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Specific Performance as a Remedy
Non-Monetary Relief in International Arbitration

Specific Issues in Different Types of Contractual Relations - Corporate Disputes

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I. INTRODUCTION

As in other areas of law the use of arbitration in corporate and M&A matters is increasing. While the use of arbitration in purely corporate matters is not frequent the opposite is true for shareholders' agreements, joint venture agreements and M&A related contracts. As a consequence, the number of cases actually going to arbitration in this area is on the rise.\(^1\)

There are a number of reasons for this trend. M&A activity in general has been very buoyant in the recent years. Another reason is the international nature of many shareholders' agreements, joint ventures and M&A transactions which lends itself to arbitration being chosen as a preferred mechanism to resolve disputes. It is characteristic of shareholders' agreements, joint ventures and M&A transactions that they are entered into by means of extended procedures and multiple agreements and recourse to arbitration for dispute resolution may be preferred. In particular, joint ventures and M&A transactions are sometimes professionalized and concluded by means of complex and interlinked contracts.

Certainly, arbitration is preferred because of the particular M&A expertise of certain arbitrators. Also, the international background of arbitrators is considered to be a great advantage. Further, the parties appreciate the fact that arbitration procedures can be tailored to the particulars of a case, and that a settlement may be more easily reached. The confidentiality of the procedure is sometimes also seen as an advantage, and arbitration can offer a compromise on jurisdiction (by agreeing on avoidance of home bias).

On the other hand, particularly in M&A matters, arbitration is seen to be disadvantageous when it comes to obtaining preliminary injunctions or temporary restraining orders. While it is true that most national arbitration laws and institutional arbitration procedures provide for tribunals to be competent to issue such injunctions or orders, enforcement ultimately still requires state courts to be involved.

\(^{*}\) I would like to thank Harold Frey, attorney-at-law of Lenz & Staehelin, for his most valuable input.

\(^{1}\) As a result of this trend, the ASA Conference of January 21, 2005 was entirely devoted to the subject "Arbitration of merger and acquisition disputes".
In this paper, specific performance is first defined (Section II). Subsequently, an outline will be given of the areas where arbitration is in fact chosen in the corporate and M&A context (Section III). In the same section typical undertakings are described for which specific performance may become relevant. Specific performance - its requirements and enforcement including injunctive relief - will be presented in Section IV. The subject is approached from a Swiss practitioner's view. As will be seen, there are only few differences between the procedure to obtain specific performance through arbitration as compared to procedures in ordinary courts. In general terms, arbitration is often more effective when it comes to specific enforcement because arbitral tribunals have more flexibility in respect of preliminary relief and because of the dialogue initiated between the parties which results in more tailor made relief and the consent of the parties to follow orders which technically speaking may be hard to enforce.

II. SPECIFIC PERFORMANCE DEFINED (NON-MONETARY RELIEF)

1. Definition (Non-monetary Relief)

In Black's Law Dictionary specific performance is defined as "the rendering, as nearly as practicable, of a promised performance through a judgment or decree"\(^2\). The definition continues by stating that specific performance is a "court-ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, ..."\(^3\). From a Swiss perspective, specific performance could also include monetary relief, e.g. where the defendant has the contractual obligation to pay a particular...
amount of money. However, in this paper the focus of specific performance shall be on non-monetary relief.

2. Governing Law

Logically, any discussion of the remedies which may be the subject matter of an international arbitration should start with the question of the relevant law\(^4\). The classification of remedies as procedural or substantive will determine whether the applicable law is the law governing the arbitration procedure (*lex arbitri*) or the law applicable to the merits\(^5\).

In Switzerland, the *lex arbitri* does not deal with the remedies that may be the subject of an award (nor does it contain specific limitations as to the remedial power of an arbitral tribunal)\(^6\). Under Swiss law, it is generally accepted that the available remedies (*Klageansprüche*) have their foundation in the substantive law. In other words, whether a party in an arbitration may seek specific performance of an obligation must be determined on the basis of the relevant agreements and the law that governs the contractual relationship\(^7\).


\(^{4}\) As these questions may arise in the context of any type of arbitration (and are not a peculiarity of corporate or M&A cases), this paper will not deal with the applicable law in any detail.

\(^{5}\) The issue whether remedies are substantive or procedural is subject to much controversy in conflict of laws doctrine. REDFERN/HUNTER, Law and Practice of International Commercial Arbitration, 4\(^{th}\) edition, at p. 359 (paragraphs 8-14), take the position that this issue may be governed by “*either the substantive law or the lex arbitri, depending on the conflict of laws rule applicable*”.

\(^{6}\) International arbitration proceedings in Switzerland are governed by the chapter 12 of the Swiss Private International Law Act (“SPILA”).

\(^{7}\) BERND EHLE, Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions, in: The Comparative Law Yearbook of International Business, Vol. 27, 2005, at p. 307 (“*This may include specific performance awards ... if the applicable substantive law and the place of enforcement permit this.*”). See also PETER SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2\(^{nd}\) ed., at p. 543: „Massgebend ist auf jeden Fall das in der Hauptsache anwendbare Recht und nicht das Schiedsverfahrensrecht. Wenn allerdings das Schiedsverfahrensrecht […] den Schiedsrichtern ausdrücklich Beschränkungen auferlegt, sind diese zu beachten“. The Swiss *lex arbitri* (set forth under Chapter 12 of the Swiss Private International Law Act) does not contain any restrictions to that effect.
While the remedies available are those set forth under the applicable substantive law, the specification and formulation of the prayers for relief is, at least from a Swiss law perspective, a procedural matter and, thus, governed by procedural rules.\(^8\)

3. **The Remedies Available Under Swiss Substantive Law**

In principle, the remedies that are available to state court judges should be available to arbitrators as well.\(^9\) This proposition is subject to at least three *caveats*:

- The first *caveat* concerns the arbitral tribunal’s power. Contrary to state courts the mandate of tribunals (and, as a result, its power) is defined by the parties. Consequently, it is in the parties’ discretion to limit the power of the arbitral tribunal to certain remedies (either directly in the arbitration agreement, or in the course of the arbitration, or indirectly by reference to a set of arbitration rules), although this rarely occurs in practice.

- The second *caveat* relates to objective arbitrability; that is to say that the remedial power of arbitrators presupposes that the underlying claim is arbitrable.

- The third *caveat* relates to the power to impose penal sanctions upon a party for example in the event that such party would not comply with an order for interim or protective measures. It is the prevailing view in Switzerland that arbitrators, as opposed to state courts, do not have the authority to order penal sanctions.\(^10\)

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\(^8\) See below Section II.5.


\(^10\) BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006 at p. 406 (paragraph 1155) with further references, amongst others, to WALTER/BOSCH/BRÖNNIMANN,
The proposition that the remedial power of the arbitrators should not be any different from that of state court judges is reinforced by the decision of the Swiss Federal Supreme Court in the much debated *Methania* case, although in a somewhat different context.\(^\text{11}\)

In Switzerland, the following three main categories of remedies (or relief) are distinguished:\(^\text{12}\)

- **Performance** (*Leistungsklagen*)
- **Creation, modification or termination of a legal relationship** (*Gestaltungsklagen*)
- **Declaratory Relief** (*Feststellungsklagen*)

The first category (*Leistungsklagen*), which is by far the most important in practice, comprises the sub-categories of claims, such as for (i) performance *stricto sensu* (*Leistung*), (ii) abstaining from (*Unterlassung*)\(^\text{13}\) or tolerating (*Dulden*) certain acts or a situation, and

\(^{11}\)Decision of the Swiss Federal Supreme Court, dated 19 December 2001 (4P.114/2001). One of the issues to be decided by the Supreme Court in that case was whether the arbitral tribunal had the power to complete contractual gaps. The Supreme Court held “Le droit suisse permet au juge étatique de compléter un contrat lacunaire en recherchant la volonté hypothétique des parties … Dès lors, si l’on reconnaît au juge étatique suisse le pouvoir de compléter de son propre chef un contrat soumis au droit suisse … on ne voit pas pour quelle raison il y a aurait lieu de dénier ce pouvoir à un tribunal arbitral ayant son siège en Suisse”. See also JOACHIM G. FRICK, Arbitration and Complex International Contracts, 2001, at pp. 194/195, to which the Supreme Court makes reference in the Methania case.


\(^{13}\)For the *Unterlassungsklage*, it is required that an unlawful act be imminent in order for it to be upheld. Decisions of the Swiss Federal Supreme Court, dated 17 June 1971 (BGE 97 II 108) and 30 October 1984 (BGE 110 II 352), at p. 359. This requirement fulfils the necessary interest (Rechtsschutzinteresse) which
(iii) claims seeking a party’s declaration of will (Abgabe einer Willenserklärung)\(^{14}\). Furthermore, it is possible to bring claims for contingent performance meaning that the performance of the defendant is contingent upon fulfilment of certain conditions or upon receiving consideration simultaneously (Zug um Zug)\(^{15}\).

In the context of this paper, the claim for performance (Leistungsklage) will be at the forefront. The Gestaltungsklage will be referred to where necessary, while declaratory judgments will not be considered further\(^{16}\).

4. Specific Performance as a Matter of Swiss Substantive Law

Swiss law, as most of the civil law jurisdictions, recognises the remedy of specific performance (Realerfüllung)\(^{17}\).

will be examined by the court as a condition to trial (Prozessvoraussetzung) failing which the action will not be taken on by the court.

\(^{14}\) See for instance § 308 of the Zurich Civil Procedure Code. See also Decision of the Swiss Federal Supreme Court, dated 19 March 1971 (BGE 97 II 48), at p. 51.

\(^{15}\) See Article 82 of the Swiss Code of Obligations ("CO") and for instance implicitly in § 304 al. 2 of the Zurich Civil Procedure Code.

\(^{16}\) Note that under Swiss concepts to be upheld declaratory relief (just like any other relief requested) requires an interest worthy of protection (Rechtsschutzinteresse) which interest is generally denied where it is possible for the claimant to obtain performance (Leistung). Hence, if for instance the exercise of an option for shares is at issue the appropriate prayer for relief would normally be for the optionholder (in the case of a call option) to request delivery of the shares against payment of the purchase price and not to request a declaratory reward first stating that the option is legally valid. In a case reported by the ICC in the context of the survey conducted for this conference, an arbitral tribunal, in a very similar case concerning the exercise of a call option and applying Swiss law, has decided just that, and dismissed the Claimant's claim seeking a declaratory relief for lack of a legal interest. That said, depending on the circumstances, the claimant might have a legal interest worthy of protection in seeking a separate declaration to that effect.

\(^{17}\) LEW/MISTELIS/KRÖLL, (FN 9) at p. 650 (24-72). The concept is generally accepted well beyond the boundaries of civil law jurisdictions. While in Switzerland (and in most other civil law jurisdictions) it is available as of right, specific performance is deemed to be an equitable form of relief (and as such an exceptional remedy) in common law jurisdictions. TROY ELDER, The Case against Arbitral Awards of
In fact, performance – rather than contractual damages – is considered to be the principal remedy under Swiss law\(^{18}\). The concept is embodied in the general part of the Swiss Code of Obligations (“CO”) and the right to seek performance is presumed in a number of provisions, in particular in Article 97(1) CO and Article 107(2) CO\(^{19}\).

Article 97 (1) CO states as follows:

"If the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him."

This article stipulates specific performance to be the primary remedy, and that the obligee shall be awarded damages only if performance of an obligation cannot be effected\(^{20}\). On the

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\(^{18}\) This seems to be the case in most civil law jurisdictions. REDFERN/HUNTER, (FN 5), at p. 359 (paragraph 8-14) who conclude (“The question of whether an arbitral tribunal is empowered to order specific performance is thus rarely an issue in international arbitration. However, the question of whether it is an appropriate remedy, and whether it can be effectively granted in the circumstances of the particular case, may prove less straightforward.”)

\(^{19}\) ALFRED KOLLER, Schweizerisches Obligationenrecht, Allgemeiner Teil, Erfüllung und Nichterfüllung der Obligation, Vol. II, 2006, at p. 123: „[The right to seek a court order for performance] exists for claims irrespective of their content; that includes also obligations to perform an act (obligationes faciendi)“. 

\(^{20}\) See however Article 98(2) and (3) CO, which deals with negative obligations (so-called “Unterlassungspflichten”; e.g. the promise not to enter into a contract or not to compete) and provides for a remedy in damages as well as specific performance. A number of Swiss commentators take the view that negative obligations are capable of specific performance only if that can (still) make sense under consideration of all the circumstances of the case. ROLF WEBER, Das Obligationenrecht, Allgemeine Bestimmungen, Art. 97-109 CO, para. 95 at Art. 98 (“Hingegen darf das Mittel des Unterlassungsbefehls nur zur Durchsetzung wesensmässig vollstreckbarer Ansprüche eingesetzt warden.”)
other hand, if the obligor is in default, he must pay damages for any delayed performance and, subject to certain requirements, the obligor has the alternative to waive performance and to ask for compensation for damage arising out of the non-performance, or to withdraw from the contract.

As a matter of Swiss law, specific performance is however not available in the following instances: First, where performance of an obligation is no longer possible even for reasons that are within the responsibility of the debtor. In that case the claimant can only seek damages. Second, the parties may contractually agree to exclude specific performance of their agreements (or specific obligations thereunder), and they may do so expressly or impliedly. One leading Swiss scholar takes the view that in some instances there is even a presumption to that effect, namely where the parties enter into a pre-contract although it would have been possible to conclude the main contract.

To conclude, subject to the procedural considerations addressed hereinafter, arbitrators, to the same extent as state court judges, may, as a matter of principle, grant specific performance when the agreements out of which the dispute arises are governed by Swiss law, and if performance of the obligation in question can be effected (whether specific performance can practically be achieved and ultimately be enforced is however a different matter).

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21 Article 103 alinea 1 CO.
22 Article 107 CO.
23 INGEBORG SCHWENZER, Schweizerisches Obligationenrecht, Allgemeiner Teil, 4th ed. 2006, at p. 438, para. 64.20 („Auch bei der von der Schuldnerin zu vertretenden Unmöglichkeit besteht kein Erfüllungsanspruch, da Unmögliches nicht verlangt werden kann (vgl. Bucher, OR AT, 247, 345). Der ursprüngliche Erfüllungsanspruch des Gläubigers wandelt sich jedoch um in einen Sekundäranspruch, in einen Anspruch auf Schadenersatz, wobei das Vertragsverhältnis erhalten bleibt“).
24 EUGEN BUCHER, Obligationenrecht Allgemeiner Teil, 2nd ed. 1988, at p. 328. As a further example of instances where often an implied waiver of specific performance must be presumed, BUCHER (at p. 331) mentions obligations to express a declaration of will.
5. Procedural Requirements – How Specific Must the Formulation of the Claims be?

As set out above, the specification and the formulation of the prayers for relief is, at least from a Swiss law perspective, a procedural matter and, thus, governed by procedural rules\textsuperscript{25}. Chapter 12 of the SPILA mentions the prayers for relief (\textit{Rechtsbegehren}) only in one provision, that is Article 181 dealing with \textit{lis pendens}. Article 181 SPILA provides that the arbitral proceedings shall be pending from the time that one of the parties files a claim with the arbitrator or arbitrators designated in the arbitration agreement. In view of the principle of \textit{lis pendens} (in particular that it should be inadmissible to bring an identical claim in another forum) one may argue that the prayers for relief should be sufficiently detailed\textsuperscript{26}.

More generally, it is an established principle of Swiss procedural law that the prayers for relief should be precisely defined and unambiguous\textsuperscript{27}. A number of commentators have expressed the view that this should equally apply in international arbitration\textsuperscript{28}.

The main concern lies with due process (right to be heard)\textsuperscript{29}. The principle of due process pursuant to Article 190(2) lit. d SPILA means that each party is entitled to express its position and produce evidence as to all the facts and legal points relevant to the decision\textsuperscript{30}. To be in a


\textsuperscript{26} Commentators and practitioners are however divided as to the level of specification that is required for the initial prayers for relief. WIRTH, (FN 25), at p. 7.

\textsuperscript{27} MAX GULDENER, Schweizerisches Zivilprozessrecht, 3\textsuperscript{rd} edition 1979, at p. 193.

\textsuperscript{28} WIRTH, (FN 25), at p. 148; BERGER/KELLERHALS, (FN 10), at p. 383 (paragraph 1096).

\textsuperscript{29} BERGER/KELLERHALS, (FN 10), at p. 383 (paragraph 1096).

\textsuperscript{30} It further means that a party must be given the opportunity to respond to the allegations, submissions and evidence of the other, and to provide its own evidence in rebuttal. Decision of the Swiss Federal Supreme Court, dated 1 July 1991 (BGE 117 II 346), 347-348; Decision of the Swiss Federal Supreme Court, dated 19 December 1990 (BGE 116 II 639), 642-643; Decision of the Swiss Federal Supreme Court, dated 7 September 1993 (BGE 119 II 386).
position to defend itself properly, a party must first be able to understand what the other party is requesting, or, where such request (or prayer for relief) is not sufficiently precise, how the arbitral tribunal may interpret and ultimately decide on the request. In this respect the arbitral tribunal may have to invite the parties, on their own initiative, to make their prayers for relief more specific.\[31\]

In the event that an arbitral tribunal intends to make an award only based on a prayer for relief that is vague, it should make sure that both parties have had ample opportunity to address the basis of their decision both on the facts and the law and adduce evidence in that regard.\[32\]

To conclude, Swiss procedural law requires that the relief must be formulated in a way that the court, when seized with an application to that effect, is in a position to enforce the judgment without further ado (that is to say without having to revisit the merits of the case).\[33\]

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31 BERGER/KELLERHALS, (FN 10), at p. 383 (paragraph 1096). WIRTH, (FN 25), at p. [16]. See also UNCITRAL Notes on Organizing Arbitral Proceedings, 1996, at paragraph 46, which provides as follows: “If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.”

32 Another problem associated with general (or vague) prayers that may arise in the setting aside proceedings or at the enforcement stage is to determine whether a decision of an arbitral tribunal went beyond what was requested by the parties (ultra petita). Being ultra petita is a ground on the basis of which an award can be challenged in Switzerland. Article 190(2)(c) SPILA; Article V(1)(c) New York Convention.

33 BERGER/KELLERHALS, (FN 10), at p. 383 (paragraph 1096). Decision of the Swiss Federal Supreme Court, dated 2 March 1971 (BGE 97 II 92), at p. 93: “Die Vollstreckung des verlangten Verhotes muss möglich sein, ohne dass der hiefür zuständige Richter nochmals eine materielle Beurteilung des in Frage stehenden Verhältnis vorzunehmen hat”. In that case, the party requested injunctive relief. See also Decision of the Swiss Federal Supreme Court, dated 1 May 1990 (BGE 116 II 215), at p. 217: “Das Rechtsbegehren […] nach der Rechtsprechung so zu formulieren ist, dass es bei gänzlicher Gutheissung der Klage ohne Ergänzung und Verdeutlichung zum Dispositiv des Urteils erhoben werden kann […].” Decision of the High Court (Obergericht) of the Canton of Zurich, dated 8 April 1997, in ZR 97 (1998) Nr. 114. MARKUS WIRTH, (FN 25), at p. 3 and fn. 1., takes the position that the standard applicable in civil proceedings should also apply in international arbitration. He further notes that undefined or incomplete relief is only admissible where it is founded on the applicable substantive law, e.g. where a
6. Potential Obstacles at the Enforcement Stage

Problems at the enforcement stage arise in different contexts and for different reasons. For present purposes, a distinction should be made between the situation in which an award is not enforceable because the relief requested is unclear (i.e. not sufficiently specified), and the situation where it would be impossible (in law or in fact) to enforce the award for any other reasons. For the reasons detailed above, arbitrators should make every effort to ensure that the relief sought and ultimately awarded is sufficiently clear. Beyond that, whether and to what extent arbitrators have a duty to make an enforceable award (and, in this regard to what extent they should advise the parties as to potential problems regarding the enforceability of an award), is a more delicate issue, and one that is beyond the scope of this paper.

claim is subject to a condition precedent, or where the performance of an obligation is due only upon receiving consideration simultaneously (Zug um Zug).

See also Article 7.2.2 (lit. a) of the UNIDROIT Principles which stipulate that performance of non-monetary obligation is not available, amongst others, in situations where performance is impossible in law or in fact.

See above Section II.5 regarding the concerns of due process and ultra petita.

That an award has to be defined and unambiguous to be enforceable is reinforced by Article V(1)(e) of the New York Convention, which provides that enforcement may be refused, amongst others, on the ground that the award has not yet become binding. As has been confirmed by Wirth, such binding effect presupposes that each party knows exactly what it is entitled to enforce or what it is obliged to perform (see Wirth, (FN 25), at p. 13 with reference to Franz Satmer, Verweigerung der Anerkennung ausländischer Schiedsprüche wegen Verfahrensmängeln, Schweizer Studien zum internationalen Recht, Vol. 89, Zurich 1994, at p. 205 et seq.)

PIERRE A. KARRER, Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?, in: Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum Briner, 2005, at p. 429 ss. There is general consensus that arbitrators have a certain responsibility to render an enforceable award, although the source of that obligation is unclear, is it statutory law or an (implicit) obligation arising out of the receptum arbitri? Some rules do mention such an obligation, at least in general terms.
The question remains however as to whether it should be upon the arbitrator to identify and assess potential problems (as a matter of fact or in law) that may or may not arise at the enforcement stage. To begin with, the arbitrators may not be in a position to make that determination. Indeed, they may not even know where (and under what legal regime) the award will be enforced, or whether enforcement will be necessary at all.

In any event, arguably it is up to the party seeking the relief to decide whether it wants to take the risk of not being able to enforce an award for specific performance against the other party’s will.

What is more, in many jurisdictions there exists the possibility of converting awards for specific performance into awards for money damages in the event that enforcement of the performance proves impossible. This is, for example, the case in Switzerland.

7. Specific Performance against Whom?

Clearly, specific performance may be sought against the contractual counterparty, i.e. debtor of the obligation. As a rule, however, an award is not binding upon third parties, in particular where the third party is not subject to the arbitration. This is subject to certain exceptions, in

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(e.g. Art. 35 ICC Rules, Art. 32(2) LCIA Rules). In any event, the crucial question is that of the scope and reach of such an obligation, if any.

For example, the Code of Civil Procedure of the Canton of Zurich provides for the following means to enforce judgments/awards: court order for penal sanction in the event of non-compliance (§ 306), court order for compulsory measures or to commission the works to be performed by a third party (§ 307), court order replacing a declaration of will that the defendant is not willing to issue (§ 308), and court order converting the award for specific relief into a award for payment of damages. It is controversial whether and to what extent these remedies are available when enforcing arbitral awards. For example as to the converting of specific relief into a damage claim, it has been argued that this remedy is founded in the substantive law, and that this question may have to be put to an arbitral tribunal where all disputes are referred to arbitration.
particular, so-called *Gestaltungsurteile* relating to the existence of a legal relationship which have an effect erga omnes.

III. CORPORATE AND M&A MATTERS TYPICALLY MADE SUBJECT TO ARBITRATION

1. Corporate Matters

a) Corporate Actions

Corporate law provides for a significant number of legal actions, such as under Swiss law actions for responsibility of the board or the auditors\(^{39}\), actions for restitution of constructive dividends\(^{40}\), actions for challenging shareholders' resolutions or for declaring the nullity of shareholders' resolutions or board resolutions\(^{41}\), actions for enforcing informations rights\(^{42}\) or for initiating a special audit (*Sonderprüfung*)\(^{43}\), actions for dissolution of the corporation\(^{44}\), actions for removing the auditors\(^{45}\), actions for enforcing the right to convene a shareholders' meeting and/or to request that certain items be put on the agenda\(^{46}\) of a shareholders' meeting, just to name the

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\(^{39}\) Article 752 et seq. CO.

\(^{40}\) Article 678 et seq. CO.

\(^{41}\) Article 706 et seq. CO.

\(^{42}\) Article 697 CO.

\(^{43}\) Article 697a CO.

\(^{44}\) Article 736 CO.

\(^{45}\) Article 727e alinea 3 CO.

\(^{46}\) Article 699 alinea 3 CO.
essential ones available under Swiss corporate law. Quite a few of these actions by their nature would call for non-monetary relief as a remedy.

There is general consensus that the articles of incorporation may provide for arbitration to apply in such cases. However, for domestic Swiss arbitration the shareholders must agree pursuant to a written declaration which expressly refers to the arbitration clause contained in the articles of incorporation. Also, in international contexts the view prevails that the arbitration clause in the articles of incorporation as such is not sufficient but that the shareholders must consent to the arbitration in a form compliant with Article 178 alinea 1 SPILA. In addition, it is not entirely beyond doubt that Gestaltungklagen (such as actions for challenging shareholders' resolutions or dissolution of the company) are arbitrable at all. Given this uncertainty and also given the requirement that consent must be obtained from each and every shareholder to be certain of its validity, arbitration clauses in articles of incorporation have become extremely rare, at least in Switzerland. They are no longer found at all in articles of incorporation of publicly listed companies, for obvious reasons. In light of the foregoing this subject will not be pursued any further in this paper.

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47 For a good overview see PETER V. KUNZ, Die Klagen im Schweizer Aktienrecht, Zürich 2000, 40 et seq. The action to request registration as a registered shareholder should also be specifically mentioned (Article 695b CO), or the action to determine the so-called "real value" of a share pursuant to Article 685b alinea 1 and 4 CO.

48 KUNZ, (FN 47), at p. 175 with further references, BERGER/KELLERHALS, (FN 10), at p. 154 (paragraph 446 et seq.). See, however, the reservations expressed by the authors referred to in FN 51. According to BUCHER/TSCHANZ, actions merely seeking a declaratory judgment that a legal entity does not exist or seeking the dissolution of a legal entity do not have a predominant property nature, which is a requirement for arbitrability (BUCHER/TSCHANZ, International Arbitration in Switzerland, Geneva 1989, at p. 43/44, paragraph 68, with reference to BGE 112 II 1 and 112 II 191).

49 Article 6 alinea 2 of the Swiss Intercantonal Arbitration Convention.

50 BERGER/KELLERHALS, (FN 10), at p. 154 et seq. (paragraph 448).

51 See WALTER/BOSCH/BRÖNNIMANN, (FN 10), at p. 59; MARC BLESSING in ASA Special Series No. 6, March 1994, at p. 15.
b) Shareholders' Agreements

Shareholders' agreements are an important source of arbitration. Shareholders' agreements are concluded between all or some of the shareholders of a particular company. The shareholders agree inter partes on the exercise of their shareholders' rights and they also stipulate purchase rights relating to their shares. The company itself is not bound by the agreement unless it becomes a party. Shareholders' agreements bind the shareholders contractually which means that corporate actions that they undertake contrary to their contractual duties as such are still valid. Under Swiss law they generally are considered to be partnership agreements\(^{52}\). Typical undertakings in a shareholders' agreement are the following:

- The parties pool their votes generally such that they meet in advance of the shareholders' meeting in order to find a common position and to vote their shares accordingly. As an alternative, the parties may agree that they will vote in favour of certain pre-determined items, such as for instance that each party has the right to appoint a specific number of members to the board of directors of the company.

- The parties agree that if they want to sell their shares they will have to offer the shares first to the other parties to the agreement (Andienungspflicht/Vorhandrecht/Right of First Refusal). In addition or alternatively, the parties may agree that the other parties have a pre-emptive right (Vorkaufsrecht) in the event that one of the parties agrees with a third party to sell its shares. The parties may further agree that if one party sells to a third party the other parties have the right to sell to the same purchaser (Mitverkaufsrecht/tag along). Alternatively, they might agree that one party desirous to sell its shares has the right to request that the other parties sell their shares together with the selling shareholder to the same party on the same terms (Mitverkaufspflicht/drag along).

• In certain cases, the parties agree on put options or call options which become exercisable upon the passing of time or fulfilment of certain conditions.

• Frequently, the parties enter into a non-compete commitment.

Often, shareholders’ agreements contain further undertakings, but in connection with the subject of this paper the above mentioned are the important ones\textsuperscript{53}.

Indeed, in view of the fact that shareholders' agreements only bind the shareholders and not the company itself\textsuperscript{54}, obtaining specific performance is the main issue when it comes to enforcing shareholders' agreements. As a result, the parties usually agree on a number of provisions trying to secure actual compliance with the terms of the shareholders’ agreement, in particular they provide for penalty payments (\textit{Konventionalstrafen}) in case of breach\textsuperscript{55}.

In shareholders' agreements the parties quite frequently commit to arbitration as the applicable procedure in the event of dispute. Subject to the usual requirements such arbitration clauses are valid\textsuperscript{56}.

c) \textit{Joint Ventures}

Joint ventures may have many different features and may be used in many different circumstances. In this paper the focus is on corporate/equity joint ventures, i.e. the founding parties (which are enterprises themselves) together form a company which

\textsuperscript{53} For an overview of other undertakings see PETER FORSTMOSER, Der Aktionärbindungsvertrag an der Schnittstelle zwischen Vertragsrecht und Körperschaftsrecht, in: Honsell/Portmann/Zäch/Zobl, Aktuelle Aspekte des Schuld- und Sachenrechts, Festschrift für Heinz Rey zum 60. Geburtstag, Zürich 2003, at p. 384 et seq.

\textsuperscript{54} Sometimes the company itself is made a party to the shareholders' agreement as well. However, the company may bind itself only to a limited extent. For instance, it could not undertake not to recognize voting of the shares by a shareholder in breach of the shareholders’ agreement.

\textsuperscript{55} For an overview of the measures trying to secure compliance with the obligations of the shareholders’ agreements see FORSTMOSER, (FN 52), at p. 375.
itself pursues a business. The joint venture agreement (Grundvereinbarung) constitutes the basis for creating the joint venture company. Furthermore, additional agreements are regularly concluded (so-called satellite agreements/Satellitenverträge) between the joint venture company and its founders, such as loan agreements, license agreements, distribution agreements, rent agreements or the like\(^{57}\).

The joint venture agreements are similar to shareholders' agreements in many respects (voting commitments, undertakings regarding transfer of shares). Usually, they also qualify as partnerships in the meaning of Article 530 seq. CO. Further, the agreements bind the parties only and are solely effective inter partes. The joint venture documentation commonly consists not only of the joint venture agreement, but also of the satellite agreements as well as the articles of incorporation and the organisational regulations of the joint venture company. As for shareholders' agreements the joint venture company is sometimes made a party to and signs the joint venture agreement as well. However, in particular as concerns matters which require a shareholders' resolution the joint venture company cannot validly bind itself\(^{58}\).

Joint venture agreements typically contain the following undertakings:

- Undertaking to form a company with a certain capital at a pre-determined location. Alternatively, the parties might chose an already existing company and increase the capital, or one party sells its shares in an already existing company to the other parties pursuant to an agreed upon proportion.

- Undertaking to generate or to modify the articles of incorporation in a particular way, e.g. making certain resolutions of the shareholders subject to quorums in terms of presence and/or voting.

\(^{56}\) FORSTMOSER, (FN 53), at p. 404 et seq.

\(^{57}\) For a more in depth view see MATTHIAS OERTLE, Das Gemeinschaftsunternehmen (Joint Venture) in schweizerischem Recht, Diss. Zurich 1990, at p. 65 et seq. and RUDOLF TSCH ÄNI, M&A-Transaktionen nach Schweizer Recht, Zurich/Basel/Genf 2003, at p. 293 et seq.

\(^{58}\) E.g. the undertaking of the joint venture company to increase its capital would not be valid. This is a resolution to be taken by the shareholders and not the joint venture company.
agreement may contain an agreement on how management should be structured and appointed. At least for Swiss corporations, however, this is not a matter in the competence of the shareholders but within the authority of the board of directors. Accordingly, the clauses provide for the parties to procure that the board members appointed by them will act in a way so as to give effect to the agreed upon provisions relating to the structure and appointment of management.

- Particularly, in cases of 50:50 joint ventures mechanisms are designed to remove deadlock situations, such as by way of a decisive vote of the chairman of the board of directors of the joint venture company or the appointment of an additional board member. Such deadlocks may also be overcome by providing for an escalation procedure requiring e.g. that the CEOs of the founding partners shall try to find a solution. Finally, sometimes put and call arrangements are put in place with the intention that one party acquires the shares in the joint venture company from the other party. According to one mechanism (blind bids) both parties simultaneously submit to each other an offer for purchasing the shares of the other party. The party quoting the higher price will be entitled to buy the shares. According to another mechanism (Russian roulette clause) one party submits an offer to the other party which if not accepted by the other party will mean that the offering party will have to buy the shares at the price quoted.

- Regularly, joint venture agreements contain transfer restrictions, e.g. the prohibition to sell the shares to a third party. Alternatively, the parties may provide for purchase and sales rights in much the same way as described above for shareholders' agreements (right of first refusal, preemptive rights, tag along, drag along etc.).

- The parties agree regularly on other clauses, such as in respect of capital increases, dividend policy, competitive behaviour, the entering into satellite agreements, liquidation rules in case the joint venture company is terminated, etc.
Necessary provisions are included in the articles of incorporation and the organisational regulations of a company intended to secure compliance with the joint venture agreement. Further, similar measures to those in shareholders’ agreements are included, in particular penalties are provided for in case of breach of the agreement.

The content of the satellite agreements depends on the particular circumstances. Not infrequently those agreements are made subject to a law different to the one governing the joint venture agreement. Also, parties sometimes provide for jurisdiction of state courts, while the joint venture agreement predominantly is made subject to arbitration.

2. M&A Matters

a) Private Transactions

A distinction must be drawn between private transactions and public tender offers. In private transactions seller and purchaser are opposite each other in a negotiation situation. The autonomy of the parties prevails, i.e. they define their agreement on each side. If such transactions are international in nature the parties almost always agree on arbitration, regardless of whether the shares (share deal) or the assets of a company (asset deal) are sold. The reasons for this have been mentioned above\(^{59}\). On the other hand, in a national context there is no clear trend in Switzerland, neither in favour of arbitration nor in favour of the state courts.

Quite often, a letter of intent and/or agreements on exclusivity or confidentiality precede the conclusion of a share purchase agreement (SPA) or asset purchase agreement (APA). Sometimes the two are combined such that exclusivity and confidentiality undertakings are included in the letter of intent as well.

\(^{59}\) See above Section I.
The letter of intent frequently contains a choice of law, but a jurisdiction/arbitration clause is often missing, particularly if the letter of intent does not contain exclusivity or confidentiality undertakings. If an SPA or an APA providing for arbitration is concluded but the letter of intent does not provide for arbitration, the question arises whether a claim out of the letter of intent can be brought in arbitration proceedings or whether the claimant will have to resort to state court procedures. Quite often the SPA or APA contains a so-called "entire agreement clause" whereby all previous agreements and undertakings between the parties are replaced by the agreements in the SPA or APA. This would mean that arbitration would apply. On the other hand, if there is no such entire agreement clause it is conceivable, depending on the circumstances, that the letter of intent is regarded in isolation when it comes to determining the applicable law and jurisdiction.

In the case of exclusivity and/or confidentiality agreements, which are signed separately from the letter of intent or where no letter of intent is entered into, the parties regularly agree on the applicable law and jurisdiction. In those instances the parties agree on the governing law and mostly also on ordinary jurisdiction. This is a consequence of the disadvantages ascribed to arbitration procedures as outlined above. To protect against breaches of exclusivity and confidentiality the parties want to move quickly and efficiently. To have to constitute an arbitral tribunal is viewed as a great disadvantage for a relatively straight forward dispute.

b) Public Tender Offers

Friendly and unfriendly public tender offers must be distinguished. In an unfriendly context, the tender offer is not made subject to arbitration for obvious reasons. Also in a friendly scenario the bidder would not chose arbitration. However, the bidder, at least in Switzerland, prior to launching the tender offer, often signs a so-called

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60 See above Section I.
61 Leaving aside the question whether such an arbitration clause could become valid in the first place.
transaction agreement with the target company\textsuperscript{62}. In the transaction agreement the parties quite frequently agree on arbitration.

Sometimes, separate agreements are concluded with the dominant shareholders. In case of so-called irrevocable agreements (by which the dominant shareholder agrees to tender the shares on the terms of the tender offer) no separate arbitration clause would be agreed between the parties. However, if the bidder and the dominant shareholder enter into a full-fledged SPA they would agree on the applicable law and very often on arbitration. If the target company is a Swiss company they would generally have Swiss law applicable and arbitration with seat in Switzerland.

c) Auction Procedures

In auction procedures aiming at selling the company essentially to the bidder offering the highest price\textsuperscript{63} different stages must be distinguished. Interested parties have to sign a confidentiality agreement before they receive an information memorandum together with a description of the procedure (procedure letter) from the bank organising the auction. The interested parties first have to submit an indication of interest substantiating their offer, in particular the price. Those continuing in the process will have to submit their final bid. Based on the final bid the parties will agree on the SPA or, less frequent, on the APA. The view is taken by some commentators that as a result of the confidentiality agreement, the various procedure letters, the statements in the information memorandum and the bid letters the parties are subject

\textsuperscript{62} See TSCHANI/IFFLAND/DIEM, Öffentliche Kaufangebote, Zürich 2007, at p. 59 (paragraph 114) and SCHNYDRIG/VISCHER, Die Transaktionsvereinbarung bei öffentlichen Übernahmen, AJP 2006, at p. 1192 et seq.

\textsuperscript{63} It is true that the price is but one element and that the seller could prefer another party for particular reasons.
to a series of rights and obligations which must be qualified as an agreement negotiating an SPA ("Vertragsverhandlungsvereinbarung")\textsuperscript{64}.

Procedure letters, information memorandums, bid letters and confidentiality agreements are practically never made subject to arbitration. Apart from the confidentiality undertakings, the parties are apparently not aware at the stage before they enter into an SPA or APA that they are already subject to mutual rights and obligations. Another reason is to avoid lengthy negotiations regarding this question during the auction procedure. As in standard private transactions, however, confidentiality agreements and exclusivity agreements, if any, regularly provide for state courts to be competent. On the other hand, in the SPA or APA resulting from the auction procedure arbitration is very often chosen.

d) Typical Clauses relating to M&A Matters and Specific Performance

A distinction may be drawn, following the timeline of an M&A transaction, between the time of pre-signing, the time of pre-closing and the time of closing as well as post-closing.

As regards \textit{pre-signing} the letter of intent often provides that the parties shall conduct negotiations in good faith. Due to the non-binding nature of the letter of intent, however, such negotiations cannot generally be enforced from a legal perspective. Specific performance would not be available.

As mentioned above, the parties sometimes agree on confidentiality or exclusivity in the pre-signing phase. Such undertakings are meant to be binding and enforceable. The party entitled to exclusivity or confidentiality will want to obtain specific performance.

Sometimes, the parties agree that they will sign an agreement and will attach the agreement. The question arises whether the execution of the agreement can be specifically enforced.

As regards *pre-closing* matters, conditions precedent and covenants must be mentioned. Conditions precedent are often coupled with undertakings by the parties to act in a certain way in order to bring about fulfilment of the condition. It is agreed between the parties e.g. that they work together towards obtaining, and that one party shall obtain the necessary regulatory or antitrust approvals. The question arises whether this can be enforced by way of specific performance. Another condition could be that one party (the seller) has to reorganize the target company, for instance to spin off a part of the business which will then be sold. What if the seller does not proceed with the promised reorganisation? As for covenants, SPAs and APAs provide that certain actions between signing and closing may not be undertaken by the target company without the prior approval of the buyer. Since the target company is not a party to the agreement the obligation is placed on the seller to *procure* that certain actions are not taken. Such action could be the making or disposing of investments in excess of a certain amount, the entering into certain contracts, the distribution of dividends or modifications of capital etc.

As for *closing* the question arises whether the buyer can specifically enforce the transfer of the shares (or release of the shares from escrow) against payment of the purchase price. Often, the parties agree that at the time of closing certain other acts have to be undertaken, such as entry of the buyer in the share register or the holding of a shareholders' meeting resolving to grant discharge to the previous board members. *Post-closing* issues frequently relate to price adjustment mechanisms. What if the seller or the buyer, as the case may be, does not prepare the necessary financial statements which form the basis of the adjustment, or does not cooperate in the appointment of an expert to determine the price adjustment?
IV. THE CONCEPT OF SPECIFIC PERFORMANCE APPLIED IN THE CORPORATE OR M&A CONTEXT

A. Shareholders' Agreements and Joint Venture Agreements

1. Introductory Remark

Bearing in mind their similarity the shareholders’ agreements and the joint venture agreements will be dealt with together. In so doing, the first issue to be examined will be whether an action for specific performance can be brought (Erfüllungsklage). Further, assuming that an award for specific performance may be granted, the enforceability of such an award will be considered and, finally, specific performance will be considered as part of injunctive relief.

2. Action for Specific Performance (Klage auf Realerfüllung)

a) Undertakings re Exercise of Voting Rights

There has been some debate in Swiss doctrine regarding the validity and thus the availability of specific performance of undertakings relating to the exercise of voting rights (Stimmrechtsabsprachen)\(^6\). In short, the argument was put forward that an award for specific performance may not be made because specific performance would interfere with the principle that (i) the shareholder must be free to exercise his voting rights, (ii) such an award would have an impermissible effect on third parties, (iii) the award would in most cases be late and of no help to the claimant, (iv) an award may only be granted if the claim is due (which would not be the case prior to the

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\(^6\) For an overview see MONIKA HINTZ-BÜHLER, Aktionärbindungsverträge, at p. 193 et seq. and THEODOR LANG, Die Durchsetzung des Aktionärbindungsvertrags, Zürich 2003, at p. 72 et seq.
shareholders' meeting), and (v) the claimant lacks an interest worthy of protection (Rechtschutzinteresse) because specific performance allegedly cannot be enforced. All of these arguments have been convincingly rejected so that according to the prevailing view in Swiss doctrine today specific performance is available.

A relatively old decision of the Supreme Court (Kassationsgericht) of the Canton Zurich considers this issue\(^{66}\). The court held that specific performance is the basic remedy available to enforce shareholders' agreements. In the particular case, the claimant requested that the defendants be ordered to re-elect the claimant as board member for a further tenure at the next shareholders' meeting. The court did so by threatening criminal sanctions in accordance with Article 292 StGB\(^{67}\) should the defendants not comply with the order. The order was passed as part of an injunctive relief. The court made it clear that specific performance is the primary remedy and that the claim for damages is only secondary in nature.

Thus, an arbitral tribunal with seat in Switzerland applying Swiss law could and would have to make an award granting specific performance when it comes to enforcing voting undertakings. The exact remedy will depend on the contractual agreement of the parties. If, for instance, the shareholders' agreement provides that the parties pool their votes and meet in advance of the shareholders' meeting in order to find a common position and vote their shares accordingly, the arbitral award could require such a meeting to be held again and for the defaulting party(-ies) to attend. On the other hand, in such instance it would not be possible to make an award forcing the defaulting parties to exercise their votes in a specific way because the determination of the vote would be part of the meeting\(^{68}\).

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67 This article reads as follows: "Art. 292 Refusal to comply with Official Orders: Whoever refuses to comply with an official order issued by a competent authority or a competent public official and indicating the threat of punishment under this Article shall be punished by detention or fine".

68 This could be different where the shareholders' meeting contains a mechanism for the determination of the voting in case a party does not attend or, to give another example, if the shareholders' meeting provides for the majority of parties to the shareholders' agreement to determine in which way to vote the shares at the company's shareholders meeting.
Specific performance is also available in the context of a joint venture agreement. Accordingly, it would be possible to claim and be granted an award for the following:

- To order the defaulting company to undertake the necessary steps to form the joint venture company, although there will be certain limits as to the enforceability of such an award (see below).
- To order the adoption of the articles of incorporation of the joint venture company as agreed in the joint venture agreement. As the arbitral tribunal has no power to bind the board members (who are not a party to the arbitration), performance of such an obligation may prove impossible to the extent that the board members are not bound to follow any instructions (and also in view of the fiduciary duty vis-à-vis the company for which they are appointed).
- To order the defendant(s) to instruct the board members appointed by them to appoint management as foreseen in accordance with the terms of the joint venture agreement.

It is for the claimant to decide whether making a claim for such an award is the appropriate way to proceed. Depending on the subject matter of the relief, enforceability might be difficult. As regards the formation of a joint venture, it might be more advisable to withdraw and claim damages instead. This is particularly true in cases where businesses of the partner to joint venture agreements are expected to be contributed to the joint venture company.

b) Further Undertakings

For other undertakings specific performance is also the primary relief available to the claimant. This applies in particular to every kind of transfer restrictions for shares (Andienungspflicht/Vorhandrecht; Vorkaufsrecht; Mitverkaufsrecht;)

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69 HINTZ-BÜHLER, (FN 65), at p. 217 et seq.; LANG, (FN 65), at p. 84 et seq.
Mitverkaufspflicht), or options, such as put options or call options\(^ {70} \). Particular mention should be made of certain clauses, namely those including the blind bid mechanism and the Russian roulette clause which are basically enforceable in accordance with their terms. Such clauses quite often do not contain provisions as to the consequences of a party's failure to participate in the procedure. It is possible for a claimant to make a claim requesting the arbitral tribunal to state that the requirements for the operation of the blind bid clause or the Russian roulette clause have been fulfilled and to order the defendant to participate in the procedure. The claimant could also consider requesting the arbitral tribunal to supervise the procedure and to then issue an award providing for delivery of the shares against payment. It would be preferable to state the consequences of a party's failure to participate in the procedure in the provisions of the agreement from the outset in order to quash any argument that by supervising the procedure, the arbitral tribunal is acting outside its authority. In any event, this is a typical example where arbitration might be superior to state court procedure because supervision by a state court might not be possible or desirable.

Regarding the obligation to enter into satellite agreements the availability of specific performance will depend on whether the parties have already agreed on the draft of the satellite agreements and attached these to the joint venture agreement. If so, specific performance is conceivable but if not, the required specificity may be lacking.

**Cases**

1) The claimant and defendants 1 and 2 had entered into a consortium agreement (shareholders' agreement) as well as into a purchase agreement regarding the transfer of a 20% interest by defendant 1 in company X (which held a controlling interest in the company Y) to each of the claimant and defendant 2.

The parties further entered into an amendment to the consortium agreement

\(^ {70} \) See for instance Decision of the Swiss Federal Supreme Court, dated 13 February 1990, in SZW 62 (1990), at p. 213 et seq. where the Court affirmed the obligation of the defendants to take delivery of the shares of the claimant. See further the cases mentioned by EHLE (FN 7), at p. 301 where specific performance was granted in respect of option agreements relating to shares. Federal Supreme Court, Decision of December 14, 2004, 4P.208/2004 in ASA Bulletin 2/2005 at p. 326.
whereby claimant and defendant 2 acquired the same amount of shares each in company Y. Years later, defendant 1 acquired from defendant 2 all its shares in X as well as its shares in Y.

The parties were in dispute whether the transaction entered into by defendant 1 and defendant 2 complied with the provision of the right of first refusal as contained in the consortium agreement. The claimant claimed that the transfer of shares from defendant 2 to defendant 1 constituted a breach of the consortium agreement and a violation of the principle of good faith and of the fiduciary duty among the shareholders and was thus not valid. Further, the claimant claimed to have a right of first refusal to buy half of the shares held by defendant 2. Therefore, the claimant sought an award ordering defendants 1 and 2 to rescind the allegedly unlawful transaction by re-establishing the status quo ante in compliance with the consortium agreement. Further, the claimant sought an award ordering defendant 1 to transfer to the claimant 10% of the shares in company X for an adequate purchase price as well as an award prohibiting termination of the consortium agreement by defendant 1 as long as the acquisition by the claimant of 10% of the shares had not been completed. The dividends on the shares received by defendant 1 should, it was claimed, be reimbursed to the company X for re-distribution in compliance with the arbitral award.

The arbitral proceeding was concluded on the basis of a settlement agreement reached between the parties and, therefore, no award on the merits was issued.

2) In a case before an arbitral tribunal constituted under the Zurich Chamber of Commerce rules, which lasted from 1995 until 1999, the dispute turned on the termination of a joint venture. Both parties had requested termination of the joint venture consisting of two businesses. By way of an interim award the tribunal thus declared the partnership (joint venture) between the parties to be dissolved and appointed a liquidator. Previously, the parties had requested preliminary injunctions and the tribunal had ordered various measures pending the duration of the arbitration procedures, such as entitlement to manage the
joint venture, appointment of chairman of the pool formed by the parties etc. In a further interim award the tribunal ordered that the sale of the shares in the joint venture companies be effected by way of an auction to take place under its supervision pursuant to procedures decided by the arbitral tribunal. One of the parties appealed against the way the procedures had been decided by the tribunal. The appeal was dismissed by the Swiss Federal Supreme Court and the parties then entered into a settlement.

3. **Enforceability in Switzerland**

Awards providing for specific performance immediately beg the question how they can be enforced should the defendant not follow the terms of the award. Set forth below are some considerations regarding enforceability of such awards in Switzerland. It should be mentioned from the outset that when it comes to enforcement the advantages of arbitration are clear. There may be a dialogue during the arbitration procedure with the parties in a way that procedure through state courts usually does not encourage, with the intention of reaching an agreement in which the defendant gives the necessary commitments to make the award enforceable. Alternatively, the arbitral tribunal would structure the necessary process itself during the procedure by issuing the required orders. For instance, the arbitral tribunal would supervise an auction, the exercise of put and call options, or the procedure regarding blind bids or Russian roulette.

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a) **Awards re Exercise of Voting Rights**

In Switzerland, foreign arbitral awards for non-monetary relief are enforced pursuant to the New York Convention in proceedings in accordance with the Cantonal Rules of Civil Procedures. In particular, the means of enforcement (Vollstreckungsanordnungen) are those set forth under the Cantonal Procedural Law. In the case mentioned above relating to the specific performance of voting undertakings, the order to vote the shares to the effect that the claimant should be elected as member of the board of directors was coupled with the threat of criminal sanctions pursuant to Article 292 of the Swiss Criminal Code. In fact, in cases where the order is directed at having the defendant abstain from voting the shares in a particular way this seems the only viable way to enforce the award. However, the view prevails that the threat of criminal sanctions pursuant to Article 292 of the Swiss Criminal Code is not available to arbitral tribunals with their seat in Switzerland, although it is conceivable that subject to certain conditions the arbitral tribunal could threaten the issue of a private fine (Astreinte).

As an alternative, it has been discussed (and is controversial) in Swiss doctrine whether the award itself could replace the actual vote by the defendant. The permissibility to issue such an award is uncertain and I am not aware of a case dealing with this issue. On the other hand, there is a common understanding that, failing the defendant acting in compliance with the judgment, a third party may be ordered to exercise the vote in accordance with the findings of the judgment (so called substitute performance/Ersatzvornahme). Substitute performance should also be available for enforcing an award. There is one relevant exception, however, in that the articles of

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72 The enforcement of an award rendered by an arbitral tribunal with seat in Switzerland would not be governed by the New York Convention. Such awards will be considered equal to state court judgments with respect to their enforceability.

73 See above in Section IV.A.2.a, FN 66.

74 See above in Section II.3, FN 10.

75 For discussion of this topic see LANG, (FN 65), at p. 90 et seq.

76 LANG, (FN 65), at p. 92 et seq.
incorporation of a particular company may provide that a power of attorney for exercising the votes may only be given to another shareholder. If that is the case, substitute performance would not be possible, except if another shareholder can be entrusted with the power of attorney. Further, according to the dominant view, physical enforcement by a state power is not available in respect of awards providing for the exercise of or abstention from exercising votes\(^77\).

### b) Awards re Other Undertakings

In respect of other undertakings, enforcement of specific performance should normally not pose a problem. The exercise of rights of first refusal, pre-emptive rights, tag along rights and drag along rights as well as of put and call options will result in an enforceable obligation to buy shares and to pay the respective purchase price on the part of the buyer, and an obligation on the part of the seller to deliver the shares at the same time. However, in the case of blind bids and Russian roulette, the cooperation of the other party will be needed. It seems the most effective way to enforce such cooperation is in the course of the arbitration procedure in order to obtain an award which contains the obligation of the buyer to buy, and of the seller to sell, the shares at a price determined in the award (or an interim award, as the case may be). In other words, the claimant should request the arbitral tribunal to order the parties first to go through the blind bid or the Russian roulette mechanism and to then issue specific orders depending on the outcome of the mechanism.

\(^{77}\) LANG, (FN 65), at p. 93.
4. **Injunctive Relief**

a) **Introductory Remarks**

Arbitral tribunals with their seat in Switzerland have the power to issue injunctive measures upon the motion of one of the parties. However, if the party concerned does not submit to the measure ordered by the arbitral tribunal on a voluntary basis the arbitral tribunal may have to resort to the assistance of the state judge. This power is defined in the SPILA but, as regards institutional arbitration, the applicable procedure rules of the respective institution must be considered as well. It is even possible (although quite rare) for the arbitral tribunal to issue injunctive measures on an *ex parte* basis. Furthermore, a party may at any time address itself to state courts to obtain preliminary relief, be it prior to the constitution of the arbitral tribunal or thereafter.

Assuming that the requirements for injunctive relief are met the court/arbitral tribunal may issue orders for the purposes of maintaining the status quo (*Sicherungsmassnahmen*), to regulate the legal relationship in a preliminary way during the procedure (*Regelungsmassnahmen*) and to enable preliminary enforcement of the matter (*Leistungsmassnahmen*). Thus, injunctive relief regularly provides for specific performance.

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78 Article 183 alinea 1 SPILA. Note, however, that for domestic arbitral tribunals the power is only to *propose* injunctive measures (Article 26 of the Swiss Intercantonal Arbitration Convention and BERGER/KELLERHALS, (FN 10), at p. 395 (paragraph 1126 et seq.) with references).

79 Article 183 alinea 2 SPILA.

80 See overview in BERGER/KELLERHALS, (FN 10), at p. 417 seq. (paragraph 1190 et seq.).

81 For these requirements generally (threat of irreparable harm, prima facie case etc.) see BERGER/KELLERHALS, (FN 10), at p. 402 seq. (paragraph 1142 et seq.).
b) **Injunctive Relief re Exercise of Voting Rights**

As pointed out above\(^{82}\), whether specific performance can be used to enforce the exercise of voting rights is somewhat disputed in Swiss doctrine. Logically, the same must apply to the availability of preliminary measures, as the power of the arbitral tribunal when ordering interim measures cannot go beyond its power when deciding on the merits. The view prevails that injunctive measures must be available in this respect as well\(^{83}\). Nevertheless, it is generally recognized that to enforce voting agreements by way of preliminary injunction severely interferes with the interests of the defendant. As a result, arbitral tribunals might try to find other solutions which, preferably have the consent of the parties.

As mentioned above, there is one case in which defendants have been ordered by way of a preliminary injunction to vote their shares so as to elect the claimant as a member of the board of directors\(^{84}\). The potential harm to the claimant's interests should not be underestimated in such a situation. Irreversible damage may occur to the claimant's interests if the award is made too late.

c) **Injunctive Relief re Exercise of Other Rights**

Regarding the exercise of other rights, which mainly relate to the transfer of shares, the typical remedy is to order the respective party to abstain from selling the shares to a third party. This would constitute a *Sicherungsmassnahme*. It should be noted, however, that any protection to be gained from injunctive measures or awards for specific performance in general is limited as a disposal of shares in breach of an agreement may not be reversible, such as a sale to a bona fide purchaser. As a result, both in shareholders' agreements and joint venture agreements the parties take great

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\(^{82}\) See above Section IV.A.2.a.

\(^{83}\) LANG, (FN 65), at p. 108 et seq. contains an overview of the positions taken in the Swiss doctrine so far.

\(^{84}\) See above Section IV.A.2.a, FN 66.
pains to draft clauses and put in place structures which are intended to deter or make it difficult for the parties to act in breach of their contractual obligations\textsuperscript{85}.

Case\textsuperscript{86}

In an ICC arbitration proceeding, the dispute had arisen out of an agreement entitled "Shareholders Agreement" between the claimant and the defendant, as well as out of various technical assistance agreements and a trademark license agreement entered into by, among others, affiliates of the claimant. The shareholders' agreement was entered into for the direct and indirect participation in several companies ("Y"). The claimant's interest in Y was 15\%, while the defendant's participation was 85\%. The defendant later entered into a share exchange agreement with company A, whereby A contributed various assets held by its subsidiaries to the defendant's operations in

\textsuperscript{85} See above FORSTMoser, (FN 52), at p. 375; FORSTMoser, (FN 53), at p. 388.

\textsuperscript{86} See also the case referred to in EHLE, (FN 7), at p. 302 where a shareholder was enjoined by way of an injunction from exercising a purchase option pending arbitration proceedings about the validity of the sale and the occurrence of a trigger event provided for in the shareholders' agreement. For a further case see GEORG VON SEGESSER Arbitrating Pre-Closing Disputes in Merger and Acquisition Transactions in: Kaufmann-Kohler/Johnson (ed.), Arbitration of Merger and Acquisitions Disputes, ASA Swiss Arbitration Association Conference of January 21, 2005 in Basle, ASA Special Series No. 24, May 2005, at p. 21. A very interesting case is further summarized by VON SEGESSER, at p. 42 where the arbitral tribunal ordered interim measures as follows:

- The shares in dispute were to be deposited with a receiver, or in an escrow, or in trust;
- the principal place of business of the company in dispute and its subsidiaries, and the books and records of those entities were to be maintained in situ;
- the target company and its subsidiaries were not to purchase new assets, nor sell existing assets, in excess of a total aggregate amount of USD 500'000 without prior written acceptance of any such transaction by claimant;
- the target company was not to refinance its assets in excess of a total aggregate amount of USD 500'000 without prior written acceptance by claimant;
- the company was to provide claimant, amongst others, with monthly statements and financial reports and, at least 20 days prior to the closing with notice, of any proposed purchase, sale, exchange, refinancing, or any other transaction not occurring naturally in the ordinary course of business, along with a statement disclosing the terms of the transaction, any past or present relationship between the parties, and a detailed account of the proposed use of funds.
exchange for shares in the defendant. On the same date, company B, which held 49% of the shares in the defendant, entered into a stock purchase agreement with A for the transfer of a part of its stock in the defendant. As a result, A held 36% of the voting rights in the defendant in the aggregate.

In its request for arbitration, the claimant sought inter alia, a declaration that defendant and B were required to provide the claimant with the opportunity to consider and exercise its right of first refusal to purchase from the defendant their 85% interest in Y, as provided by the shareholders' agreement. Further, the claimant sought an order requiring the defendant to specifically perform its duties under the shareholders' agreement, including its duty to cause Y and its operating companies to specifically perform their respective duties under the technical assistance agreements and the trademark license agreement with the claimant's affiliates.

In addition, the claimant submitted prayers for interim relief prohibiting the defendant from completing the transactions contemplated by the defendant, company A and company B. The claimant alleged that as a minority shareholder of Y and as a competitor to A, the claimant would suffer a permanent loss of its strategic interest in the market. Furthermore, the claimant would suffer irreparable harm from the immediate and irreversible acquisition of the claimant’s proprietary technology and know-how by A. In the establishment of a *prima facie* case, the claimant relied on the argument that the disputed transactions would trigger and violate the right of first refusal since the transactions described above amounted to a change of control in Y. Further, the claimant based its *prima facie* case on an anticipated violation of the exclusivity clause of the shareholders agreement. The claimant alleged that the exclusivity clause prevented the defendant or any affiliate of the defendant from participating in any way in the business of A.

In its first order on conservatory and interim measures, the arbitral tribunal held that the claimant failed to establish that the sale of the 85% interest in Y triggered the right of first refusal clause because the change of control had not been addressed in the shareholders' agreement and could not be read to be equal to a transfer of 85% of the shares in Y. Insofar, the request for interim measures was dismissed. With regard to
the alleged violation of the exclusivity clause in the shareholders agreement, the arbitral tribunal held that this issue could not be decided at that stage of the arbitration proceedings yet.

The arbitration ended as a result of a settlement concluded between the parties.

B. M&A Agreements

1. Introductory Remark

Most litigation and, therefore, arbitration relates to breaches of representations and warranties given by the seller of the shares or the assets. SPAs regularly provide the remedies for such a situation. Anglo-Saxon/US type SPAs and APAs stipulate the right to be indemnified and to be held harmless. In Swiss style agreements, there is often the additional provision that the seller shall have the right to remedy the deficiency failing which the buyer shall have the right to request that the seller has to pay the buyer or, at the election of the buyer, the target company, an amount sufficient to put the target company in the position in which it would have been if no misrepresentation or breach of warranty had occurred. It is, therefore, the agreement itself which provides for monetary relief rather than non-monetary relief. Although the contracts could be drafted differently it is generally recognized not to be in the interests of the buyer to ask the seller to remedy the misrepresentation by taking certain acts, or by abstaining from certain acts. Accordingly, in all agreements monetary relief is the remedy for breaches of representations and warranties.

2. Pre-Signing Disputes

Typical pre-signing disputes would relate to confidentiality or exclusivity undertakings. Evidently, such undertakings require specific performance, i.e. an order directed at one party that it shall keep the information and documents confidential, or
not to pass on the information on to any other parties, or (as regards exclusivity) an order that it shall exclusively negotiate with the party that is entitled to exclusivity and to abstain from entertaining into any negotiations with third parties. In light of the urgency, a clear commitment and the imminent harm, obtaining specific performance should be straightforward.

Another area concerns the question whether the parties can compel negotiations to take place. The answer is negative usually because in most cases the letter of intent is not legally binding. In any event, negotiations do not give rise to a duty to enter into a contract and, under Swiss law parties are basically free to terminate contract negotiations at any time and for no particular reasons. Furthermore, to request specific performance would lack sufficient specificity and would be unlikely to assist the claimant as negotiations do not necessarily result in an agreement.

Cases are known where parties negotiated an agreement and exchanged a letter providing for later signing of the agreement. Contrary to expectation the parties could not however reach a final agreement. In such circumstances, it would be possible to enforce the execution of the agreement by way of specific performance. Alternatively, the claimant could claim that the exchange of the letter itself constitutes an agreement and ask for specific performance of the sale of the shares at the price agreed in the letter. This follows from the decision of the Swiss Supreme Court which held that if a pre-contract already includes all the necessary elements of the main contract then a party may claim specific performance of the obligations which were to be the subject of the main contract. In other words, the parties are not obliged to first obtain an order to execute the detailed agreement but may enforce the obligations arising out of the initial agreement. The crucial issue will be whether the parties had the intention to

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87 Similar position by VON SEGESSER, (FN 86), at p. 22.


89 Such a case is referred to in VON SEGESSER, (FN 86), at p. 24.

90 Decision of the Swiss Federal Supreme Court, dated 6 March 1992 (BGE 118 II 32). As explained above (FN 24), where a pre-contract is concluded although the parties, at the same time, could have entered into the main contract, this may have to be interpreted as to mean that the parties (impliedly) excluded the possibility of specific performance of the main contract.
be bound before reaching agreement on specific points and executing the relevant contractual documents. In light of today's international business practice of highly formalized corporate transactions, such intention would rather be unusual and should not be readily assumed absent unambiguous indications to the contrary.

3. **Pre-Closing Disputes**

The question arises whether the undertakings given by the parties to bring about conditions precedent may be enforced by way of specific performance. While it is conceivable that undertakings related to conditions precedent and pre-covenants may be enforced in this way\(^91\) in reality this is rarely seen. First, the interests of the parties at that time are usually aligned with the result that they work towards a closing without friction. In those instances where this is not the case it is doubtful from a practical viewpoint whether in the end the other party can really be forced to cooperate by way of an order for specific performance. There may however be certain well-defined acts which lend themselves to an order to this effect. However, time is against the buyer as it is often essential that a transaction be completed within three to six months after signing. It depends on the particular circumstances as to whether a claim for specific performance is appropriate or whether it is preferable for the seller to instead request the payment of damages.

As a matter of Swiss law, the rule should be noted that a condition is deemed to be fulfilled if non-fulfilment is due to one party acting contrary to the principle of good faith\(^92\). However, when it comes to regulatory approvals drafted as conditions

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91 [VON SEGESSER, (FN 86), at p. 45, 48.](#)

Covenants could in all likelihood be the subject of a preliminary injunction in the event that the seller does not observe them. In this case, the difficulty lies in the fact that the company itself is not a party to the agreement or to the arbitration clause. Therefore, technically speaking the order may not be binding on to the target company itself but rather it would have to oblige the seller to procure that certain actions be undertaken or not be undertaken by the target company. Furthermore, as outlined above for undertakings related to conditions precedent there are additional reasons speaking against starting arbitration proceedings. Indeed, speaking from my experience arbitration in this area is rare.

4. Closing and Post-Closing Disputes

If one of the parties refuses to close the transaction specific performance is normally available, assuming that conditions precedent have been met, waived or been deemed to have been fulfilled as a result of Article 156 CO. It is possible to request contingent performance (Zug um Zug) such that the shares have to be transferred against payment of the purchase price94. Such an award would be enforceable.

Sometimes closing is coupled with an escrow arrangement. The purchase price and the shares are deposited with the escrow agent who will pay the purchase price to the seller and deliver the shares to the buyer at the time of closing. Escrow arrangements can more frequently be seen as a mechanism to secure the claims of the buyer

93 Typically, antitrust laws provide that a transaction must not be completed before the authorities have approved the transaction, or before the lapse of certain time periods. The rule contained in Art. 156 CO is thus of no help in this connection.

94 See also VON SEGESSER, (FN 86), at p. 45. Further, in the newspapers it has recently been reported that Jelmoli has instituted arbitration against the buyer of its real estate portfolio requesting payment of the purchase price against transfer of shares (Tages-Anzeiger of January 3, 2008, at p. 19).
resulting from breaches of representations and warranties by the seller. A certain amount of the purchase price is deposited with the escrow agent who would then have to make payment to the seller if no claims for breaches of representations and warranties have been raised, or to the buyer if the buyer has made a successful claim for such a breach. Specific performance in such arrangements would mean that the arbitral tribunal would order the escrow agent to pay the purchase price to the seller and to release the shares to the buyer, or in the event of the more frequent arrangement of securing claims for breaches of representations and warranties, to pay the amount on deposit to either the buyer or the seller, be it in full or partly. This would basically require the escrow agent to be a party to the arbitration procedure which is not desirable. It has become common practice instead to provide that the escrow agent shall, in the event of breach, release the funds in accordance with an award of an arbitral tribunal notified to it. In proceeding this way, the parties try to avoid the possible resistance of the arbitral tribunal to issuing an order in respect of an entity that is not a party to the arbitration procedure.

As noted above, many post-closing issues relate to price adjustment mechanisms. The mechanism foresees that a preliminary price will be paid at signing and that an adjustment will be made subsequently based on financial statements to be established as per the closing date. The SPA stipulates that either the seller or the buyer will have to prepare such financial statements and that in case of controversy an expert will be appointed who will conclusively determine the price adjustment. Should the party obligated to prepare the financial statements not do so it appears possible to commence arbitration and obtain an order obliging the defaulting party. The enforcement would have to be sought by substitute performance if the defendant does not obey the award. If one of the parties does not cooperate in the appointment of an expert the agreement usually provides for an institution to appoint such an expert.

To conclude this part of the paper, a peculiarity of Swiss substantive law must be mentioned. The Swiss Federal Supreme Court has held that apart from the Gewährleistungsklagen other remedies may be available in the case of breach of representations and warranties, in particular the remedy for fundamental error
A buyer could rescind or - according to the practice of the Swiss courts - partially rescind (i.e. claim a reduction of the purchase price) an agreement for fundamental error. Such a claim can be raised even when the term of the representations and warranties has already lapsed. From the time that the buyer realizes the error he has a period of one year within which to object to the sale. Against this background, it is not surprising that in most arbitrations decided under Swiss law the buyer will not only claim for breach of representations and warranties, but he will also base his claims on the argument that there has been a fundamental error. Depending on the particulars of the case, especially when the term of the representations and warranties has lapsed, the remedy for fundamental error might even be the only possible basis on which the buyer may proceed against the seller.

To avoid this unforeseen remedy, in many cases the parties agree that the remedies set forth in the SPA are to be exclusive. From time to time they even explicitly exclude the right of the buyer to rescind the SPA. Due to the lack of court precedents, it is not entirely certain whether such exclusion is valid.

Nevertheless, in case that the buyer wants to rescind the agreement in full on the basis of fundamental error he could, therefore, move to be granted an award for specific performance, i.e. the seller would have to accept delivery of the shares he has sold and on his part would have to pay the purchase price (Rückabwicklung Zug um Zug). I am personally not aware of such a case as where this argument was raised the buyer actually sought to have a reduction of the purchase price rather than a rescission of the whole contract.

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95 Article 24 alinea 1 item 4 CO.

96 In favour: BRUNO SCHMIDLIN, Berner Kommentar, Band VI, 1. Abteilung, Teilband 2 1b, Bern 1995, Art. 31 CO note 123 et seq., including a summary of authors arguing against the exclusion.
Case

In an ICC arbitration proceeding, the parties disputed whether a share purchase agreement was validly entered into (material error and/or wilful misconduct) and whether representations and warranties were complied with. The claimant sought, inter alia, an arbitral award for partial rescission of the share purchase agreement, i.e. for a reduction of the purchase price, for fundamental error.

The claimant alleged that its decision to enter into the share purchase agreement was primarily based on a valuation conducted in accordance with the discounted cash flow method. The claimant relied upon the defendant's EBITDA and CAPEX forecasts, which were alleged to be wrong in view of the data available to the defendant already at the time the share purchase agreement was concluded. It was further alleged that the defendant breached his duty to inform the claimant with regard to the substantial deviation from the actual figures from the forecast.

No award was finally issued as the parties entered into a settlement.

V. CONCLUDING REMARKS

Arbitration is not common in corporate disputes on the basis of an arbitration clause in the articles of incorporation. In shareholders' agreements and joint venture agreements, however, arbitration is a mechanism often used to solve disputes. The same applies for SPAs and APAs in private transactions, whereas letters of intent, exclusivity agreements and confidentiality agreements usually do not include an arbitration clause. From a Swiss viewpoint a claim for specific performance is the primary remedy in corporate and M&A matters. However, the main body of cases concerning M&A (SPAs and APAs) relates to breach of representations and warranties where the claims are monetary in nature. Nevertheless, there are some areas where specific performance plays a very important role, in particular in the enforcement of closing (delivery of shares against payment of the purchase price).
Specific performance is of particular relevance in connection with shareholders' agreements and joint venture agreements when it comes to enforcing voting agreements. Protection available from specific performance in arbitration proceedings is limited, however, and the parties preferably rely on other means to secure specific performance. As concerns transfer restrictions in shareholders' and joint venture agreements frequent arbitration cases have become known ordering specific performance.

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