CHAPTER 6

Post M&A Disputes: Recent Nordic Case Law, Especially Regarding Loss Calculation

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§6.01 INTRODUCTION

Arbitration is the main dispute resolution method used in Sale and Purchase Agreements (SPAs) between a buyer and seller concerning company shares or the asset itself. In recent years, especially in Denmark and Norway, several arbitral awards rendered have great importance outside the awards commented on.

Post mergers and acquisitions (M&A) disputes can typically be divided into two main categories. The first category, earn-out disputes, concerns the seller's entitlement to additional compensation in the future depending on the target company achieving certain results and will not be dealt with here.[1] The article will instead focus on the second category, damage claims in case of breach of warranties.

Loss calculation in awards occasionally seems to be handled less thoroughly than other parts of the case. Tribunals typically focus most of their attention on the liability question, at least on the basis of a review of awards and their reasoning.[2] As post M&A disputes are mainly handled by arbitration, there is a shortage of publicly available case law, at least in Nordic countries, including case law regarding the way in which loss calculation after the breach of warranties in SPAs is carried out.

This chapter presents three post M&A awards, focussing on the issue of loss calculation. The tribunals' thorough and solid analyses in these cases, especially regarding loss calculation, should be of interest to a wider audience. Several of these awards also focus quite intensively on the calculation aspects.

1. *See,* for example: Niels Schiersing, *Earn-Out Disputes* (Ex Tuto 2020).
2. This observation is also supported by the 2015 PwC report *International Arbitration damages research,* although the report mainly covers investor-state disputes under the ICSID rules.

The aim of the chapter is to show how loss calculation has been carried out for post M&A disputes in recent Nordic case law. The fact that the awards are not public is reflected in the way in which they are presented here, although quotes from the awards are included wherever possible – without disclosing the parties involved – in order to make it easier for readers to assess the tribunals' reasoning. However, they are quoted to different extents, partly because of the above and partly because different reasoning styles are used: some go into more detail than others; some make more general remarks, and others mainly provide more case-specific comments.

The article begins with a short overview of the basic principles in Nordic countries as compared with English law, with the goal of drawing together different readers' legal backgrounds. While tribunals are guided by these general principles, damages must be determined on the basis of the facts in each individual case.

The three awards are presented in sections §6.03, §6.04 and §6.05. While several commentators have viewed them as clarifying how loss calculation in post M&A disputes should be undertaken, space constraints make it impossible to include my own position here.

§6.02 BASIC PRINCIPLES FOR THE CALCULATION OF DAMAGES IN CONTRACTS

[A] Introduction

The basic principle for calculating damages in contracts is that the damages for breach of contract by one party must consist of a sum equal to the loss suffered by the other party as a consequence of the breach. This principle of full compensation applies not only in Nordic countries but also in English law[3] and more internationally, as illustrated by Article 74 of the CISG[4] and UNIDROIT Principles Article 7.4.2.[5]

[B] Positive Interest/Expectation Interest

When damages are claimed as the contract was not fulfilled as agreed, this is often referred to in Nordic countries as claiming the positive interest of the contract.[6] Positive interest means that the sufferer must be left in the same financial position as he would have been if the contract had been fulfilled properly, and the damages are, therefore,

3. Kåre Lilleholt, *Kontraktsrett og obligasjonsrett* (Cappelen Damm Akademisk 2017) pp. 349–351 with further references, and for English law: *Robinson v. Harman* (1848) 1 Ex 850.
4. The United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980. For the sake of order, pursuant to Art. 2 (d), CISG does not apply to sales of stocks and shares.
5. UNIDROIT (formally the International Institute for the Unification of Private Law) Principles of International Commercial Contracts 2016.
6. Norway: Lilleholt, *supra* n. 3, Sweden: Jan Ramberg & Christina Ramberg, *Allmän avtalsrätt,* 11th edition (Norstedts juridik 2019) pp. 261 and 267–268, and Denmark: Torsten Iversen, *Obligationsret 2. del på grundlag af Bernhard Gomards obligationsret*, 5th edition (Jurist- og økonomforbundets forlag 2019) p. 225.

a performance substitute. In English law, this is covered by '*expectation interest*', which focuses on the fundamental reasoning.[7]

In Nordic countries, positive interest is normally used as the opposite of negative interest, whereby the claimant is left in a position as though the contract had never been entered into; '*reliance interest*' in English law.[8] In the three awards discussed, the claimants were seeking positive interest.

[C] The Differential Principle

In German law, what is known as 'differential principle' (*Differenzhypothese*) is often used to explain the content of the principle of full compensation.[9] The differential principle is normally defined as the difference between the actual and the hypothetical situation, and the difference constitutes the loss. The principle is based on the roman law of *id quod interest* and is often referred to in Nordic countries, although there has been some debate about it in recent years.[10]

The differential principle has been criticised for being too abstract and for complicating issues. It is said to be too abstract as the principle is modified by various rules that apply differently for various heads of damages, and by that complicating issues when trying to compile these into a general principle. However, this does not prevent the differential principle from serving as a starting point and for examining the loss calculation that has been carried out.[11]

Under certain circumstances, the loss to be calculated does not typically consist of several types of losses (heads of damages). This could apply in post M&A disputes where the loss claimed could be the difference between the value that was agreed and the value that would have been agreed if the contract breaches had been known about prior to entering into the contract.

That said, it may still be useful to bear in mind the criticisms of the differential principle, especially the observation that it involves a significant risk of prejudicing the solution to several problems. These may be generic problems such as compensation *lucre cum damno* and concurring causes or more specific issues such as a claim for compensation for parts of period costs.[12]

7. Guenter Heinz Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press 1988) p. 82, Hugh G. Beale ed., *Chitty on Contracts Volume I General Principles*, 34th edition (Sweet & Maxwell 2021) pp. 2080–2081.
8. Iversen, *supra* n. 6, pp. 307–309 and Jack Beatson, Andrew Burrows & John Cartwrigh, *Anson's Law of Contract,* 31st edition (Oxford University Press 2020) pp. 540–541.
9. Schlechtriem & Schwenzer, edited by Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th edition (Oxford University Press 2016) p. 1059.
10. Viggo Hagstrøm, *Obligasjonsrett* (Universitetsforlaget 2021) 3rd edition by Herman Bruserud, Ivar Alvik, Harald Irgens-Jensen og Inger Berg Ørstavik pp. 564–565 and Torsten Iversen, *Erstatningsberegning i kontraktsforhold* (Thomson Reuters 2000) pp. 113 et seq.
11. Hagstrøm, *supra* n. 10, p. 564, Johnny Herre, *Ersättningar i köprätten: särskilt om skadeståndsberåkning* (Nordstedts Juridik 1996) pp. 315–317 and Iversen, *supra* n. 10, p. 115–121.
12. Iversen, *supra* n. 10, p. 120.

[D] Concrete Assessment

The principle of full compensation guides tribunals in the same way as positive interest (expectation interest) and the differential principle can do. However, none of these clarifies how damages should be calculated, and the differential principle could be viewed as the name of the result rather than a detailed guide as to how to actually calculate the loss.

In addition to these general guidelines, the type of contract in question is often guiding when damages are calculated. Where cases regarding damages for breach of warranty in an SPA are concerned there seem to be several similarities in the approaches taken by courts and tribunals in Nordic countries and under English law.[13]

Three awards presented below illustrate how this could be done in post M&A disputes; in practice, the loss has to be determined in every single case on the basis of the facts presented.

As the assessment of the evidence is often decisive for the final calculation of the buyer's claim for damages,[14] it is useful to run through the rules for the burden of proof and the standard of proof before looking at the three awards.

[E] The Burden of Proof and the Standard of Proof

In Nordic countries, the burden of proof lies in general with the party making the claim or assertion for both breach of contract and the loss claimed, as it does in English law.[15] However, if the burden of proof requirements are met for breach of contract, causation and loss as such, Nordic case law contains examples of cases in which the compensation was set at the court's discretion.[16]

The general principles of evidence are similar in Swedish, Danish, Norwegian and English law at the outset, although several differences emerge when the more specific rules are examined. There is, however, one main difference that could be relevant: under Norwegian and English law, the standard of proof is the balance of probabilities.[17] This is different under Swedish and Danish law.

In Swedish law, the standard of proof is 'styrkt', which is more than the balance of probabilities, and in principle, this also applies to claims for damages. The Swedish Supreme Court has confirmed that 'styrkt' means a higher standard than the balance of

13. Margrethe Buskerud Christoffersen, *Kjøp og salg av virksomhet: risiko og ansvar for mangler* (Gyldendal akademisk 2008), Part 5 with further references and Harvey McGregor, edited by James Edelman, *McGregor on Damages,* 21st edition (Sweet & Maxwell 2021) pp. 960–961, and *Chitty on Contracts, supra* n. 7, p. 2197.
14. Iversen, *supra* n. 10, p. 166 and Christoffersen, *supra* n. 13, p. 584.
15. Bernhard Gomard & Michael Kistrup, *Civilprocessen,* 8th edition (Karnov Group 2020) p. 564, Per Olof Ekelöf, Henrik Edelstam & Lars Heuman, *Rättegång. Fjärde häftet,* 7th edition (Nordstedts Juridik 2009) pp. 94–95, Jens Edvin A. Skoghøy, *Tvisteløsning,* 3rd edition (Universitetsforlaget 2017) p. 911, Sidney L. Phipson & Hodge M. Malek ed., *Phipson on Evidence*, 20th edition (Sweet & Maxwell 2021) para. 6-06, p. 171.
16. Iversen, *supra* n. 6, p. 270 with further references.
17. English: *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373–374. Norwegian: HR-2019-1225-A [73].

probabilities, but has not ruled exactly how much higher, while Swedish legal scholars state that 'styrkt' is more than likely and the balance of probabilities, but less than evidently and beyond a reasonable doubt.[18]

In Danish law, there is no general standard of proof, and it may vary not only depending on the rule applied but also for different assertions of facts under the same rule. In spite of the fact that the standard of proof can vary, it is seldom solely the balance of probabilities and is thus often greater than this.[19]

The fact that the threshold for the standard of proof in Swedish and Danish law is higher may make it more difficult for claimants to prove claims for damages for breach of contract from the outset under Swedish and Danish law than under Norwegian and English law.

§6.03 THE FSN AWARD

[A] Introduction

In June 2020, an arbitral tribunal seated in Copenhagen rendered an award in a post M&A dispute under the rules and administration of the Danish Institute of Arbitration. The SPA was governed by Danish law and the tribunal consisted of Torstein Iversen, Mads Bryde Andersen and Torben Melchior, all from Denmark.

The case concerned a buyer's claim against the seller for losses caused by alleged breaches of the seller's warranties resulting from the seller's fraud and wilful misconduct in connection with the buyer's acquisition of the entire share capital of a holding company and its subsidiaries ('the target company').

The buyer was awarded damages for the loss as the tribunal found that there had been wilful misconduct by the seller. The loss consisted of the difference between the market value (price paid) without the warranty breaches and what the market value (price) would have been if the warranty breaches had been known prior to the SPA. As it is public knowledge that the successful buyer was FSN Capital, the case was later referred to as the FSN Award, and this term will be used here as well.

[B] The Seller Was Found Liable

Pursuant to the SPA, the seller's responsibility for warranty breaches was covered by warranty and indemnity insurance, so the buyer could only claim directly against the seller in cases of fraud or wilful misconduct.

Before deciding on whether there had been any warranty breaches, the tribunal had to decide who was covered by the exception in the SPA for seller fraud or wilful misconduct. As the seller was a holding company, information was given by other individuals on the seller's behalf, in particular, the target company's top management. The tribunal interpreted the SPA in such a way that wilful misconduct or fraud on the

18. NJA 2013 p. 524 [21] and *Rättegång, supra* n. 15, p. 85.
19. Gomard & Kistrup, *supra* n. 15, p. 560.

part of the target company's top management concerning the information provided by the seller could be considered to be provided either by the seller or on the seller's behalf, and was thus attributable to the seller in both instances.

The tribunal next decided whether there had been any warranty breaches and, if so, whether they involved fraud or wilful misconduct. It concluded in the buyer's favour in both matters. The tribunal found that the financial information provided to the buyer on the seller's behalf had been systematically manipulated through fictitious write-ups and cut-off misstatements,[20] all carried out with the intention that the buyer should not discover the underlying facts.

In addition to the question of loss due to breach of warranty, the tribunal had to decide whether the seller should pay the purchase price adjustment amount to the buyer in accordance with an independent accountant's final decision. Although this second main issue will not be discussed further here, its relation to the loss calculation due to breach of warranty will be commented on.

[C] Causation

The tribunal found that the buyer would not have acquired the target company if it had known about the misstatements due to wilful misconduct, and therefore found that the wilful misconduct as such was the root cause of the buyer's loss. Causation was therefore proven.

Furthermore, the tribunal stated:

> The Tribunal does not agree with the Seller that the Buyer has 'to prove a causal link between each alleged warranty breach and the amount claimed'. It suffices if the Buyer proves a causal link between the Warranty breaches in toto and Buyer's decision to acquire the Group, which resulted in a loss because the Buyer bought at a price exceeding the value.
>
> A different result would be conceivable only if the warranty breaches found to constitute wilful misconduct on the part of the Seller were held to have played a minor or immaterial role for Buyer's decision to enter into the SPA compared to other warranty breaches. This is not the case, and generally speaking, this case does not give rise to other problems of causation than those mentioned above. As a starting point, the Warranty breaches invoked by the Buyer must be seen in their totality in relation to causation.[21]

[D] The Valuation Methods Applied by the Buyer for Its Bid

[1] Introduction

The tribunal found that the buyer had based its bid for the target company on a market value assessment using several valuation methods. The key methods used were

20. Cut-off misstatements could be explained to be misleading information given in relation to the end of relevant accounting periods.
21. Paragraphs 1286–1287, p. 402.

Discounted Cash Flow (DCF) and leveraged buyout (LBO) (long and short exit horizons), whereas the multiples analysis and liquidation value were used as sense-checks and inputs to DCF and LBO. As these methods are relevant not only for this case but also for the two others and for cases of this kind in general, what follows is a brief introduction to the buyer's methods.

[2] Discounted Cash Flow

The DCF method can be explained as a valuation method that is used to estimate an investment's value based on its expected future cash flows. The DCF approach uses estimates of future financial performance in order to estimate free cash flows for future years. In other words, a DCF analysis attempts to calculate the value of an investment today on the basis of projections as to how much money it will generate in the future.[22]

[3] Leveraged Buyout

A LBO may be used if the acquisition of a company is financed by substantial amounts of debt – hence the term 'leveraged'. The cash flow generated by the company acquired is used to finance the acquisition, interest and principal on outstanding debt. An LBO analysis may be used to obtain an LBO market value for a company by analysing the alternative sources of funds in terms of their contribution to the net internal rate of return. This analysis is carried out by the financial buyer to project the enterprise value[23] of a company.[24]

[4] Multiple

The multiple approach is a valuation method in which key figures from the target company's accounts are multiplied using a multiple that is normally based on comparable companies or similar companies within the same industry. To be more specific: to calculate a company's value, a multiple is used on the cash flow, balance sheet or result that reflects the industry's required rate of return, typically based on publicly listed companies' multiples or multiples that could be obtained from transactions.[25]

22. For a more thorough presentation of DCF; *see* Olle Flygt, *Värderingstvister: något om vad som kan göras för att domstolars och skiljenämnders avgöranden ska bli så högkvalitativa som möjligt. Del 1*, Juridisk Tidskrift No. 3 of 2020/2021 pp. 590 ff (pp. 602–607).
23. The enterprise value is in short the total value of the company including equity and liabilities.
24. Victoria Ivashina, Alexey Tuzikov & Abhijit Tagade, *Valuation Techniques in Private Equity: LBO Model* (Harvard Business School Background Note 218-106, June 2018).
25. Christoffersen, *supra* n. 13, p. 70. *See also* section §6.04[D][7] below.

[5] Liquidation

Liquidation valuation is an asset-based method that calculates the amount that the business would receive by selling the assets on the open market. The liquidation value is the net value of a company's assets if the assets are sold or the company goes out of business. The liquidation value is notably different from the book value, as assets with no book value may still have a liquidation value.

[E] Loss Calculation

[1] Introduction

As mentioned above, the buyer had based its bid for the target company on a market value assessment using several valuation methods. To find the enterprise value, these methods were used together via triangulation, i.e., by taking different valuation methods into account and collating the results in order to achieve a more solid basis for the value. The original enterprise value based on the information that the buyer originally possessed was named the *as warranted* situation.

After the warranty breaches were discovered, a similar market value analysis was carried out using several valuation methods, taking into consideration the new information about the actual situation, which was named *as is*.

The claim for damages was calculated on the basis of the difference between the company value *as warranted* and *as is*. The latter was based on an *ex ante* assessment, i.e., the date of the breach, using forecasts, as opposed to taking into consideration later developments in an *ex post* assessment. For the *ex ante* assessment of the *as is* valuation, a key question was what the situation would have been if the *as is* had been known when the bid was made and the price agreed on.[26]

To carry out the *as is* valuation, the target company management revised its estimates of anticipated future performance, termed the revised case, which reflected the management's best estimate of the forecasts it would have made at the time of the acquisition had all the issues identified since the acquisition been known then. On the basis of the revised case, an expert carried out an *as is* market value assessment by using similar valuation methods to those used by the buyer prior to entering into the SPA.

The tribunal stated that the loss claimed by the buyer was essentially the difference between the enterprise value as it was and as it ought to have been had there been no wilful warranty breaches:

26. As this article is included in the Stockholm Arbitration Yearbook it is useful to mention that the *ex ante* and *ex post* reasoning in economic topics was introduced by the Swedish economist Gunnar Myrdal in *Monetary Equilibrium* (William Hodge & Company Ltd. 1939).

> Thus, the value difference is the difference between the Enterprise Value agreed upon at the time of the SPA and paid by the Buyer, and the actual value at the same time, calculated on the basis of reasonably correct information.[27]

The seller does not seem to have disputed the valuation methods applied by the buyer as such. That such an assessment of this difference should be the basis for calculating the compensation appears to have been taken as a matter of course.

[2] The *as Warranted* Valuation

The tribunal found that the enterprise value agreed on reflected the target company's market value had there been no warranty breaches, and emphasised three factors: first, this was the value agreed on between two independent parties with opposing interests; second, the sales process was organised as an auction process with the aim of obtaining the best possible bid from a buyer, and third, there was another buyer in the running almost to the end of the process.

According to the tribunal, this implied that all the known risks should have been factored into the enterprise value, including known unknowns such as uncertainties of results and projections, but not unknown unknowns such as the risk of falling victim to wilful misconduct.

[3] The *As Is* Valuation

For the *as is* valuation, the tribunal stressed that the position in which buyer found itself involved in a situation very different from its acquisition case and referred to it as a turnaround case in which the target company was loss-making. Furthermore, the tribunal stated that the buyer's only option was to replace the company's top management, causing additional disruption.

The tribunal found no grounds for dismissing the revised case prepared by the target company's new management as a basis for the comparison between *as warranted* and *as is*. They also saw no reason for setting aside the explanations given for the revised case, and commented that the seller's objections to the revised case were of a general nature and contained no specific relevant criticism.

Moreover, the tribunal found that the buyer had presented extensive evidence that had been prepared by an expert in support of its proposition that the real enterprise value *as is* of the target company should be calculated on the basis of the revised case. Prior to the acquisition, the buyer had prepared a detailed business case to project the target company's expected performance in future years under the buyers' expected ownership period, including key financial statement items such as revenue, costs, capital expenditures, net working capital etc. Following the acquisition, the buyer made a revised business case in which the expected performance in future years, including key financial statement items such as revenue, costs, capital expenditures,

27. Paragraph 1247 on p. 394.

net working capital etc. were adjusted for the information discovered by the buyer subsequent to the closing ('the revised case').

In the tribunal's opinion, the severe setbacks regarding revenue and EBITDA[28] significantly reduced the enterprise value. In addition, the tribunal found that the seller's objections were mostly of a general nature and had not convinced the tribunal that the loss was overstated. Accordingly, the award did not focus on the later developments of the target company's when calculating the loss.

[4] The Asserted Overlap with the Purchase Price Adjustment

The seller had asserted that the above-mentioned purchase price adjustment decision made by the independent accountant overlapped with the buyer's claim for damages. To deal with this issue, the tribunal referred to the report and to testimony from the buyer's expert. The expert submitted that when calculating the market valuation, using mainly the DCF model and the LBO model, which are both forward-looking, he had relied on the target company's future expected cash flows and had calculated the target company's enterprise value as the present value of these future cash flows. According to the expert, the revised case represented these future estimated cash flows. However, the purchase price adjustment in accordance with the Purchase Price Calculation (PPC) neither measures the target's market value nor relies on future expected cash flows. The PPC is a pure accounting-based calculation of the seller's equity value given several items on an agreed closing balance sheet per an agreed balance sheet date, and is, therefore, a result of past financial performance. The tribunal thus found that there was no overlap between the buyer's claim no. 1 (damages for loss incurred by warranty breaches) and claim no. 2 (calculation of the final purchase price).

[5] Should the Amount Paid for W&I Insurance Be Deducted?

On the basis of the above considerations, the tribunal concluded that the buyer had documented a total loss of EUR 103,700,000 as claimed. The buyer had received EUR 50 million from the warranty & indemnity (W&I) insurer as part of a settlement.

W&I insurance has become a familiar feature of M&A transactions in recent years. Although it is usually taken out by the buyer, it is frequently proposed by the seller, who often wants a clean exit, including removing/reducing the need to hold part of the purchase price in escrow, or for the seller to retain large amounts of cash to cover post-closing liability.

The parties in the FSN case disagreed over the consequences of the insurer's payment for the buyer's damages claim against the seller. The buyer submitted that neither the SPA nor the W&I insurance policy limited the seller's liability in the event of fraud or wilful misconduct. The seller submitted that the SPA rules stated that any amount paid out by the W&I insurer must be subtracted when calculating the loss as the buyer cannot claim compensation for the same loss twice, and that these SPA

28. Earnings Before Interest, Taxes, Depreciation and Amortization.

provisions were no limitation on liability that was not applicable in cases of fraud/wilful misconduct.

The tribunal agreed with the seller that the SPA provisions were not limitations on the seller's liability for loss. Hence, pursuant to the SPA, the amount of insurance paid to the buyer should be deducted when calculating the loss. As a consequence, the EUR 50 million paid by the W&I insurer reduced the loss that the buyer could claim from the seller to EUR 53,700,000.

[6] Calculation of Interest

The tribunal found that the buyer also was entitled to a statutory interest in accordance with Danish law. It could be mentioned that the seller had not objected to the buyer's interest claims as such.

§6.04 THE OCC AWARD

[A] Introduction

In April 2021, an arbitral tribunal seated in Oslo rendered an award in a post M&A dispute under the rules and administration of the Oslo Chamber of Commerce (OCC). The SPA was governed by Norwegian law. The tribunal consisted of Torben Melchior (Denmark), Axel Calissendorff (Sweden) and Tore Schei (Norway), with Schei as chair. Like many such hearings during COVID-19, the main hearing in February 2021 was held virtually.

The case concerned a claim under W&I insurance for warranty breaches. An investment company had acquired all shares in the target company through a firm which was established for the purpose of acquiring and owning the shares. The buyer entered into an SPA with the sellers of the target company and signed a W&I insurance policy as part of the transaction. Pursuant to the SPA, the claims had to be submitted against the underlying insurers, as only claims due to fraud or wilful misconduct on the seller's part could allow claims against the seller. That was not the case here, and the underlying insurers were thus the respondents in the case.

The buyer was awarded damages for its loss with an amount equal to the limitation of liability in the W&I insurance of NOK 250 million,[29] less payments already made by the respondents. The tribunal's approach to calculating loss in this case is of wider interest. In addition to their legal analyses, the tribunal also referred to other interesting sources for what is a set market approach in determining losses of the type which applies in this case. The tribunal found reason to rely on a DCF approach, and this analysis was held against market-based multiples on acquisitions of other companies when determining the loss to the buyer.

29. Equal to approximately EUR 26 million as per 24 March 2022.

The award was rendered in Norwegian, so all the quotes are from an unofficial translation of the award. The original statements have been included in the footnotes for Nordic readers.

[B] The Respondents Were Found Liable

The SPA included warranties for the correctness of the target company's audited accounts for 2016 and the unaudited accounts for Q1 in 2017. During the arbitration, the respondents acknowledged a warranty breach for the 2016 accounts, while still disputing the other alleged warranty breach. The tribunal found both warranties had been breached.

Furthermore, it was not disputed that losses caused by the warranty breach were covered by the W&I insurance and so the dispute mainly concerned the scope of the loss suffered by the claimant, for which the respondents were liable under the insurance agreement.

[C] Causation

The tribunal found the causal requirement to be fulfilled. The warranty breaches were the direct reason why the bid was submitted and the agreement was entered into with no knowledge of the accounting errors that constituted the warranty breaches. According to the tribunal, there could be no doubt that the loss could be traced back to the fact that a higher bid was submitted than there was a basis for was foreseeable or adequate. The tribunal found that this is exactly what happens when a company is sold with a warranty stating that it is in better financial condition than it actually is.

[D] Loss Calculation

[1] The Parties' Main Arguments

The parties agreed that the buyer was entitled to compensation for the positive contractual interest, and that the buyer should be in the same financial situation as it would have been if the terms of the warranty had been fulfilled. However, the parties disagreed on what this actually meant in practice.

The parties agreed that the target company's market value matched the purchase price. The dispute concerned the reduction in value in the *as is* state, and whether the loss should be calculated on the basis of a difference between *as warranted* and *as is* for the target company as a whole.

The buyer argued that the loss should be calculated on the basis of the difference between the target company's *as warranted* and *as is* value. The buyer submitted that three silver bullet points were central to this calculation. First, a reasonable buyer will take an *ex ante* perspective, i.e., assess the values on the basis of information provided at the time of purchase and do the calculations on the basis of recognised methods for

valuing companies in connection with acquisitions. Second, a reasonable buyer will assess the effect of financial errors affected by the warranties on the company as a whole. Third, the starting point for assessing the company *as is* must be the valuation method that the buyer actually used as a basis for the purchase.

The respondents submitted that the principle of positive contractual interest did not provide any guidance on a specific valuation method. The respondents submitted that the buyer's valuation method as the starting point, as asserted by the buyer, had no legal or factual basis as the buyer had mentioned several valuation methods in correspondence to the seller prior to concluding the SPA. The analyses and assessments in the recommendation to the investment committee were also based on various methods. Moreover, the respondents submitted that the lack of EBITDA and revenue should be assessed (and dealt with) in isolation, and that the target company as a whole should not be considered. The respondents also maintained that there was no causation between the warranty breaches concerning accounts and revenue from future customers, and submitted that much of the buyer's claim was the future loss that was not covered by the warranty breaches.

[2] The Tribunal's General Introductory Remarks

After confirming that the SPA did not stipulate a particular loss calculation method, the tribunal stated: 'However, this does not mean that, inter alia, the nature of the purchase and the breach cannot indicate that a correct calculation presupposes a specific method.'[30]

As regards the SPA's regulation that compensation was the sole remedy, the tribunal stated:

> It follows from Clause 10.1 d that compensation is the sole remedy that can be claimed. This also means that price reductions cannot be claimed. However, as the Tribunal will return to, compensation and price reductions may in some situations lie fairly close to each other and almost coincide both in justification and scope. This is not in itself sufficient to exclude such a compensation calculation on the basis of Clause 10.1d. The key is that the loss must be attributable to the breach of the warranties in Clauses 8.5 and 8.6, which triggers the claim for compensation – i.e. that there is causation – and also that the condition of foreseeability/adequacy is fulfilled.[31]

The tribunal emphasised that the buyer should be placed in the same financial position as it would have been in without the breach of warranty, stating:

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30. Page 31, original on p. 33: *'Men det er ikke ensbetydende med at ikke blant annet karakteren av kjøpet og misligholdet kan tilsi at en korrekt beregning forutsetter en bestemt metode.'*
31. Page 32, original on p. 33: *'Det følger av 10.1 d at erstatning er den eneste misligholdsvirkningen som kan gjøres gjeldende. Det vil også si at prisavslag ikke kan kreves. Men som retten kommer tilbake til, vil erstatning og prisavslag i noen situasjoner kunne ligge helt opp til hverandre og nærmest falle sammen både i begrunnelse og i omfang. Det er i seg selv ikke nok til ut fra 10.1 d å utelukke en slik erstatningsberegning. Det sentrale er at tapet må kunne føres tilbake til bruddet på garantiene i 8.5 og 8.6 som utløser kravet på erstatning – altså at det er årsakssammenheng – og også at vilkåret om påregnelighet/adekvans er oppfylt.'*

> The breach of warranty has led to the Buyer not having the opportunity to calculate and offer a price that reflected the real state of the company. This has obviously led to the Buyer having paid a higher price than it would have been willing to if it had received the correct information. This higher price is the positive contractual interest in this case.[32]

The tribunal stressed that the higher price caused by the breach of the warranties was precisely what was central in the case: the difference between the value of the company *as warranted* and *as is*. According to the tribunal, this was the difference between what was actually offered and agreed in the SPA and what would have been offered with knowledge of the warranty breaches. The tribunal then stated:

> It goes without saying that the first value ('as warranted') must be an ex ante assessment. And this is not disputed. It is agreed that the 'as warranted' value is what was paid, MNOK [amount]. But it is equally clear that also 'as is' must be an ex ante assessment. The question is: What would the Buyer have paid for the company if the incorrect elements in the accounts that constituted the breaches of the warranty had been clarified before the conclusion of the agreement. It is precisely what the Buyer would have done at this point that should be considered. What would the buyer have done then if he had had this information then? Subsequent information about other matters is not suited to shed light on this.[33]

After referring to legal theory and some case law, including the FSN case, the tribunal stated: *'A loss calculation based on the difference* ex ante *between the value of the Company "as warranted" and "as is" has, as the Tribunal has explained, clear support in the background rules of law.'*[34]

The tribunal also remarked:

> Although it cannot be considered a 'source of law', it is also important that the perception among leading academic economists highlights calculating the difference between the value of the company 'as warranted' and 'as is' as the correct method for calculating the loss. The assessment must be made ex ante, and the company values must be determined on the basis of accepted ways of determining the value – first and foremost DCF calculation held against the use of market-based multiples. The Tribunal refers here to the explanation – in writing and at the main hearing – from Professor [name].[35]

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32. Page 33, original on p. 34: *'Garantibruddet har ført til at Kjøper ikke fikk anledning til å til å beregne og tilby en pris som reflekterte den reelle tilstanden til selskapet. Dette har åpenbart ført til at Kjøper har betalt en høyere pris enn kjøper ved riktig informasjon ville vært villig til. Denne høyere prisen er den positive kontraktsinteressen i denne saken.'*
33. Page 33, original on p. 34: *'Det sier seg selv at det første må være en ex ante vurdering. Det er heller ikke omstridt. Det er enighet om at as warranted-verdien er det som ble betalt, MNOK [beløp]. Men det er like klart at også "as is" må være en ex ante vurdering. Spørsmålet er: Hva ville Kjøper betalt for selskapet dersom de uriktige elementene i regnskapet som utgjorde garantibruddene, var blitt klarlagt før avtaleinngåelsen. Det er nettopp hva Kjøper ville gjort på dette tidspunktet som skal vurderes. Hva ville kjøper gjort den gang om han da hadde hatt denne informasjonen? Etterfølgende informasjon om andre forhold er ikke egnet til å kaste lys over det.'*
34. Page 37, original on p. 38: *'En tapsberegning ut fra differansen ex ante mellom verdien av Selskapet "as warranted" og "as is" har, som retten har redegjort for, klar støtte i bakgrunnsretten.'*
35. Page 36, original on p. 36: '*Selv om det ikke kan betraktes som en "rettskilde", har det også betydning at oppfatningen blant ledende akademiske økonomer fremhever en differanse mellom*

[3] The *as Warranted* Valuation

The parties agreed that the target company's market value matched the purchase price. Among other observations, the tribunal stated the following regarding the valuation of the target company:

> The buyer based the bid of MNOK [amount] on a DCF analysis compared to market-based multiples taken from other known acquisitions. The Arbitral Tribunal takes as a starting point that this is a standard way of valuing companies. The Tribunal refers in this regard to the statement from the expert witness [name] and also to the witness statements of the representatives of [Parent].[36]

[4] The *As Is* Valuation

With regard to the disputed *as is* valuation, the tribunal stated, *inter alia*, the following:

> As pointed out, we know what kind of methods the calculated offer and purchase price were based on. It is then, as the Tribunal has also pointed out, a natural starting point to use similar methods as a basis for calculating the value of [Target] 'as is'. We have no basis for assuming that the approach would have been different. Such a valuation 'as is' also has clear support in theory and practice.[37]

Moreover, the tribunal underlined:

> It is not a subjective test that shall be performed in determining the difference between 'as warranted' and 'as is'. It must be considered how an ordinary reasonable buyer would act. This is not a big point in this case. [Parent] based its bid on a general and professional procedure for company acquisitions, and must be presumed to have acted reasonably and rationally in a determination 'as is'.[38]

The respondents had argued that the negotiations and the situation up to the conclusion of the SPA indicated that it was not tenable to carry out the loss calculation

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verdien av selskapet "as warranted" og "as is" som den korrekte metoden for tapsberegningen. Vurderingen må skje ex ante, og selskapsverdiene må fastlegges ut fra aksepterte måter å fastsette verdien på – først og fremst DCF- beregning holdt opp mot anvendelse av markedsbaserte multipler. Retten viser her til forklaringen – skriftlig og under hovedforhandlingen – fra professor [navn].'

36. Page 33, original on p. 34: *'Kjøper baserte sitt bud på NOK [beløp] på en DCF-analyse holdt opp mot markedsbaserte multipler hentet ut fra andre kjente oppkjøp. Voldgiftsretten legger til grunn at dette er en standard måte å verdsette selskaper på. Retten viser på dette punkt til forklaringen fra ekspertvitnet professor [name] og også til vitneforklaringene fra representantene for [mor].'*
37. Page 36, original on p. 37: *'Som påpekt vet vi hva slags metoder kjøper beregnet tilbuds- og kjøpsprisen med grunnlag i. Det er da, som retten også har vært inne på, et naturlig utgangspunkt å legge tilsvarende metoder til grunn ved beregningen av verdien av [target] "as is". Vi har ikke grunnlag for å anta at tilnærmingen ville vært annerledes. En slik verdsettelse "as is" har også klar støtte i teori og praksis.'*
38. Page 33, original on p. 34: *'Det er ikke en subjektiv test som skal foretas ved differansefastleggelsen mellom "as warranted" og "as is". Det må ses hen til hvordan en alminnelig fornuftig kjøper ville handlet. Noe stort poeng i denne saken er ikke dette. [Mor] baserte sitt bud på en alminnelig og profesjonell fremgangsmåte ved selskapsoppkjøp, og må forutsettes å ville ha opptrådt fornuftig og rasjonelt ved en fastsettelse "as is".'*

on the basis of the difference between *as warranted* and *as is*. However, the tribunal stated:

> The Arbitral Tribunal cannot see that these objections from [Insurer] are tenable. A loss calculation based on the difference ex ante between the value of the Company 'as warranted' and 'as is' has, as the Tribunal has explained, clear support in the background rules of law. The fact that the parties have not agreed that the valuation shall take place in this way, or that it has not been pointed out during the negotiations between them, is not an argument against the background rules of law being applied on this point. The significance of the background rules of law is precisely that it is applied where the parties have not expressly or as a background assumption resolved the issue.[39]

As regards the respondents' arguments concerning future profit loss, the tribunal stated:

> As the Arbitral Tribunal will describe when addressing the specific loss calculation, the 'as is' value will be determined by discounting future revenue streams. [Insurer] has claimed that this would be in conflict with Clause X.XX of the SPA regarding 'No other Warranties'. This position is not tenable. The fact that budgets, estimates, prospectuses, etc. cannot be regarded as warrantied, does not mean that one must disregard future assessments that appear to be probable based on moderate and reasonable and sensible considerations.
>
> The fact that there is discounting – a calculation of the present value of future revenue streams – is also not, as [Insurer] has claimed, the same as claiming compensation for future lost profits. This is well illustrated when looking at the 'as warranted' value and how it was determined. There, calculations were made of future revenue streams. The present value of these were, through discounting, used to find the value of [Target] when the purchase was to be completed. It is exactly the same procedure that is followed in determining the 'as is' value. One seeks to calculate the value that [Target] would have had with information about the errors in the warranted accounts. As with the determination of the 'as warranted' value, overall cash flows are estimated, based on the other conditions at the time the contract is entered into. Through discounting, the value of [Target] 'as is' is then determined at the time of entering into the SPA.[40]

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39. Page 37, original on p. 38: '*Voldgiftsretten kan ikke se at disse innvendingene fra [forsikrer] er holdbare. En tapsberegning ut fra differansen ex ante mellom verdien av Selskapet "as warranted" og "as is" har, som retten har redegjort for, klar støtte i bakgrunnsretten. At partene ikke har avtalt at verdsettelsen skal skje på denne måten, eller at det ikke har vært trukket frem under forhandlingene mellom dem, er ikke noe argument mot at bakgrunnsretten på dette punkt kommer til anvendelse. Bakgrunnsrettens betydning er nettopp at den får anvendelse der partene ikke uttrykkelig eller forutsetningsvis har løst spørsmålet.*'
40. Page 36, original on p. 37: '*Som voldgiftsretten kommer til ved den konkrete tapsberegningen, vil "as is"-verdien fastlegges ved diskontering av fremtidige inntektsstrømmer. [Forsikrer] har hevdet at dette vil være i strid med SPA X.XX om "No other Warranties". Det er ikke holdbart. At ikke budsjetter, estimater, prospekter etc. kan ses på som garantier, kan ikke være ensbetydende med at man må se bort fra fremtidsvurderinger som fremstår som sannsynlige ut fra nøkterne og rimelig og fornuftige betraktninger.*
    At det skjer en diskontering – en beregning av nåtidsverdien av fremtidige inntektsstrømmer – er heller ikke, som [forsikrer] har hevdet, det samme som at man krever erstatning for fremtidstap. Det illustreres godt når man ser på "as warranted"-verdien og hvordan den ble fastlagt. Der ble det foretatt beregninger over fremtidige inntektsstrømmer. Nåtidsverdien av disse ble, gjennom diskontering, brukt for å finne verdien av [target] da kjøpet skulle gjennomføres. Det

[5] Mitigation in Particular

Another interesting statement from the tribunal concerned the buyer's alleged lack of mitigation:

> [Insurer]'s views that the Buyer has not fulfilled its loss mitigation obligation are, in the Arbitral Tribunal's view, irrelevant to the method of compensation to be used. The loss that the Buyer is entitled to have compensated is the loss the Buyer has suffered by not being able to bid and being able to conclude the contract with knowledge of the deviation from the warranted accounts, held up against what the Buyer actually paid for [Target]. Here, the Buyer has no loss to mitigate by taking measures. Any 'mitigation' will result in the Buyer not completely receiving its positive contractual interest.[41]

[6] The Specific Loss Calculation and Its Test Intensity

As regards the specific loss calculation, the tribunal made some general remarks on its test intensity:

> [Claimant] has emphasised that the Tribunal is composed of legal professionals. This is where the Tribunal's competence lies. The Tribunal is not composed of experts in valuation of companies. The Tribunal of course agrees with this, and notes that the composition of the Arbitral Tribunal is the choice of the parties. This provides some guidelines for the loss assessment. The Tribunal must – without any reservations – test whether the method used in the loss calculation fully complies with the legal framework for the valuation that the Tribunal has described above. Both parties have used financial experts for their assessments and estimates of the loss that they believe there is a basis for compensating. The Tribunal must therefore fully test whether the assessments and estimates are based on the correct legal principles. However, the Tribunal must exercise caution in assessing issues of a factual nature, where it is obviously the experts who have the greatest competence. The parties do not challenge the 'mathematics' of the experts' calculations. But there are, as the Tribunal will return to, assumptions in these calculations that are disputed. The Tribunal cannot refrain from trying such objections, but must exercise caution in the review where specialized financial insight is required.[42]

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er akkurat den samme fremgangsmåten som følges ved fastleggelsen av "as is"-verdien. Man søker å beregne den verdien [target] ville fått med opplysninger om feilene ved de garanterte regnskapene. Som ved fastleggelsen av "as warranted"-verdien, anslår man, basert på forhold ellers ved kontraktsinngåelsen, fremtidige kontantstrømmer. Gjennom diskontering, bestemmes så verdien av [target] "as is" på tidspunktet for inngåelsen av SPA.'

41. Pages 37–38, original on p. 38: *'[Forsikrers] synspunkter om at Kjøper ikke har oppfylt sin tapsbegrensningsplikt – mitigation – er, etter voldgiftsrettens syn, uten relevans for den erstatningsmetoden som skal anvendes. Det tapet som Kjøper har krav på å få erstattet, er det tapet Kjøper har lidt ved ikke å få by og kunne slutte kontrakten med kunnskap om avviket fra de garanterte regnskapene holdt opp mot hva Kjøper faktisk betalte for [target]. Her er det ikke noe tap å begrense ved tiltak fra Kjøpers side. Enhver "begrensning" vil føre til at Kjøper ikke fullt ut får oppfylt sin positive kontraktsinteresse.'*
42. Page 38, original on pp. 38–39: *'[Kjøper] har fremhevet at retten er sammensatt av jurister. Det er der rettens kompetanse ligger. Retten er ikke sammensatt av eksperter i verdivurdering av*

After making this general remark, the tribunal assessed the parties' submissions concerning the specific loss calculation. Although it is not possible to go into the details here, the tribunal found that the respondents' different loss calculations were based on valuing what in the case has been characterised as the gap – what was missing, and then first and foremost in subscriptions, and therefore not the company as a whole. In the tribunal's view, this was contrary to what the correct legal starting point in the valuation should be, as commented above.

However, the tribunal concluded that the buyer's expert's '*analyses and assessments of, inter alia, prospects for growth in revenue, EBITDA and EBITDA margins appear to be professionally well-founded, and they are rooted in the situation at the time of purchase*'.[43]

[7] Multiple in Particular

Central to the buyer's valuation of the target company before the SPA, the value *as warranted*, was a DCF analysis. In addition, to ensure the quality of the valuation, a further valuation was carried out on the basis of a market-based multiples method. The tribunal described the procedure for a marked-based multiples method in five steps, as follows:

> (1) Find comparable companies, (2) Find economic indicators that are relevant in determining the values of these, (3) For each company find the value of these indicators and the amount the company was sold for, (4) Based on the selling price divided by the relevant indicator, determine typical multiples and (5) Based on the same indicator and the typical multiples make an estimate of the value of the relevant purchase object.[44]

It was not disputed that the buyer's expert analysis related to the loss calculation on the basis of a market-based multiples method had followed the method used by the buyer for its analyses and calculations. The tribunal found that the market-based

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selskaper. Dette er retten selvfølgelig enig i, og bemerker at sammensetningen av voldgiftsretten er partenes valg. Dette gir noen føringer for tapsvurderingen. Retten må – uten noen reservasjoner- prøve om den metoden som anvendes ved tapsberegningen fullt ut samsvarer med de rettslige rammer for verdivurderingen som retten har beskrevet foran. Begge parter har benyttet økonomiske eksperter for sine vurderinger og anslag over det tapet de mener det er grunnlag for å erstatte. Her må altså prøve fullt ut om vurderingene og anslagene er basert på riktige rettslige prinsipper. Men retten må vise forsiktighet i prøving av temaer av faktisk art, hvor det åpenbart er ekspertene som har den største kompetansen. "Matematikken" i ekspertenes beregninger er ikke angrepet. Men det er, som retten kommer tilbake til, forutsetninger – assumptions – i disse beregningene som er bestridt. Retten kan ikke avstå fra å prøve slike innvendinger, men må vise forsiktighet ved prøvingen der det kreves spesialisert økonomisk innsikt.'

43. Page 43, original on p. 46: '*analyser og vurderinger av blant annet utsikter for vekst i revenue, EBITDA og EBITDA-marginer som faglig godt begrunnet, og de er forankret i forholdene på kjøpstidspunktet.*'
44. Page 46, original on p. 48: '*(1) Finne sammenlignbare selskaper, (2) Finne økonomiske indikatorer som er relevante ved fastleggelsen av verdiene på disse, (3) For hvert selskap finne verdien på disse indikatorene og den sum selskapet ble solgt for, (4) Basert på salgspris delt på den relevante indikatoren, fastlegge en typisk multippel og (5) Basert på den den samme indikatoren og den typiske multippel foreta et anslag over verdien på det aktuelle kjøpsobjektet.*'

multiples method supported the tenability of the DCF method's estimate of NOK 245 million.

[8] Risk Premium in Particular

There was a separate question as to whether there was any basis for a markup on a loss amount from a risk point of view – damages for unknown unknowns – a risk premium.

The buyer argued that in a case like this, someone who buys a company whose revenue and EBITDA are incorrect will not only base their offer on correct figures, but their offer will also take into account the possibility that the company may have other weaknesses besides the fact that the actual figures for revenue and EBITDA are different from those shown in the accounts. The buyer submitted that the risk premium should be calculated by marking up the rate for the cost of capital in the DCF analysis by 2%. This led to an additional claim of MNOK 298 on top of MNOK 245, MNOK 543 in total.

The respondents argued that there was no basis for a risk premium, holding that if there were, this would involve double compensation, while also stressing that any risk premium would be affected by an adequacy limitation. The respondents also held that in any event the claim was significantly exaggerated and could be a question of MNOK 5–10 million at most.

The tribunal made reference to the sources of law invoked by the buyer, including legal theory from Johnny Herre and statements from the buyer's expert, concluding as follows:

> In the Arbitral Tribunal's view, it seems probable that a reasonably rational and reasonable buyer will make a deduction for such a risk. That this will have its cause in the breach of warranty seems clear. It is also difficult to see other than that such a loss is foreseeable/adequate when it is in line with reasonable behaviour from a buyer.[45]

As regards the amount of the risk premium, the tribunal stated:

> The Tribunal has a weak factual basis for assessing the size of such a risk deduction. In this regard, the Tribunal notes that it is precisely the uncertainty at the time of purchase that is to be considered. It is no question of giving an estimate of what it will cost to 'fix' the accounting system so that overstatement is avoided for the future. It would be to draw in ex post knowledge.
>
> The Tribunal finds that it has not been proven that a risk loss, and thereby a risk addition in the compensation, can amount to MNOK 298 or an amount close to it. On the other hand, an addition, given the company's size and business,

45. Page 45, original on p. 48: *'Etter voldgiftsrettens syn fremstår det som sannsynlig at en rimelig rasjonell og fornuftig kjøper vil gjøre et fradrag for en slik risiko. At dette vil ha sin årsak i garantibruddet synes klart. Det er også vanskelig å se annet enn at et slikt tap er påregnelig/adekvat når det er i tråd med fornuftig opptreden fra en kjøper.'*

> cannot constitute a completely trivial amount. In the absence of further evidence, the Tribunal assumes that the risk amounts to at least MNOK 5.[46]

As observant readers will already have noticed, the total amount of MNOK 250 would accordingly be the same as the total limitation of liability for the insurer according to the W&I insurance agreement.

[9] Calculation of Interest

It should be noted that the award also includes very thorough handling of the interest part of the claim, which is governed by the Norwegian Insurance Contracts Act, in which the parties disputed several legal and factual issues. This part of the award accounts for twenty-six of the eighty-one pages. Pursuant to the Norwegian Insurance Contract Act, the rate set out in the Norwegian Late Payment Act should apply, which was between 8% and 9.5% in the applicable period. Thus, the amount of interest was in the range of NOK 50 million alone.

§6.05 THE AD HOC AWARD

[A] Introduction

In spring 2021, an arbitral tribunal seated in Oslo rendered an award in a post M&A dispute in an ad hoc arbitration. The SPA was governed by Norwegian law and the tribunal consisted of Anders Arnkværn (Norway), Stig Even Jakobsen (Norway) and Johnny Herre (Sweden), with Herre as chair.

The case concerned a claim under W&I insurance for warranty breaches. The buyer had entered into the SPA with the seller of the target company and had signed a W&I insurance policy replacing the seller's liability for breaches of its warranties as part of the transaction. Pursuant to the SPA, the claims had to be submitted against the underlying insurance companies, which were thus the respondents in the case.

The tribunal found warranty breaches and the buyer was duly awarded damages for its loss. As in the two above awards, the tribunal's handling of loss calculation, including its general remarks concerning the valuation methods, is of wider interest. In this case, the tribunal found reason to rely on a valuation-based approach when calculating the loss to the buyer.

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46. Page 45, original on p. 48: '*Retten har et svakt faktisk grunnlag for å vurdere størrelsen av et slikt fradrag for risiko. I denne forbindelse minner retten om at det nettopp er usikkerheten på kjøpstidspunktet som skal vurderes. Det er ikke spørsmål om å gi et anslag over hva det vil koste å "fikse" regnskapssystemet slik at overstatement unngås for fremtiden. Det ville være å trekke inn ex post kunnskap.*

Retten finner det ikke godtgjort at et risk-tap, og derved et risk-tillegg i erstatningen, kan utgjøre MNOK 298 eller et beløp i nærheten av det. På den annen side kan et tillegg, hensett til selskapets størrelse og virksomhet, ikke utgjøre et helt bagatellmessig beløp. I mangel av nærmere holdepunkter legger retten til grunn at risikoen iallfall utgjør MNOK 5.'

[B] The Respondents Were Found Liable

The buyer's claim was based on the target's alleged underreporting of software licenses, where the licence costs had not been paid. The respondents disputed the allegation, relying, *inter alia,* on an audit carried out by the licensor which did not support the buyer's claim. The tribunal found that there had been underreporting on the part of the target in 2015 and that this constituted a breach of several of the warranties provided by the seller and insured by the respondents.

[C] Causation

The tribunal found the causal requirement to be fulfilled as the underreporting was the cause of the buyer's receiving less than the value *as warranted*, without making causation a separate issue.

[D] Loss Calculation

[1] The Tribunal's General Introductory Remarks

The parties mainly agreed that if there had been a breach of warranty, the resulting loss was the delta between the target company's value with and without the breach. However, the parties disagreed on how the delta value should be determined.

The SPA defined loss as any reasonably foreseeable loss, liability, claim, damage, cost, or expense. The tribunal pointed out: '*The meaning of these different terms is not further elaborated on in the agreement and must thus be resolved and established by an interpretation of the SPA as a whole with due regard to Norwegian background law.*'[47] After reviewing the SPA and the insurance policy, the tribunal further stated: '*As the term Loss is not defined in any further detail than described above and there are no other interpretative guidelines in the agreements, the further assessment of losses Claimant may claim compensation for and the calculation of such losses must be determined on the basis of the background law.*'[48]

The tribunal went on to state that the '*starting point in Norwegian law is that an aggrieved party is entitled to damages providing full compensation for any financial harm suffered as a result of the breach of contract*',[49] also asserting:

> The starting point for assessing such compensation is to compare the effects of what has happened with what would have happened if the contract was performed as contracted. It follows from this basic principle that the aggrieved party should not through the compensation be placed in a better position than if the contract had been rightfully performed.[50]

47. Paragraph 135 on p. 36.
48. Paragraph 146 on pp. 37–38.
49. Paragraph 152 on p. 39.
50. Paragraph 153 on p. 39.

As regards loss calculation, the tribunal, *inter alia,* made the following general remarks in the introduction:

> 'There are different ways to calculate a loss. These differences are mainly due to differences in the factual situations at hand. In some cases, the aggrieved party may also choose the method. §§ 67–70 of the Norwegian Sale of Goods Act provide some guidance for such calculation according to Norwegian law. However, these provisions do not provide the full picture.'[51]
>
> 'The SPA does not, as stated, provide any clear guidance on what kind of consequences that could constitute a Loss to be compensated under the SPA. The starting point must therefore be that the terms used in the SPA and in the insurance policy correspond to applicable law, i.e., general principles of Norwegian contract law (first and foremost the Norwegian Sale of Goods Act, applicable for all other sales contracts than sales of real estate and consumer sales). It is clear that compensation for the difference in market value is a compensable loss under Norwegian law.
>
> As stated above, Section [x.xx] of the SPA stipulates that compensation for Loss pursuant to Section [x.xx] excludes any other claim for damages and a claim for "reduction of the Purchase Price". This provision could not be interpreted to prevent Claimant from claiming damages calculated on the basis of the market value difference. As stated, these remedies are to be regarded as two distinct remedies with differing purposes. Thus, the exception in Section [x.xx] could not prevent and does not influence the assessment of what Claimant may be entitled to receive. If the insurance policy was intended to exclude such losses pursuant to Norwegian law as well, Respondents should have specified this in the insurance policy.'[52]

[2] The Choice of Valuation Methods

The tribunal emphasised that the buyer had '*chosen*' to claim the difference between the target's value *as warranted* (i.e., the value of the target shares without any breaches) and the value *as is* (i.e., as delivered to the buyer).

After underlining the point that the main problem is to assess an asset's value *as is*, i.e., in the non-conforming state, the tribunal made the following general remarks regarding the choice of valuation methods:

> In the marketplace there are certain more or less accepted valuation methods to be used for different kinds of assets. Thus, when the task is to assess the market value of assets in a non-conforming state, certain methods are applied by market participants and also in courts and by arbitral proceedings.
>
> The same is true for the valuation of the asset class shares or companies. However, all these methods are based upon assumptions. They only provide more or less strong indications of the value of the company. Thus, it is generally accepted that no method or combination of methods provide an objective value, i.e. a value that would be accepted by all market participants. Instead, each market participant would value a company in its own way based upon propensity to

51. Paragraph 155 on p. 39.
52. Paragraphs 161–162 on pp. 40–41.

> accept risk and the expectations regarding the future in such complex matters as price and cost development, micro and macroeconomic development etc.
>
> However, the methods for valuation of a company developed, refined and generally used are the best methods available also for a damages calculation, where the purpose is to establish with reasonable certainty the actual loss caused by one or several breaches of warranty.
>
> In general terms there are, in cases where a breach of warranty has an effect on the income generating capacity, two groups of valuation methods used for the assessment. These are methods based upon an income approach and methods based upon a market approach. The former estimates the value of the company by calculating the present value of anticipated benefits in the future, whereas in the market approach the company as delivered (i.e. with the breaches of warranties) is compared to similar business, business ownership interest and securities sold in the market. The most commonly used income-based method is the discounted cash flow (DCF) method, used by both [expert] and [expert], however, in different ways. Also such methods as the adjusted present value and the capitalized cash flow could be used. Among the market approach methods used, comparisons with publicly traded multiples, transaction multiples and stock prices and implicit trading multiples of such quoted companies could be mentioned.
>
> As no method or approach provides a clear answer, most calculations of the value of a company (the 'EV' or 'enterprise value') are based upon the application of several methods and a final appraisal of a reasonable market value. Such an approach also seems to be in line with recommended generally accepted valuation principles. As this is the basis for valuations in the marketplace forming the basis for real transactions, such an approach should also be accepted and preferred when calculating damages for a warranty breach.[53]

[3] The *as Warranted* Valuation

With regard to the value had there been no breaches, where the value was not disputed, the tribunal stressed that '*the agreed value is a strong indication of the market value of [target] at the time*'.[54] The tribunal pointed out that the buyer chose to pay the enterprise value in an auction process that involved other prospective buyers. As these competitive auction processes are frequently used by professional company sellers in order to calculate the company's market value, and as the buyers participating in these processes are primarily professional company buyers, this indicated that the market value was the agreed enterprise value. In addition, the tribunal stated:

> Furthermore, the legal position in Norwegian law, as well as in Scandinavian law in general, is that there is a rather strong presumption, both in price reduction calculations and in damages calculations based upon value difference, that the agreed price between the parties equals the market value. Already for these reasons, the Tribunal finds that MNOK [amount] could be used as the basis for a value difference calculation.[55]

53. Paragraphs 261–265 on pp. 61–62.
54. Paragraph 266 on p. 62.
55. Paragraph 267 on p. 62.

[4] The *As Is* Valuation

The tribunal's next task was to assess the target's value at the time of the transaction if the true license costs had been reported or disclosed to the buyer prior to signing the SPA.

The buyer submitted that this value would have been MNOK 170 lower. This amount was reached by using different valuation methods and thus not only the EV/EBIT multiple. One such method was the application of the DCF approach, which in the view of the buyer's expert would have had a negative effect amounting to MNOK 198 on the enterprise value. The buyer's expert had also used the implicit EV multiples of the deal and applied them giving a range of values. As the buyer's expert deemed the degree of uncertainty regarding the business's development after 2017 to be significantly higher than it had been for 2015–2017, the expert relied more on the result of the implicit multiples analysis than on the DCF analysis. Furthermore, the buyer's expert's view was that these implicit multiples were supported by observing the trading and M&A multiples of comparable companies, which is usually termed 'peer group' analysis.

The respondent's expert concluded that the reduction in value associated with the underreporting was between MNOK 16.8 and 17.4, mainly on the basis of a DCF model. The respondents, *inter alia,* argued that the target would have renegotiated each customer contract at the end of a four-year period, and that the target would have been able to pass on all additional future costs with the software licences at that point.

In the tribunal's view, it was clear that the methods used by the buyer's expert were in principle the same methods used in the valuations that formed the basis for the transaction, stating that it '*is also clear that such methods are regularly used and accepted in the marketplace*'.[56] The tribunal also found that: '*there are good arguments in favour of a market value difference of approximately MNOK 170 as claimed if the only factor to be considered is that the COGS [cost of goods sold] would have been almost MNOK 17 higher than the COGS reported in 2015 and everything else in would have remained the same*'.[57] However, the tribunal pointed out that other factors also needed to be taken into account.

First, there were some uncertainties regarding the base case and the de facto underreporting. Second, the analysis assumed that the target would not have been able to pass on any costs to the customers, and this second factor was more thoroughly assessed separately. The third and fourth factors are very general in nature:

> Thirdly, [the buyer's expert]'s implicit assumption in its application of the implicit multiple based upon the deal enterprise value is that all market participants would have made the same assumptions as Claimant and that these assumptions therefore could be applied also if the cost base proved to be higher than assumed in the valuations. The deal enterprise value as agreed is a price to be adjusted for at closing. It is based upon a multitude of valuation methods used and especially on Claimant's risk propensity and assumptions about the future. Even if the Seller

56. Paragraph 274 on p. 64.
57. Paragraph 275 on p. 64.

> accepted the price offered, it does not follow from this decision that the Seller also accepted all underlying assumptions made by Claimant when Claimant made the decision to accept to pay a price based upon an enterprise value of MNOK [amount]; it was the price that was accepted and not the assumptions and the importance of these for the different calculations. Thus, [the buyer's expert]'s approach in this regard is in some respects a problematic assumption as this would from a legal perspective mean that the Seller actually assumed or accepted these assumptions made by Claimant when accepting a stated enterprise value and the purchase price.
>
> However, it is clear law that the assumptions made by a buyer when accepting to buy something at a certain price are the buyer's risk. Therefore, one has to take into account that a seller would not necessarily have accepted the same assumptions forming the basis for the different valuation methods (e.g. the peer companies to be used for the comparison or the WACC or other factors).
>
> Fourthly, it is not the best approach for a calculation of damages due to a breach of this nature to assume that the costs would have been higher at the beginning of the negotiations – and thus when the transaction was initiated – and that these costs would have been treated in the same way as other costs on an aggregate level even if disclosed just prior to the signing of the SPA.[58]

The tribunal also made the following statement concerning the valuation assessment performed:

> It is in this respect of relevance that a breach of warranty would have been avoided if the Seller had disclosed the underreporting to the Buyer prior to signing of the SPA (i.e. not necessarily when the transaction was initiated) and that the decisive question for the claim for damages is how a rational buyer in such a case would have valued [target]. It is fair to assume that a rational buyer would have adopted the valuation methods adopted by as a starting point, but it is also fair to assume that the valuation would have been affected by an assessment as to which extent the additional costs would be considered to be recurring losses or not and to some extent whether the loss could be mitigated without affecting the upside of the business already paid for by the buyer through the valuation of the company.
>
> Thus, the valuation has to be based upon how reasonable market participants would have treated disclosed higher license costs. However, as the calculation should be objective, no assumptions should be made regarding the reasonable reactions of the parties (however, see below). Therefore, it must for example be ignored if the buyer could reasonably be assumed to have treated the surprising information about non-compliance with its most important supplier's license rules as a deal-breaker.[59]

The tribunal made a thorough assessment of whether the target would have been able to pass on the part of the increase in costs to its customers and concluded that only a limited part could have been passed on. This assessment also included other general remarks of interest.

As regards facts about the target's development after the transaction, the tribunal stated:

58. Paragraphs 280–282 on pp. 64–65.
59. Paragraphs 284–285 on p. 65.

> These statements indicate that neither in 2016 nor later managed to pass on any significant portion of the extra costs incurred as a result of the correction of the underreporting. However, in the view of the Tribunal, this information is of minor importance for the assessment of the compensation. One should not, in principle, consider facts about the development after the transaction as part of the market difference assessment. This assessment should be made based upon the situation at the time of delivery (i.e. closing of the transaction) and the assumed assessment of a rational buyer at this stage. Thus, the actual reporting of [name] licenses in 2016, 2017, 2018, 2019 and 2020 is of minor importance for the calculation as such. The same is true for the results of the efforts made by [target] to pass on costs.
>
> By contrast, evidence from the period when the underreporting was discovered is of importance for how the issue would have been handled by a rational market participant at the time of the contract if the information would have been available. In this regard, the Tribunal notes the following from the correspondence and the investigations made at that time.[60]

The tribunal concluded as follows: '*Considering all relevant circumstances, the Tribunal concludes that the market value difference loss amounts to MNOK 145.*'[61] The buyer was therefore compensated with MNOK 135, from which the agreed MNOK 10 retention had been deducted.

[5] Calculation of Interest

The tribunal found that the buyer was entitled to late payment interest in accordance with the Insurance Contract Act.

In addition, the buyer was awarded loss of use interest (Nw: avsavnsrente) from the closing of the transaction until the date on which late payment interest started to accrue, a fact which may be surprising in some jurisdictions.

The tribunal stressed that in Norwegian law, it is clear that loss of use interest should in principle be treated in the same way other losses to be compensated as damages, reasoning as follows: as the loss is the difference between the value paid for *as warranted* and the value received, this means that the buyer was entitled to compensation for the loss from the time at which the transaction was closed. As no such compensation was paid by either the seller or the respondents at the time, the buyer made a loss in the form of the interest costs suffered. The buyer was awarded an additional amount.

§6.06 CONCLUDING REMARKS

These awards show how tribunals in the Nordic countries have handled loss calculation after finding warranty breaches and give highly useful insight to parties involved in such cases. As mentioned in the introduction, these three recent awards have been viewed by several commentators as clarifying how loss calculation in post M&A disputes should be undertaken.

60. Paragraphs 290–291 on pp. 66–67.
61. Paragraph 311 on p. 71.

At the same time, the awards also show that there may be some differences between the approaches taken by the tribunals to some of the issues at hand. One example may be the relevance for loss calculation of circumstances that arise after the transaction. In the OCC Award, the tribunal stated that subsequent information was not suited to shed light on what the buyer would have done if he had had the information prior to the transaction.[62] In the ad hoc Award, the tribunal stated one should not, in principle, consider facts about the development after the transaction as part of the market difference assessment. However, the tribunal continued to state that evidence from the period when the underreporting was discovered is of importance for how the issue would have been handled by a rational market participant at the time of the contract if the information had been available.[63]

Furthermore, there are also issues that only appear to be dealt with in one of the awards and on which the tribunal's reasoning seems less elaborated and provides less clarification than other issues in the award. One such example could be the calculation of the risk premium part in the OCC Award.[64] For the sake of good order, it is important to stress that while the OCC Award was the only one to explicitly deal with a risk premium in the award's reasoning, it cannot be ruled out that a risk premium was included in the loss calculation presented by the experts in the other cases, as this could be part of the experts' view on the weighted average cost of capital (WACC), even though the tribunals did not refer to it.

In an article in 2018, Claes Zettermarck wrote that the multiple question had not been forgotten and that it would turn up again.[65] These awards, and perhaps especially the ad hoc Award, show that the multiple question has indeed turned up again, and the last word on loss calculation in post M&A disputes has not yet been spoken.

62. *See* section §6.04[D][2].
63. *See* section §6.05[D][4].
64. *See* section §6.04[D][8].
65. Claes Zettermarck, *Var är multipeln?*, pp. 827–834, in Lars Edlund, eds et al., *Festskrift till Stefan Lindskog* (Jure Förlag AB, 2018).