrary, Alstom has laid out – in a more than plausible manner – the specifics of its objections and the accounting principles upon which each objection is based. … The mere fact that the issues raised by Alstom call for more than 'bean-counting' does not take them outside the scope of the purchase price adjustment dispute-resolution provisions.[96]

The court also made reference to the carve-out in the arbitration agreement which excluded from the scope of the arbitral tribunal's jurisdiction disputes arising out of the price adjustment process. It found that the decision whether a dispute falls within the scope of such a carve-out or not should be interpreted by the IAF (ED). The parties to the dispute were clear that they wish such issues to be decided by the IAF (ED) and not the arbitral tribunal. Therefore, the question which of thirty-eight disputed items can be entertained by the IAF (ED) should be submitted in the first instance to the IAF (ED), even if the IAF (ED) might subsequently agree with GE that these issues do not have an accountancy character. The court emphasized the sequence of events, and quoted *XL Capital* case, where the court 'caution[ed] that [its] conclusion . . . [was] not a back door permitting' non-accounting issues 'to be brought before' the IAF, and 'note[d] that disputes may well remain for the ICC to decide even after the IAF "resolves the issues before it." But these are arguments that GE must make in the first instance to the IAF, not to this Court or to the ICC'.

This judgment is interesting for a number of reasons. First, the court found that the ED clause was in fact an arbitration agreement, and consequently applied to the FAA. The judge relied on older case law where the court had noted that '[c]ourts have consistently found that purchase price adjustment dispute resolution provisions … constitute enforceable arbitration agreement'.[97] He did so, despite the fact that the parties included in the ED clause the statement that the IAF 'shall function as an expert and not as an arbitrator'. At a glimpse, this order seems to disregard not only the parties' explicit intention to maintain a clear distinction between ED and arbitration but

94. *Id.*, at 10.
95. *Id.*, at 11.
96. *Id.*, at 11-12.
97. *Id.*, at 6.

also a rather consistent New York case law which takes the opposite view, clearly distinguishing ED from arbitration. However, once one takes into account the final result, the judge in fact respected the parties' intention; i.e., he compelled GE to honour its contractual obligation to direct a certain type of dispute to the expert first for final and binding determination. Only after that, under a broad arbitration agreement, could GE request the arbitral tribunal to hear GE's challenge to the ED decisions. While this case is very US specific, it nevertheless illustrates how important it is to be very careful while drafting ED clauses and also very vigilant in designating different dispute resolution methods for different types of dispute.

Finally, the *third case*, ICC Case 11587 is illustrative of how an arbitral tribunal may 'absorb' the ED procedure into the arbitration proceedings. In that case, the claimant agreed to sell to respondents all the shares of several companies incorporated in various jurisdictions. The purchase contract provided for two different closing dates, at each of which 50% of the shares of the target companies were to be transferred against payment of 50% of the purchase price which was subject to adjustment depending, among other things, on the determination of the consolidated net equity of the target business. A dispute arose between the parties over the method of determining the price adjustment. The buyers claimed that any dispute relating to the calculation of the price was to be settled by ED pursuant to the dispute settlement clause contained in the contract and requested the appointment of a contractual expert. The seller objected, arguing that the dispute extended beyond mere price determination and covered the buyers' compliance with their contractual obligations with respect to the exchange of documents and information relating to price adjustment. The arbitral tribunal rendered three partial awards dealing with the preliminary issues. In its first partial award, the arbitral tribunal 'postponed' the decision on whether to appoint a contractual expert to determine the matters in dispute relating to price adjustment, as requested by the respondents. It decided to appoint a procedural expert under Article 20(4) of the 1998 ICC Rules of Arbitration to assist it in assessing the parties' conduct with respect to the price adjustment mechanism provided in the contract. In the second partial award, the tribunal endorsed the conclusions of the expert it had appointed and decided that none of the parties had forfeited their rights with respect to price adjustment. Accordingly, the arbitral tribunal granted the respondents' claim for the appointment of a contractual expert to assess the accounting issues required for determining the final sale price. In the third partial award, the arbitral tribunal determined the cut-off dates on the basis of which the price adjustment should be assessed.[98]

§12.05 CONCLUSIONS

The analysis of the case law which has emerged in international arbitration thus far suggests that it is possible to draw a demarcation line between ED and arbitration. It

98. Carlevaris, *supra* note 1 at 23.

seems that there is no dispute on how to distinguish an ED clause from an arbitration agreement.

The best test to distinguish ED from arbitration 'can be found in the type and scope of authority that is being delegated by the parties to the decision maker'.[99] This is because the authority granted to an expert is limited to deciding a specific factual issue or dispute concerning a matter which is within the special expertise of the expert, usually concerning an issue of valuation. The expert's authority is limited to their mandate to use their specialized knowledge to resolve a specified issue of fact. The parties do not, however, normally grant the expert the authority to make binding decisions on issues of law or legal claims, such as legal liability.[100] In the absence of clear language in a contract suggesting that the expert is not an arbitrator, this author agrees that the scope of the ED's mandate should be decisive in assessing whether the clause under analysis is an ED clause or an arbitration agreement.

The real problem with ED, however, seems to be the conflict of competences between the ED and arbitral tribunal's jurisdiction. There does not seem to be a good or final answer to how that conflict of competence should be resolved. The overlap between the two seems unavoidable and, most importantly, impossible to prevent. Thus, it seems that the best and most logical solution when the parties decided to include both an ED clause and an arbitration agreement and the ED process has not been complied with is for the arbitral tribunal to stay the proceedings and compel the parties to go through the ED first. This is in line with the general concept of admissibility which pertains to the claim and not the jurisdiction of the arbitral tribunal. Only once the ED is finalized can the claims pertaining to the scope of the ED be entertained by the arbitral tribunal. Otherwise, the ED clause would have been devoid of its purpose and would be made redundant. Indeed, the practical examples provided herein confirm that the intention of the parties to keep a certain order of events (first the ED procedure, and only after that arbitration) should be the decisive factor.

99. NYC Bar, *supra* note 5 at 4.
100. *Id.*, at 4.