



ADR VIETNAM CHAMBERS LLC
INDEPENDENT ARBITRATORS & MEDIATORS

INTERNATIONAL ARBITRATION: EFFICIENT AND MOST SUITABLE TOOL TO RESOLVE M&A DISPUTES

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INTERNATIONAL M&A DEALS - GENERAL REPORT



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*In most jurisdictions, legal practitioners tend to recommend arbitration for international M&A transactions. Reasons cited for recommending arbitration include **confidentiality** and the advantage of being able to choose the **language** of the proceedings, and the **expertise** of arbitrators as opposed to judges of local courts who are often unfamiliar with international M&A transactions.*

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COMMON FEATURES OF INTERNATIONAL ARBITRATION



- Confidentiality
- Language
- Expertise
- Flexibility
- Finality
- International Enforceability
- Party Autonomy

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NEGOTIATING AND DRAFTING MULTI TIERS DISPUTE RESOLUTION CLAUSE IN M&A TRANSACTIONS



- i. Choice of governing law
 - ii. Negotiation and Mediation (ADR)
 - iii. Arbitration
- *ADR is optional or mandatory?*

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DRAFTING VIAC ARBITRATION CLAUSE



"Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre (VIAC) in accordance with its Rules of Arbitration".

Parties may wish to consider adding:

- (a) the number of arbitrators shall be [one or three].
- (b) the place of arbitration shall be [city and/or country].
- (c) the governing law of the contract [is/shall be] the substantive law of [].*
- (d) the language to be used in the arbitral proceedings shall be [].**

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DRAFTING KCAB ARBITRATION CLAUSE



Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the International Arbitration Rules of the Korean Commercial Arbitration Board.

*The number of arbitrators shall be [one / three]
The seat, or legal place, of arbitral proceedings shall be [Seoul / South Korea]
The language to be used in the arbitral proceedings shall be [language]*

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POSSIBLE COMPROMISES



1. Choice of arbitration institution and its Rules: KCAB or VIAC
2. Choice of **seat or legal place** of arbitral proceedings shall be [Hanoi/Vietnam OR Seoul - South Korea]
3. Choice of **language** to be used in the arbitral proceedings [English - Vietnamese - Korean or both]
4. Choice of number of arbitrators [1 or 3] and **its qualifications** [nationality, expertise, seniority, etc.]

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WHAT ARE THE ISSUES MOST LIKELY TO BE ARBITRATED?



- i. a breach of representations and warranties;
- ii. Price mechanism/adjustment;
- iii. earn out;
- iv. lack of performance by one of the parties;
- v. conditions precedent.
- vi. Indemnities;
- vii. Other: Employment issues and shareholders' agreements

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A CASE STUDY: SALE AND PURCHASE AGREEMENT (SPA)



Sole arbitrator unfamiliar with M&A Transaction
Legal nature of a SPA transaction: trading or investment?
Remedies;
Earn out;
Price mechanism/adjustment;
Other: Employment issues

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ARBITRATING M&A DISPUTES IN A COMPARATIVE VIEW



which specialised law should govern certain legal issues: Civil law, commercial law, investment law, corporate law and security law or all together?

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HOW TO USE EXPERT WITNESS IN M&A ARBITRATION?



- CPC Rules on Evidence # IBA Rules on the Taking of Evidence in International Arbitration
- Expert Determination # Expert Witness
- Article 5 — Party-Appointed Experts
- Article 6 —Tribunal-Appointed Experts

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RECOMMENDATIONS



1. Seat is an important factor for negotiation and drafting of an arbitration agreement.
2. Consider using commercial mediation in a multi-tier dispute resolution clause.
3. Selection of a right arbitrator is crucial
4. Finding a legal ground is not enough, more importantly is its enforceability!

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REFERENCE



Managing Disputes Through Contract: Evidence from M&A by John C. Coates IV, *John F. Cogan, Jr. Professor of Law and Economics* Harvard Law School;

ABA Section of Business Law, Survey on Dispute Resolution in International M&A Deals -General Report

IBA Rules on the Taking of Evidence in International Arbitration;

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THANK YOU FOR YOUR ATTENTION!



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