Let’s agree to disagree!

Arbitration: A preferred mechanism of alternative dispute resolution.

Increasingly construction companies are doing more and more business overseas. Whilst this can present huge opportunities, it equally poses many risks, particularly in the event of a dispute. Whilst the battle over the choice of law will often be lost when contracting with overseas governments or large commercial organisations, arbitration is often a preferred mechanism of alternative dispute resolution (ADR) in acting as a level playing field.

ADR includes dispute resolution processes between parties other than litigation, including amongst others: meeting of directors, mediation and arbitration. Many agreements contain an escalation clause that sets out the different steps of ADR before any litigation is commenced. One of the fundamental differences between arbitration and litigation is that the right to commence arbitration proceedings arises from a contractual agreement between the parties. Therefore, it is particularly important that the parties to an agreement negotiate an arbitration clause which best serves both their interests. An arbitration agreement may be a free-standing agreement or, more commonly, a clause within a wider agreement.

Key benefits of arbitration

1. Arbitration is usually preferred among parties from different countries as it allows the parties to freely determine many aspects of the dispute resolution procedure.
2. Arbitration proceedings are usually confidential.
3. The parties usually can choose the rules that will govern the arbitration procedure and the seat of arbitration.

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**Pros and cons of the ICC, LCIA, and UNCITRAL Rules**

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<th>Arbitration Rules</th>
<th>Description</th>
<th>Pros</th>
<th>Cons</th>
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<tr>
<td>ICC Rules</td>
<td>An arbitral institution based in Paris with offices in Hong Kong, Singapore, Sao Paulo, Abu Dhabi and New York. The place of arbitration is fixed by the ICC Court unless the parties agree otherwise.</td>
<td>• Awards are scrutinised.</td>
<td>• No express confidentiality provisions. • Terms of reference must be drawn up after the appointment of the tribunal, negotiation of which can cause delay and increased costs.</td>
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<td>LCIA Rules</td>
<td>One of the oldest international arbitral institutions. The LCIA’s head office is in London and it has a regional office in Dubai. The place of arbitration will be London unless the LCIA court decides otherwise.</td>
<td>• Confidentiality of awards and documents.</td>
<td>• Awards are not scrutinised.</td>
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<td>UNCITRAL Rules</td>
<td>Does not act as an arbitration institution or administer arbitrations. However, it has a set of procedural rules which are often used in ad hoc or unadministered arbitrations as well as administered arbitrations.</td>
<td>• Can be useful for ad hoc arbitrations where parties cannot agree on a set of rules or a designated institution.</td>
<td>• Additional procedural steps may be required as UNCITRAL does not administer arbitrations. • Under the UNCITRAL rules information and documents in the arbitration process are made public, subject to certain safeguards, including the protection of confidential information.</td>
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4 Usually the arbitral tribunal can decide on its own jurisdiction, however, jurisdictional challenges are becoming more common, particularly in the Middle East.
5 Decisions on the merits of the dispute by an arbitral tribunal are usually final and not subject to appeal.
6 Decisions of an arbitral tribunal (an “award”) are widely enforceable abroad by virtue of several conventions e.g. the New York Convention.

**Clear drafting**
It is often the case that little consideration is given to drafting effective arbitration clauses when negotiating contracts. However, in order to be effective and enforceable it is key that an arbitration clause is comprehensive and clear. Failure to draft effective arbitration clauses can result in jurisdictional challenges and satellite disputes amongst other things and in many cases extensive legal fees.

**Key points to include in drafting an effective arbitration clause**

1 **Identifying which disputes are subject to arbitration**
   Parties need to consider whether or not the arbitration clause should apply to all disputes arising out of the contract or if it would be best to carve-out certain types of disputes. For example, it may be preferable to carve-out simple fee claims as arbitration may not be an appropriate forum for such matters.

2 **Validly executed contract**
   It is important that the contract which contains the arbitration clause is validly executed in order to avoid jurisdictional challenges. Parties need to ensure that their contract is validly executed by the relevant persons with delegated authority to sign the contract including powers of attorney. In addition, the parties need to ensure that they comply with the execution formalities whether the contract is executed underhand or by deed.

3 **Choice of arbitrator**
   Arbitration disputes are usually heard by one or three arbitrators in order to avoid deadlock. In order for arbitration to work effectively, the arbitrator must be carefully selected and be an expert in their field of activity to which the dispute relates. There are a wealth of great arbitrators across the globe, with expertise in construction, to choose from, including a number of retired English high court judges. The parties should consider naming their preferred choice of arbitrator or the chair up front to avoid tactical disagreements and delay over the choice of arbitrator and/or a poor arbitrator being appointed.

4 **Choice of seat of arbitration and location of arbitration**
   The law of the arbitral seat often governs applications to a court in connection with arbitration and therefore is essentially the legal jurisdiction to which the arbitration is tied. This is usually the same location where the arbitration hearings are held, however, this is not necessarily always the case.

5 **Choice of language of arbitration**
   The parties should ensure to clearly specify the language of the arbitration. Failure to specify an appropriate language could lead to parties incurring unnecessary translation costs.

6 **Arbitration rules**
   It is imperative that the arbitration clause clearly sets out the arbitration rules of the arbitral institution, otherwise any ambiguity could lead to an award being ruled unenforceable by a court as was recently highlighted in a Russian Supreme Court ruling (Supreme Court of the Russian Federation dated 26 September 2018 No. 305-3C18-1934). In this ruling, it was held that an arbitration award was unenforceable due to the reference, in an arbitration clause, to the arbitration rules of an arbitral institution not being sufficiently clear.

7 **Allocation of costs**
   As the costs of arbitration can be expensive, it is important to expressly draft a provision that the opponent to an arbitration must pay their share of the arbitration costs.

**Summary**
In order to agree effective arbitration clauses, it is essential that the parties to a contract clearly set out the key arbitration provisions, including the seat and location, appointment of the arbitrator(s), arbitration rules, language and allocation of costs. Most importantly, the contract must be validly executed in order that the parties have the right to arbitrate and the subsequent award is enforceable.