

**2022 Arbitration Webinars**  
**Practice guidance with new faces**

**ADR Vietnam Chambers LLC**

# M&A Arbitration

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# M&A = the heart of international business

“As is the case in marriage, business acquisitions often deliver surprises after the “I do's””

-Warren Buffet

# Overview

- What M&A disputes arise?
- What are the pros and cons of M&A arbitration and litigation?
- How are multi-contract, multi-party issues dealt with in M&A arbitration?
- What are warranty & indemnity insurance disputes?
- How should you draft arbitration clauses for M&A transactions?

# What M&A disputes arise?



## Pre-signing

- Breach of MoU & letter of intent
- Breach of confidentiality / exclusivity agreements
- Indicative offers: binding?

## Pre-completion

- Non-fulfilment of conditions precedent
- Breach of pre-completion covenants

## Post-completion

- Breach of representations & warranties
- Price adjustment mechanisms
- Indemnity claims

# What are the pros and cons of M&A arbitration and litigation?

## Arbitration

- Neutral
- Private & (generally) confidential
- Arbitrators, partially selected by parties
- Choice of procedure, language, etc.
- Generally final
- Global enforcement under NY Convention

## Litigation

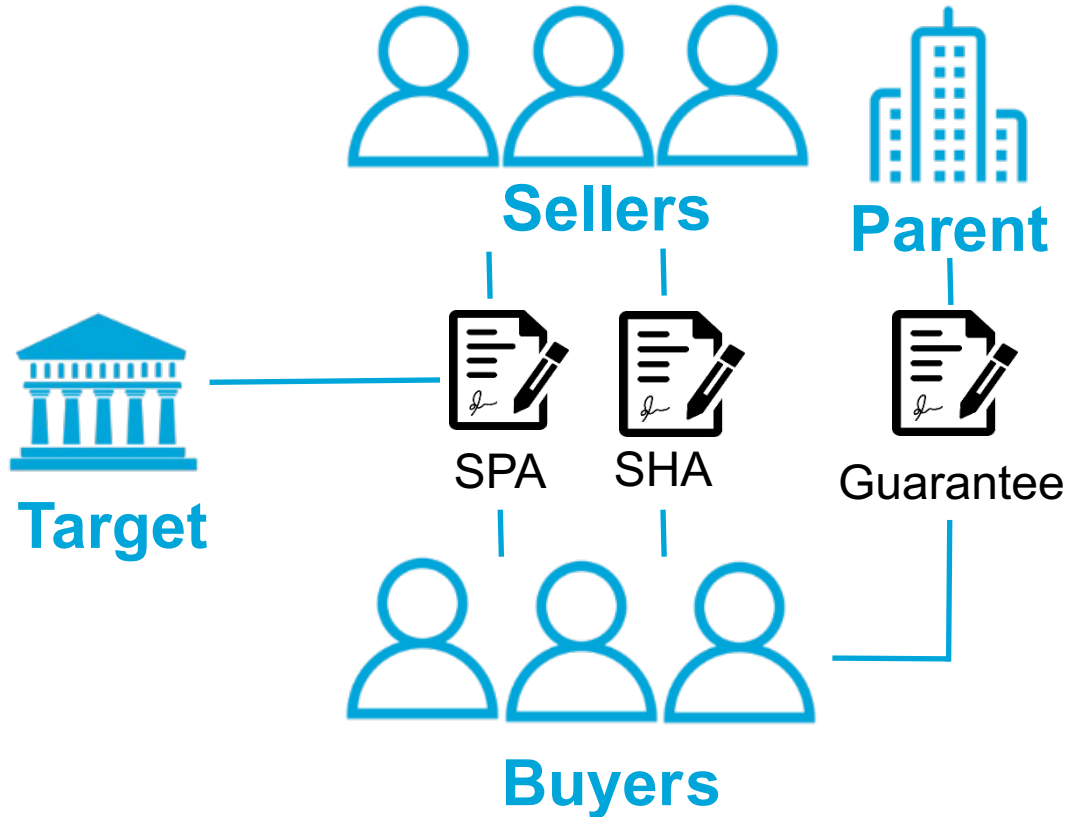
- Attached to a specific legal system
- Public in most cases
- Judge, chosen by the court administration
- No choice of procedure, language etc.
- Subject to appeals
- Difficulty of foreign enforcement

# How are multi-contract, multi-party issues dealt with in M&A arbitration?

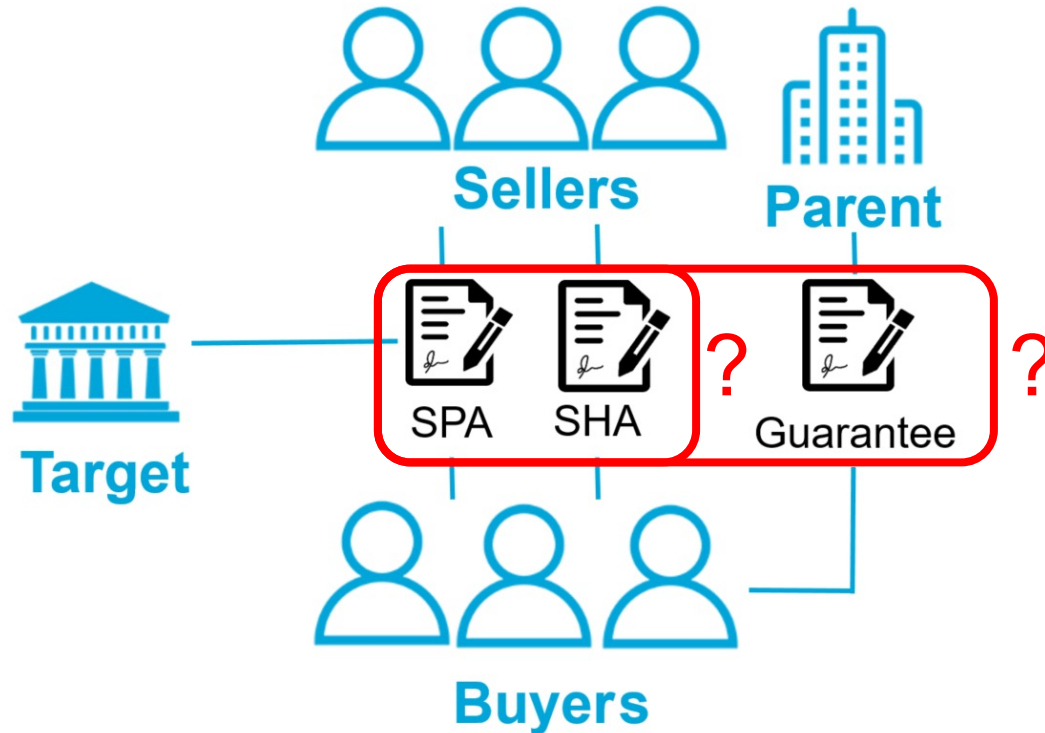
- Arbitration's consensual nature clashes with multi-contract/multi-party situations



# M&A multi-party, multi-contract complexity



# Which of these parties/contracts can be in a single arbitration?





# Where can you find consent to multi-contract, multi-party arbitration?

**Arbitration  
agreement**



**Institutional  
rules?**



**Implied  
consent?**



# Joinder in M&A arbitration

INTERNATIONAL COURT OF  
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RESOLUTION  
WORLDWIDE

## ARBITRATION RULES

In force as from 1 January 2021

## MEDIATION RULES

In force as from 1 January 2014

### Article 6(4)(i):

“where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7(1), with respect to which the Court is prima facie satisfied that an arbitration agreement under the Rules that binds them all may exist ...”

# Consolidation in M&A arbitration

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RESOLUTION  
WORLDWIDE

## ARBITRATION RULES

In force as from 1 January 2021

## MEDIATION RULES

In force as from 1 January 2014

### Article 10:

- a) the parties have agreed to consolidation;
- b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or
- c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.”

# What are warranty & indemnity insurance disputes?



Warranty = statement of fact, a breach of which gives rise to *damages*



Indemnity = statement of fact, a breach of which gives rise to a *right to be indemnified*



W&I Insurance protects the insured from losses that arise from a breach of warranty or indemnity

# Warranty & indemnity insurance

- Who: Both vendor & purchaser (mostly purchaser)
- What: Against breaches of warranties & indemnities (and representations)
- When: Pre-signing
- Where: Globally
- Why: Upon a breach of warranty / indemnity, the counterparty claims against the insurer, not the insured

# ▶ Arbitration of warranty & indemnity insurance disputes?

- Question of consent
- Really just a specific multi-contract, multi-party issue

# How should you draft arbitration clauses for M&A transactions?



# Step 1: Start with a standard institutional 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."*

## Standard ICC Arbitration Clause

**All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators chosen in accordance with these Rules.**

*"Any controversy or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the International Chamber of Commerce (ICC) under the ICC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*

*"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*

*The law of this arbitration clause shall be ... (Hong Kong law).\**

## SIAC MODEL CLAUSE

*In drawing up international contracts, it is recommended that the following clause be included:*

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("SIAC") in accordance with the Arbitration Rules of the International Chamber of Commerce ("SIAC Rules") for the time being in force.

The seat of the arbitration shall be [City and/or Country].

The Tribunal shall consist of \_\_\_\_\_\*\* arbitrator(s).

The language of the arbitration shall be \_\_\_\_\_.

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

### Recommended additions:

The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator.

The seat of arbitration shall be [...].

The language to be used in the arbitral proceedings shall be [...].

This contract shall be governed by the substantive law of [...].

*arbitration proceedings shall be*

*"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.*

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ]."



## Step 2: Include the basic choices

- ✓ Seat/place of arbitration
- ✓ Number of arbitrators
- ✓ Language

## Step 3: Include consent to multi-contract, multi-party arbitration if appropriate

- Rules are helpful, but pre-suppose some level of consent
- Best to just express consent in broad terms
- Eg:

“The Parties agree that disputes under this SPA can be resolved in a single arbitration with disputes under the Related Agreements. The Parties agree in advance to any joinder or consolidation necessary to achieve this.”

# Questions?

Thank you