

Global Arbitration Review

# The Guide to M&A Arbitration

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Editor  
Amy C Kläsener

# The Guide to M&A Arbitration

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Amy C Kläsener

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For further information please contact [Natalie.Clarke@lbresearch.com](mailto:Natalie.Clarke@lbresearch.com)



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# Part I

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## Key Issues in M&A Arbitration

# 1

## Drafting Arbitration Clauses in M&A Agreements

**Anne Véronique Schlaepfer and Alexandre Mazuranic<sup>1</sup>**

M&A arbitration often relates to price adjustment disputes, misrepresentations and breach of warranties, or the pre-contractual failure to disclose relevant information (usually involving allegations of fraud, wilful misconduct or gross negligence with a view to avoiding the application of clauses limiting liability).<sup>2</sup> The specificities of M&A disputes may have an impact on the drafting of the arbitration clauses themselves.

This chapter is therefore divided into two main Sections. The first recalls some basic rules that apply to the drafting of arbitration clauses in general. The second focuses on certain aspects related to M&A disputes, in particular, matters that drafters may wish to consider when drawing up arbitration clauses.

### Basic drafting rules for arbitration clauses

#### Validity

The arbitration clause must reflect the parties' consent to have their dispute settled through arbitration. Including the word 'arbitration' in a contract is generally sufficient to demonstrate the intention of the parties.<sup>3</sup> To avoid confusion and interpretation issues at a later stage, it is advisable to avoid language that could contradict or call into question that intention, for instance, by providing recourse to both arbitration and litigation, or by incorporating an appeal mechanism in respect of the arbitral award.

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1 Anne Véronique Schlaepfer is a partner, and Alexandre Mazuranic is counsel, at White & Case SA. The authors wish to thank Myriam Karama, a former associate at White & Case, for her help with the research.

2 In the case of failure to disclose, the seller would have hidden important information, which if known would have had a substantial impact on the price or even prevented the transaction. In this circumstance, the party raising a claim for fraud will seek to disapply the limitation of liability clauses. This type of dispute is not specific to M&A transactions and does not call for any specific drafting in the arbitration clause.

3 Gary B. Born, *International Commercial Arbitration* (Second Edition), Kluwer Law International 2014, p. 764.

Most national laws governing the arbitration process and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) require the arbitration agreement to be ‘in writing’.<sup>4</sup> The rationale is that a decision to use arbitration constitutes a waiver to a fundamental right of access to national courts (an approach that may be seen as obsolete, possibly even contradictory, given that it is broadly accepted nowadays that arbitration is the ordinary means of dispute resolution for international commercial disputes). This requirement should not be an issue in M&A transactions, which are usually governed by written agreements.

## Scope

The arbitration agreement should contain broad language to ensure that any dispute arising from the M&A transaction will be resolved by arbitration, unless the parties intend to proceed otherwise, for instance, by submitting specific disputes to an expert. Whenever possible, the arbitration agreement should reflect the wording recommended by the selected arbitration institution. Broad wording used to describe a dispute or contractual relationship covered by the arbitration agreement will include wording similar to the following clause recommended by the IBA:

*All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination shall be finally resolved by arbitration.*<sup>5</sup>

Issues regarding the scope of the arbitration clause can arise when parties refer specific disputes to different mechanisms, for instance, price adjustment disputes to an expert and all other disputes to an arbitral tribunal. The contract needs to set up precisely what disputes will be submitted to what mechanism and how they might interact. This issue is discussed in more detail in the Section on expert determination, below, and in Chapter 3 on conflicts between expert determination and arbitration clauses.

## Seat of the arbitration

The seat of the arbitration (usually a city) determines the law that will govern certain procedural aspects of the arbitration, such as the powers of the arbitrators and judicial oversight of the arbitral process as well as challenge to awards.<sup>6</sup> The law of the seat of the arbitration determines the extent to which local courts may intervene in the arbitration proceedings, be it to hinder (by unwanted interventions) or to support them. To the extent it is possible, it is therefore appropriate to choose a seat where the legislation and the courts are supportive of arbitration and, for enforceability purposes, located in a signatory state to the New York Convention.<sup>7</sup>

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4 Often the writing requirement will be interpreted in light of the evolution of technology. France does not require the arbitration agreement to be in writing (see Article 1507 of the Code of Civil Procedure, as amended by Decree No. 2011-48 of 13 January 2011: ‘*La convention d’arbitrage n’est soumise à aucune condition de forme.*’ The arbitration agreement is not subject to any form requirement.’).

5 IBA Guidelines for Drafting International Arbitration Clauses, Guideline 3, para. 18.

6 *Ibid.*, Guideline 4, para. 21.

7 *Ibid.* Guideline 4, para. 22.

In M&A agreements as in other types of contracts, agreeing on a seat is not always easy, and it may be that one party will try to impose a seat that the other party deems inappropriate. In this event, rather than agreeing on a seat, which may prove inadequate for the reasons stated above, it may be wiser not to designate any seat. In such a scenario it is critical to choose an arbitration institution that will be able to decide on the seat, taking into account the interests of the arbitration.

### Institutional or ad hoc arbitration

The parties need to decide whether they want their arbitration to be administered by an arbitral institution under a relatively pre-determined procedure or opt for *ad hoc* arbitration where the proceedings are managed by the parties, and subsequently by the arbitral tribunal. The trend (to the extent that we may determine it) in M&A practice seems to be to refer disputes to institutional arbitration.

Being assisted by a reputable institution will help parties and tribunals run the proceedings (e.g., by monitoring the process, handling communications with arbitrators). More importantly, it may provide guidance and support if the arbitration clause is silent on an issue or if the parties cannot agree on some procedural steps (such as the appointment of arbitrators).

Some institutions also scrutinise the draft awards and verify, to a certain degree, that all issues have been determined, without, however, making any review on the merits of the decision itself.<sup>8</sup>

When opting for *ad hoc* arbitration, it may be easier to choose a set of predetermined arbitration rules available for such arbitration (such as the UNCITRAL Arbitration Rules<sup>9</sup>). Otherwise, the arbitration clause should include a minimum set of rules regarding the composition and appointment of the tribunal, and an appointing authority in the event that the parties fail to appoint an arbitrator.

### Constitution of the arbitral tribunal

In recent years, some practitioners have voiced concerns about the nomination or appointment of arbitrators by the parties. Nevertheless, parties often see the ability to choose their own nominated arbitrator as one of the main advantages of arbitration. This is, of course, also true in M&A transactions where parties value the possibility of appointing arbitrators who, in addition to their experience as arbitrators, understand the complexities and mechanics of their transactions.

Parties may therefore specify the number and method of appointment of the arbitrator or arbitrators in the arbitration clause. Alternatively, both institutional and *ad hoc* arbitration rules provide default mechanisms for selecting or replacing arbitrators. Since these default mechanisms vary from one institution to the other, it may be useful to have a look at them before finalising the arbitration clause.

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8 e.g., the ICC scrutinises the entire award, while the Court of Arbitration of the Swiss Chambers' Arbitration Institution will only review the cost decision contained in the award.

9 Blackaby, Partasides, Redfern et al., *Redfern and Hunter on International Arbitration* (Sixth Edition), Oxford University Press 2015, p. 42, para. 1.141.

In any case, providing for the specific qualities or qualifications or even naming the arbitrators in the agreement is not recommended. Excessive predictability is tantamount to rigidity and may render the arbitration proceedings very difficult to manage when a dispute arises. Establishing set criteria at the outset may prevent the parties from appointing the arbitrators with the appropriate profile to handle the dispute, which may be different from what the parties had anticipated at the time of entering into the transaction.

## Confidentiality

Confidentiality may be of importance in M&A disputes. For instance, sellers will not want to disclose any price-sensitive information or confidential information regarding the business and operation of the target; similarly, the buyer, having spent a considerable amount of time and money evaluating a transaction, might want to preserve the confidentiality of its investment from other potential acquirers.<sup>10</sup>

Although it is generally assumed to be, confidentiality is not always an inherent feature of arbitration. The approach to confidentiality can vary between arbitral institutions and jurisdictions. For instance, the Swiss Rules of International Arbitration provide that the arbitration is confidential.<sup>11</sup> On the contrary, the ICC Arbitration Rules do not provide for any default confidentiality obligation. Often contracts will provide for confidentiality but where this is not the case, and in the absence of a default provision in the applicable rules, the parties should seek a confidentiality order from the tribunal.<sup>12</sup>

## Aspects related to M&A disputes

### Pre-arbitral dispute resolution mechanisms

Considering the complexity and the high stakes involved in mergers and acquisitions, the parties in M&A disputes, as in others, may be tempted to consider pre-arbitral dispute resolution mechanisms, such as mediation (we discuss expert determination in the Section below). In this event, the dispute resolution clause should specify whether mediation is mandatory and provide time limits for it to occur.

As a rule, we would advise against implementing mandatory pre-arbitral mechanisms, or, at least, we would advise permitting the commencement of arbitration in parallel (this last point may be important when the dispute involves questions submitted to expert determination and legal aspects falling within the arbitral tribunal's jurisdiction). When the dispute occurs, spending several months in discussion or mediation before commencing arbitration could be a false economy as it will merely delay resolution and increase costs (especially if the parties' disagreement makes a settlement unlikely or even undesirable). By contrast, providing for some flexibility will not prevent parties who consider a settlement is possible from genuinely trying to reach one.

Non-compliance with a pre-arbitral mechanism may also have different consequences depending on the arbitral tribunal and the seat of the arbitration. In Switzerland for instance, a failure to abide by a pre-arbitral mechanism is treated as a *ratione temporis* jurisdictional

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10 Joe Liu, *Arbitration of Cross-Border M&A Disputes*, Kluwer arbitration blog, 21 April 2015.

11 Swiss Rules of International Arbitration (2012), Article 44.

12 See, e.g., Article 22(3) of the ICC Arbitration Rules.

issue (the question being whether the tribunal was convened too early) and an award that does not penalise this failure can be challenged. In 2016, the Swiss Federal Tribunal decided, for the first time, to suspend an arbitration that had been initiated before certain required steps of a mandatory conciliation had been completed (the parties had initiated alternative dispute resolution proceedings but failed to hold a mandatory meeting with the neutral third party).<sup>13</sup> When considering the appropriate sanction for the failure to comply with the pre-arbitral mandatory mechanism, the Swiss Federal Tribunal rejected the payment of damages as this sanction would come too late and would be difficult to quantify. It also refused to declare the claim as inadmissible or to reject it and close the proceedings. The court instead decided to suspend the arbitration until the completion of the conciliation attempt and entrusted the procedure applicable to the suspension and, more importantly, the determination of a reasonable time limit for the suspension to the arbitral tribunal. The latter therefore remained in control of the proceedings, which *de facto* reduced the risk of a party attempting to use the mediation as a delaying tactic.

Other jurisdictions have reached different conclusions. For instance, the French courts consider that the failure to abide by a pre-arbitral mechanism is a matter of admissibility of the claim, which is not subject to judicial review pursuant to Article 1502 of the Code of Civil Procedure.<sup>14</sup> The German Federal Court of Justice has reached a similar conclusion.<sup>15</sup>

### The expert determination

As will be explained in more detail in Chapter 3 on conflicts between expert determination and arbitration clauses, it is common in the context of M&A transactions for parties to provide for, alongside their arbitration agreement, expert determination of factual or technical issues (as opposed to legal issues), such as post-closing price adjustment.<sup>16</sup> The expert determination raises interesting questions, some of which may be considered when drafting the arbitration clause.

First, the expert's determination is (contractually) binding on the parties (and on the arbitral tribunal) only if the parties have agreed to it. Failing such an agreement, the expert's findings are non-binding and merely have indicative value, for instance, in view of future negotiations or for the purpose of assessing the chances of success of arbitration proceedings.

The parties may also grant the arbitral tribunal a limited power of review of the expert determination. For instance, the arbitral tribunal may depart from the expert's findings if the expert was not independent or impartial, if he or she breached fundamental principles of due process and the right to be heard, or if he or she reached a decision that is manifestly

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13 Decision of the Swiss Federal Tribunal dated 16 March 2016 in the case 4A\_628/2015.

14 Cour d'appel de Paris, 4 March 2004, *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*, *Revue de l'arbitrage* 2005, pp. 143 et seq.; see the Article published in *The Paris Journal of International Arbitration*, 2013 Vol. 2, p. 327 et seq., by one of the co-authors: 'Jurisdiction and Admissibility: a subtle distinction, not always easy to make in international arbitration'.

15 Bundesgerichtshof (BGE), decision published in: (1999) *Neue Juristische Wochenschrift*, Heft 9, pp. 647 s., Bundesgerichtshof (BGE), decision published in: (1984) *Neue Juristische Wochenschrift*, Heft 12, pp. 669 s.

16 There exist a variety of institutional rules for arbitration proceedings that the parties may consider when drafting the expert determination clause. Institutions may assist the parties in recommending an expert, in appointing one or in administering the entire expert procedure.

incorrect or arbitrary, or goes beyond the mandate given by the parties.<sup>17</sup> The Swiss Federal Tribunal ruled that a decision of an expert may be invalidated through ordinary proceedings (i.e., arbitration if the contract includes an arbitration clause) if the findings of the expert are manifestly unfair, arbitrary, defective, seriously inequitable or rely on erroneous facts, or are vitiated by lack of consent.<sup>18</sup>

Second, even when the expert's findings are contractually binding on the parties, they do not have *res judicata* effect and are not enforceable as arbitral awards. Therefore, the parties will need to resort to the courts or arbitration to enforce such findings should a party disregard them.

Third, the contract should specify the tasks or issues delegated to the expert and provide that all other issues not expressly delegated shall be within the competence of the arbitral tribunal. However, even in this case, it may be useful to specify that the issues relating to the determination of the scope of the expert's competence under the contract fall within the jurisdiction of the arbitral tribunal. Several factors favour this course. First, the jurisdiction of the arbitrators is broader while the expert is entrusted with specific issues related to his or her field of expertise only. Second, the issues of jurisdiction are of a legal nature and an expert with a different background may not feel comfortable having to determine such an issue. To avoid paralysing the whole dispute mechanism, this is one of the reasons why it may be wise to provide that the arbitral tribunal and the expert may be seized of the matter in parallel.

Arbitration clauses and expert determination clauses may also provide that an expert may make a preliminary determination on a legal issue if this is necessary for the expert to be able to render a determination (e.g., the interpretation of a price-adjustment clause or filling a gap in the contract where a definition is missing<sup>19</sup>). In this event, it is wise to provide that preliminary determination of an issue that does not fall within the expert's field of specialisation is not binding on the parties and the arbitral tribunal, should arbitration proceedings follow the expert determination.

### Fast-track arbitration

Many institutional arbitration rules provide for fast-track (or expedited) arbitration, where the maximum duration is in principle limited to a few months. Expedited proceedings essentially apply when the amounts in dispute are relatively small. However, nothing prevents parties from referring their dispute to fast-track arbitration in other cases not foreseen by the institutional rules. Increasingly, arbitration is being criticised by some parties and practitioners for its costs and cumbersome processes. Expedited procedures may therefore be of interest to users in cases where the amounts in dispute are more significant.

As regards M&A arbitration, parties may for instance consider that, where the role of the arbitrators is limited to assessing whether the decision of an expert is arbitrary, it is not necessary to apply the standard arbitration procedure.

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17 Balz Gross, 'M&A disputes and expert determination: getting to grips with the issues', in *PLC Cross-border Arbitration Handbook* 2010/2011.

18 Decision of the Swiss Federal Tribunal dated 17 November 2008 in the case 4A\_438/2008, paragraph 3.2.

19 Balz Gross, 'M&A disputes and expert determination: getting to grips with the issues', in *PLC Cross-border Arbitration Handbook* 2010/2011.

However, before opting for expedited proceedings in M&A disputes, certain issues must be considered:

- providing for expedited proceedings if a certain type of dispute arises and normal proceedings for others may prove very difficult to manage once a dispute has arisen;
- the requirements of fast-track arbitration may also be difficult to reconcile with the existence of a parallel expert determination procedure; and
- document production may play a central role in certain M&A disputes, notably when a party alleges that its opponent knowingly provided inaccurate or misleading representations and warranties. In such cases, fast-track arbitration may prove highly inadequate. The same is also true when the factual or legal issues at stake are complex (for instance, it is difficult to require that the arbitration proceedings be completed within six months when it takes at least four for a party-appointed expert to prepare a report).

### Consolidation or joinder

M&A deals may be concluded through a suite of transaction instruments involving multiple parties, each of which can have their own dispute resolution clause. This could potentially lead to several disputes arising out of various contracts between several parties, all of which could be the subject of multiple parallel proceedings although they all relate to a single transaction. We may consider as an example an M&A transaction between a seller and a buyer related to a target company (with multiple contracts between the seller and the buyer), where a holding company controlling the seller and the target company provides guarantees to the buyer by way of a side agreement. In case of misrepresentations and breaches of warranties by the seller, the buyer may want to act against both the seller, on the basis of the various instruments entered into with the seller, and against the holding company on the basis of the side agreement.

As will be explained in more detail in Chapter 2 on joinder and consolidation issues, permitting consolidation of two or more separate arbitrations into a single arbitration, or the joinder of additional parties into a single arbitration, can be used to save time and costs, to ensure consistency and to give the tribunal a complete picture of the transaction at issue.

This may only work if all parties agree on certain conditions. In particular, the arbitration clause should refer to arbitration rules that provide for the possibility to consolidate two or more arbitrations. The arbitration clauses contained in the various contracts must be identical or, at the very least, compatible (same institutional rules, same number of arbitrators and same seat of the arbitration).

Institutional arbitration rules will generally set out the conditions and procedures for consolidation, including deadlines and rules regarding the appointment of the tribunal in cases where it is not possible for each party to appoint an arbitrator. By incorporating such rules into the arbitration agreement, the parties are deemed to have consented in advance to a possible consolidation of the various arbitration proceedings.

In practice, it is difficult to consolidate proceedings when the parties to the various agreements are not the same (the fact that the parties are the same in all proceedings may be a condition for an arbitral institution to order consolidation unless the parties agree otherwise). Hence, when parties to the various contracts are different, it is important to provide in each contract the possibility to consolidate proceedings under the contract at issue with other proceedings relating to other contracts even if the parties are not the same.

Such clauses are not easy to draft. It is important, for instance, to provide time limits on the possibility to consolidate to avoid blocking proceedings already at an advanced stage because another dispute under a related contract has arisen. The appointment of the tribunal may also be problematic, especially if a dispute under a related contract surfaces after the appointment of the tribunal. Again, such difficulties should be taken into account when drafting the arbitration clauses.

### Emergency arbitration

M&A arbitration may require the issuance of provisional measures, for instance in the closing phase (between signing and closing) to prevent a seller from aggravating the financial situation of the target company before closing, to enjoin a party from disposing of the shares of the target, or to order a party to refrain from calling up a bank guarantee issued to secure the parties' obligations.<sup>20</sup>

Several prominent international arbitration institutions have included emergency arbitrator rules<sup>21</sup> that share more or less the same characteristics: a prompt appointment of a sole arbitrator (usually within a couple of days), who will render a decision within a limited period (usually counted in days or weeks) and not act thereafter as an arbitrator in the dispute on the merits. The nature (an order or an award) and enforceability of a decision rendered by an emergency arbitrator will depend on the rules governing such procedure and the place where such decision is to be enforced.

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<sup>20</sup> Andrea Carlevaris, 'The Arbitration of Disputes Relating to Mergers and Acquisitions: A Study of ICC Cases', 2013, *ICC International Court of Arbitration Bulletin* Vol. 24 No. 1.

<sup>21</sup> e.g., the ICC, the Swiss Chambers' Arbitration Institution or the Stockholm Chamber of Commerce.

# Appendix 1

## The Contributing Authors

### **Anne Véronique Schlaepfer**

White & Case SA

Anne Véronique Schlaepfer has acted as counsel in more than 100 arbitration proceedings involving, among others, M&A, construction contracts, pharmaceuticals, energy (upstream and downstream), joint venture agreements, sales contract, collateral management agreements and know-how licence agreements.

She also regularly serves as arbitrator and represents parties before Swiss courts in arbitration-related court proceedings, in particular in challenges to arbitral awards.

Anne Véronique is a member of the ICC executive board, a vice president of the ICC Court and a member of the LCIA Court. She has been at the forefront of the development of international arbitration in Switzerland, including as chairperson of the arbitration court administering Swiss Rules arbitration (2010–2013), a member of the arbitration committee of the Geneva Chamber of Commerce until 2014 and a member of the working group for the revision of the Swiss Rules (2010–2011).

### **Alexandre Mazuranic**

White & Case SA

Alexandre Mazuranic is a counsel in White & Case's international arbitration practice group and is based in Geneva. He has acted as counsel in complex commercial disputes submitted to arbitration, among others, in the fields of M&A, construction and engineering (EPC/EPCm contracts, joint ventures), commodities trading (collateral management agreements, supply contracts), sales and agency, and pharmaceuticals (licence agreements).

In addition, Alexandre also serves as arbitrator and represents parties before the Swiss Supreme Court in proceedings related to challenges of arbitral awards.

Alexandre is the immediate past co-chair of ASA below 40 (the Swiss Arbitration Association young practitioners' group) and is recognised as one of the future leaders of the arbitration profession in the Who's Who Legal: Arbitration – Future Leaders 2018 guide.

**White & Case SA**

5 quai du Mont-Blanc

1201 Geneva

Switzerland

Tel: +41 22 900 1560

Fax: +41 22 900 1561

[anneveronique.schlaepfer@whitecase.com](mailto:anneveronique.schlaepfer@whitecase.com)

[alexandre.mazuranic@whitecase.com](mailto:alexandre.mazuranic@whitecase.com)

[www.whitecase.com](http://www.whitecase.com)

M&A disputes can be unique in their hostility and complexity. *The Guide to M&A Arbitration* – published by Global Arbitration Review – is a new, practical guide intended to provide guidance on what merger parties should think about, when. It pools the wisdom of specialists who describe how to prevent these disputes arising and how best to resolve them when they do. The guide is structured in two sections. Part I consists of 10 chapters on planning and procedural issues, covering everything from drafting clauses to how to structure contracts to minimise the potential for disputes. Part II offers a geographical survey of important differences in national laws that may affect the outcome of a dispute. It is written by 39 specialists from a variety of backgrounds and takes a practical approach throughout.

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