



ADR VIETNAM CHAMBERS LLC  
INDEPENDENT ARBITRATORS & MEDIATORS

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

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- ARBITRATOR | VIAC & KCAB INTERNATIONAL
- DIRECTOR | ADR VIETNAM CHAMBERS LLC

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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!



ADR VIETNAM CHAMBERS LLC  
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