

HUSCH BLACKWELL



ACC SoCal Webinar

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From Conflict to Consensus: Arbitration in Transactions

In this seminar, we will:

- Examine prevailing arbitration trends and assess their respective advantages and disadvantages.
- Analyze types of disputes where arbitration presents a viable solution.
- Compare the arbitration process with traditional litigation measures.
- Enhance your understanding of the benefits and drawbacks associated with each dispute resolution mechanism.
- Offer drafting techniques to refine standard provisions, thereby granting you greater control.

Arbitration in the Context of M&A Transaction Disputes

Introduction

- With the increase in the volume of M&A transactions worldwide, arbitration has become a go-to option in M&A transactions, covering everything from merger agreements, shareholder agreements to joint ventures.
- Arbitration's perks like confidentiality, expert arbitrators, and easy enforcement make it a great fit for M&A transactions.



Types of Disputes



- NDAs
- Breaches of Representations and Warranties
- R&W Insurance Claims
- Pre- and Post-closing Covenants
- MAE Clauses
- Earn-outs

Arbitration Over Litigation

Courts/Judicial Process Favors Arbitration

- Whether a dispute is arbitrated is ultimately up to the parties and whether their agreement provides for such arbitration. But there is a question whether the parties agreed to arbitrate, courts tend to favor that approach and believe arbitration has substantial benefits.
 - *Bank of Am. V. Phulip Kushner Assocs.*
 - *Amstar Mortg. Corp. v. Indian Gold, LLC*
 - *Pepin v. Am. Univ. Ins. Co.*

Considerations for Choosing Arbitration in Transactions

- Nature and Complexity of the Dispute
- Geographic and Jurisdictional Factors
 - New York Convention (recognized in over 160 countries)
- Party Dynamics



Perceived Benefits of Arbitration



ADVANTAGE

Arbitration is a method of resolving disputes outside of court, which can have a number of advantages:

- Control
- Specialized experience
- Less expensive
- Faster
- Less formal
- Private/Confidential
- Finality

Successful Arbitration Outcomes in M&A

- Vodafone and Hutchison Essar
- Telenor and Alfa Group
- Renault-Nissan
- BP and Rosneft
- ConocoPhillips and Venezuela



Perceived Disadvantages of Arbitration

What might appear as an advantage, some might argue is an illusion in modern cases.

- Not for every case
- Not as cost effective or quick as proponents claim it is
- Less formal rules
- Lose appeal rights
- Accountability
- Split the baby

DISADVANTAGE

Is Arbitration Situational?

- Who should decide if the claim(s) is arbitrable – the arbitrator or the court?
 - *First Options of Chicago, Inc. v. Kaplan*
 - *Suski v. Coinbase*
- Court cases typically encourage settlement over arbitration.

When to Compel Arbitration? What Happens if the Other Side Files a Lawsuit in Civil Litigation?

- Arbitration rights can be voluntarily relinquished or waived if a company does not diligently pursue arbitration.
 - *Morgan v. Sundance*
- A party seeking to compel arbitration should immediately communicate their intent to do so, and thereafter properly move to compel.
- If the other side files a civil lawsuit, the party should raise arbitration as a defense and move to compel the arbitration.
 - *Hurley v. Deutsche Bank Tr. Co. Americas*
 - *McCoy v. Walmart, Inc.*

What is Mass Arbitration?

- A mass arbitration is where a large number of individual arbitrations are filed (or threatened to be filed) asserting similar claims.
 - A court cannot force all parties into an arbitration.
- *KPMG LLP v. Cocchi* – a court must compel arbitration of the arbitrable claims where both arbitrable/non-arbitrable claims exist.
 - A court cannot avoid doing so to dodge piecemeal or fragmentary litigation.

Arbitration Forums

- **American Arbitration Association (AAA)**
- **JAMS (f/k/a Judicial Arbitration and Mediation Services, Inc.)**
- **USAM (United States Arbitration & Mediation)**
- **International Chamber of Commerce (ICC) Court of Arbitration**
- **London Court of International Arbitration (LCIA)**
- **Stockholm Chamber of Commerce Arbitration Institute (SCC)**
- **Singapore International Arbitration Centre (SIAC)**

Arbitration/Dispute Resolution Clauses

- Example of arbitration clause:
 - *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 **[Rules of Arbitration of the International Chamber of Commerce]** by **[one/three]** arbitrators.*
 - *The seat [place] of arbitration shall be **[New York, NY]**.*
 - *The language to be used in the arbitral proceedings shall be **[English]**.*
 - *[The arbitrator(s) shall award to the prevailing party, if any, its reasonable attorneys' fees and costs, including the costs of the arbitration.]*
 - *The parties shall keep confidential: (i) the fact that any arbitration occurred, (ii) any awards award by the arbitration, (ii) all information or materials used, created or produced by the parties in the arbitration not otherwise in the public domain, except to the extent such disclosure might be legally required or as necessary to enforce an arbitration award before a court.*
 - *The parties shall be entitled to seek specific performance without the posting of a bond.*

Today's Presenters



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Q & A Session