International construction arbitration - the arbitration agreement

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While the use of arbitration in domestic construction disputes in the UK has waned in recent years due to the continuing popularity of adjudication, it remains a popular forum for resolving disputes arising from construction projects where the contracting parties are from different jurisdictions.

Although the costs of international arbitration are often similar to litigation, it provides a number of advantages for parties, particularly for projects undertaken in jurisdictions where the local courts may not have sufficient experience or expertise, or where there is a fear of bias.

The main advantages are:

- a neutral location for parties to conduct their dispute (the seat of the arbitration)
- the ability to specify who the arbitrators will be and ensure they are suitably experienced, and to determine the rules and law that will govern the arbitration
- the relative ease of enforcing an award made, and
- confidentiality

In order to make use of these advantages, it is important to ensure an effective arbitration clause is in place that is sufficient in its scope to address the parties' concerns.

The precise terms of any arbitration agreement will vary depending on the parties' interests. The first step is to consider what the parties want to achieve. While parties' interests will turn on the facts of each case, some key considerations include the nature, complexity (particularly in construction contracts) and value of potential claims, together with which arbitral rules should be used, where the arbitration should take place and how many arbitrators there should be.

Key provisions of the arbitration clause

The following gives an overview of the key provisions that are contained in an arbitration agreement, the pitfalls that should be avoided and an understanding of the enforcement of arbitration decisions. This is not an exhaustive list, but seeks to highlight the more important aspects that need to be considered.

Seat

The seat of the arbitration is important for the following reasons as it determines:

- where the arbitration process takes place—note that the seat is not always necessarily where the hearing is physically held and it does not effect the substantive law governing the contract (see Arbitration seat)
- where the award is made and hence whether it is subject to the New York Convention on the Recognition and Enforcement on Foreign Arbitral Awards (New York Convention)—it may also be worth considering the national courts' reputation in relation to ease of enforcement of arbitration awards before choosing the seat of the arbitration (see Law of the arbitration agreement (England and Wales))
- the procedural law to which the arbitration will be subject, including the arbitration laws—different countries can import different requirements into their own law and, to be effective, an award will have to comply with all the mandatory requirements imposed by the law of the seat of arbitration (see Law of the proceedings—curial law of lex arbitri (England & Wales))
- the courts that will have a supervisory and/or supportive function in connection with the arbitration—in this regard, parties can ascertain in advance the extent to which courts will issue interim relief such as injunctions or entertain appeals; if in any doubt, local advice should be obtained at the outset in respect of the prospects of enforcing an award in a particular jurisdiction, preferably when drafting the arbitration agreement

According to a 2010 survey by Queen Mary University, London is the most popular seat for corporations (see News Analysis: London is the preferred international arbitration seat (News, 7 October 2010)). The popularity of London is due to its reputation as a neutral and impartial jurisdiction, the prevalence of English law as the governing law of the contract and the large pool of specialist solicitors, barristers and arbitrators.

Any arbitration-related application to a London court will typically be made in the Commercial Court or Technology and Construction Court in London. It will, therefore, be heard by a judge who has specialist experience of international arbitration. Generally, the judges will have been leading Queen's Counsel at the commercial bar before their appointment. London is also home to the London Court of International Arbitration (LCIA), a well-respected and frequently used arbitration institution.

However arbitration is big business and following the establishment of new international arbitration centres, such as Singapore, some countries are now reviewing and amending their national laws so as to make them more favourable to international arbitration processes. Therefore, it is worth considering whether an alternative seat could be more favourable.

For more information see Practice Note: Arbitration seat and Choosing the seat of arbitration).

Legal framework—governing law of the contract

The substantive law of the contract between the parties is the law governing the contract. Regardless of the seat of the arbitration, the arbitrators will apply the substantive law of the contract when deciding the issues in dispute under the contract. In practice, choice of law clauses are often combined with arbitration clauses so parties may wish

to consider this when drafting the arbitration clause (see Arbitration—substantive law of the dispute (England and Wales))

Parties should give careful thought to the appropriate governing law as this is key as to whether disputes arising under or in connection with the contract can be submitted to arbitration and what remedies can be awarded by the arbitrators. The choice of law will depend upon the project in question and the parties involved. For example, if the contracting parties are both from civil code jurisdictions it may make sense to choose a familiar legal system. Alternatively, if one of the parties is a government entity it may be difficult to persuade them that its own law is inappropriate. English law remains the most common choice in international contracts because it provides a clear legal framework offering relative certainty to the parties.

Governing rules

The parties can (within the constraints of the procedural law) choose their own rules to govern the arbitration process. There are essentially two options here: (i) institutional rules which are those set down by a particular arbitration institution or (ii) an ad hoc arbitration which is where the arbitration mechanism is established by the parties specifically for the particular agreement or dispute.

Institutional arbitration

An arbitral institution can help with the selecting and replacing of arbitrators, organising hearings and handling communications between the parties and the arbitrators. Whilst institutional arbitration is likely to be more expensive than ad hoc arbitration (as a result of the charges to administer the arbitration, particularly with regards to the International Chamber of Commerce which calculates fees by reference to the value of the claim), the use of such rules is usually favoured because it provides greater certainty in so far as the rules of the major institutions are well known and their application is reasonably predictable. This can also make the recognition of an award more straightforward.

There are at least 28 arbitration institutions globally and further information on the various providers and the key differences between them can be found (see Institutional arbitration and A quick guide to the institutional and UNCITRAL rules). However, each institution has its own special characteristics and rules.

Ad hoc arbitration

Under an ad hoc arbitration (see Ad hoc arbitration) the parties are able to create their own rules, but this requires a spirit of co-operation. Cost savings can disappear if this is lacking.

Scope of the dispute

The arbitration clause should be wide enough to encompass all possible disputes and claims. This should include damages claims as well as breach of contract. The words 'disputes relating to' or 'all disputes and claims arising out of or in connection with the contract' are wider than 'disputes arising under' the contract which a court may interpret as covering only contractual claims.

The clause should be drafted in broad terms to ensure that all disputes, tortious or contractual, are referred to arbitration. There must be clear, unambiguous and mandatory submission of disputes to arbitration.

Joinder provisions

It is a common characteristic of construction related disputes for there to be multiple inter-related contracts and related parties. It would therefore be sensible for parties to consider whether disputes under separate contracts should be consolidated into one hearing should a dispute arise. However, any such agreement is often difficult to make (third parties cannot be joined to arbitration proceedings without their consent) and give effect to as an arbitrator lacks the wide powers possessed by the court in multipartite proceedings. See Practice Note: Arbitration and the Contracts (Rights of Third Parties) Act 1999 and Multi-party/multi-contract arbitration.

The Arbitration Act 1996 (AA 1996) makes no provision for proceedings between more than two parties; however, AA 1996, s 35 states that parties are free to agree on the consolidation of arbitration proceedings, or concurrent hearings.

If there are no joinder provisions in the arbitration agreement, separate proceedings may be required with different arbitrators with the likely result that separate findings of fact or law would result. Therefore, in the context of concurrent multi-party construction disputes, if this is likely to be an issue, litigation should be considered instead where joinder and consolidation can be ordered more easily.

Language

If the arbitration agreement provides for a choice of language of the arbitration, this will determine the language of the hearing and the award. It is therefore necessary to consider whether this will lead to a restriction on the choice of arbitrator and/or the need to translate multiple documents.

Usually the language adopted reflects the parties' choice of the seat of arbitration and the language of the contract, but this is not always the case.

International construction contracts invariably involve parties from different countries that speak different languages. It is not unusual to see English being used as the choice of language as it is often perceived to be common to all parties. It is worth noting that, in the absence of an agreement of the parties, the question of the language of the arbitration is one to be determined by the arbitrator(s).

Number of arbitrators

If the parties want more than one arbitrator then, in order to avoid a deadlock decision, it is important to ensure they always specify an odd number of arbitrators to be appointed.

If the contract relates to a complex and/or high-value project, having three arbitrators determine the dispute will reduce the risk of receiving an unreasonable result. It is common for each of the parties to nominate or appoint an individual arbitrator and for the two party-appointed arbitrators to appoint the chairman of the tribunal.

Although a greater number of arbitrators will result in additional expense, the general absence of the ability to appeal arbitration decisions means this may well be an expense worth incurring.

It is useful to include the default mechanism that will apply if the parties fail to agree. For example, if the parties are to agree on a sole arbitrator, consideration should be given to adding a provision that, in the event the parties cannot reach an agreement within a defined time scale, the relevant institution or a third party will appoint the arbitrator. The main institutional rules provide default mechanisms for selecting and replacing arbitrators. Depending on the rules used (if any), the parties will have greater or lesser influence in the selection process.

If it is important that the arbitrator or arbitrators have particular qualifications or experience, particularly in respect of the nature of construction disputes, parties should consider specifying this. In doing so, although this may limit the number of potential arbitrators.

Disclosure

Whilst parties may specify that particular institutional rules will apply to their arbitration, they can also adopt or refer to rules prepared specifically for disclosure such as the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) or the Chartered Institute of Arbitrators Arbitration Rules (2000 edition).

Both sets of rules are typically used in international disputes and provide familiar procedure for parties from different jurisdictions as they represent a compromise between common law and civil law systems.

Confidentiality

Under English law there is an implied duty of confidentiality in arbitration, but this is not the case in some other jurisdictions. If confidentiality is important, parties should consider including an express obligation in the arbitration clause to keep the arbitration, and all materials generated for the purpose of the arbitration, confidential, Parties may not need to do this in all cases, as some of the institutional rules already provide for confidentiality.

See Practice Note: Confidentiality in international arbitration

The award

Parties can include specific wording that states that the award is final and that judgment upon the award may be entered by any court having jurisdiction over the award, the relevant party or its assets. This, however, should not be necessary as arbitral awards are final and binding (AA 1996, s 58) (see The award—overview)

New York Convention

As stated above, one of the key advantages of arbitration awards are that they are much more easily and consistently enforceable in foreign courts than judgments from foreign courts. The New York Convention provides significant comfort to parties seeking to enforce an award in a foreign country that is a signatory to it.

At present 147 countries are signatories to the New York Convention and, save for in limited circumstances, a signatory is obliged to enforce a valid award. Therefore, in international contracts in foreign signatory jurisdictions, arbitration provides the reassurance that the award can be enforced, provided that the debtor's assets are located in that jurisdiction.