Guide to drafting arbitration clauses

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Foreword

Arbitration has long been the dispute resolution method of choice for cross-border transactions. It is also increasingly being selected as the preferred method for resolving domestic disputes, especially where parties desire a confidential and efficient dispute resolution process before suitably qualified, privately appointed decision-makers.

Arbitration is a consensual dispute resolution process. It requires the parties to enter into a valid and enforceable arbitration agreement, which records their agreement to resolve certain disputes by arbitration. Yet, despite their significance, arbitration clauses are often the last provisions to be negotiated. Called 'midnight clauses', they are rarely accorded the time and attention required to ensure that they are appropriately scoped, achieve the desired result of keeping disputes out of court and away from the public eye, and provide for an appropriately tailored procedure to meet the parties' and the transaction's needs.

The consequences of poorly drafted arbitration clauses can be significant and costly. To provide clarity and avoid unnecessary complications, we have prepared this Guide to help parties negotiate properly drafted arbitration clauses that are enforceable, efficient and fit for purpose. The Guide can be read as a standalone document or in conjunction with Corrs' *Introduction to Arbitration*, in which we explain the fundamental tenets of arbitration. Together, the guides will help users to avoid common pitfalls when selecting arbitration, and to successfully navigate an arbitration whenever disputes do arise.

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This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

The information contained in this publication is current as at October 2024.

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Types of arbitration agreements

There are two types of arbitration agreements: an arbitration clause and a submission agreement. An arbitration clause is typically found in a commercial contract and is entered into between the parties prior to a dispute arising. It is the most common type of arbitration agreement. A submission agreement, on the other hand, is an agreement entered into between the parties to submit existing disputes to arbitration. The terms 'arbitration clause' and 'submission agreement' are used throughout this Guide in accordance with these descriptions. The term 'arbitration agreement' refers to both arbitration clauses and submission agreements.

To be enforceable in accordance with the parties' intention to submit disputes to arbitration, and to provide clarity as to their operation, arbitration agreements should include certain components. For the most part, arbitration clauses and submission agreements should incorporate the same fundamental elements and can include certain optional components. However, there are certain distinct considerations and challenges that will arise when concluding a submission agreement, as opposed to an arbitration clause. The most obvious challenge is that the arbitration clause is drafted at a time when it may be difficult to predict what kind of disputes are likely to arise. Indeed, most parties enter commercial contracts in the hope that the arbitration clause will never be used. Submission agreements, on the other hand, are entered into at a time when the parties are amid a dispute that requires resolution. Therefore, even the most basic of requirements may be challenging to negotiate.

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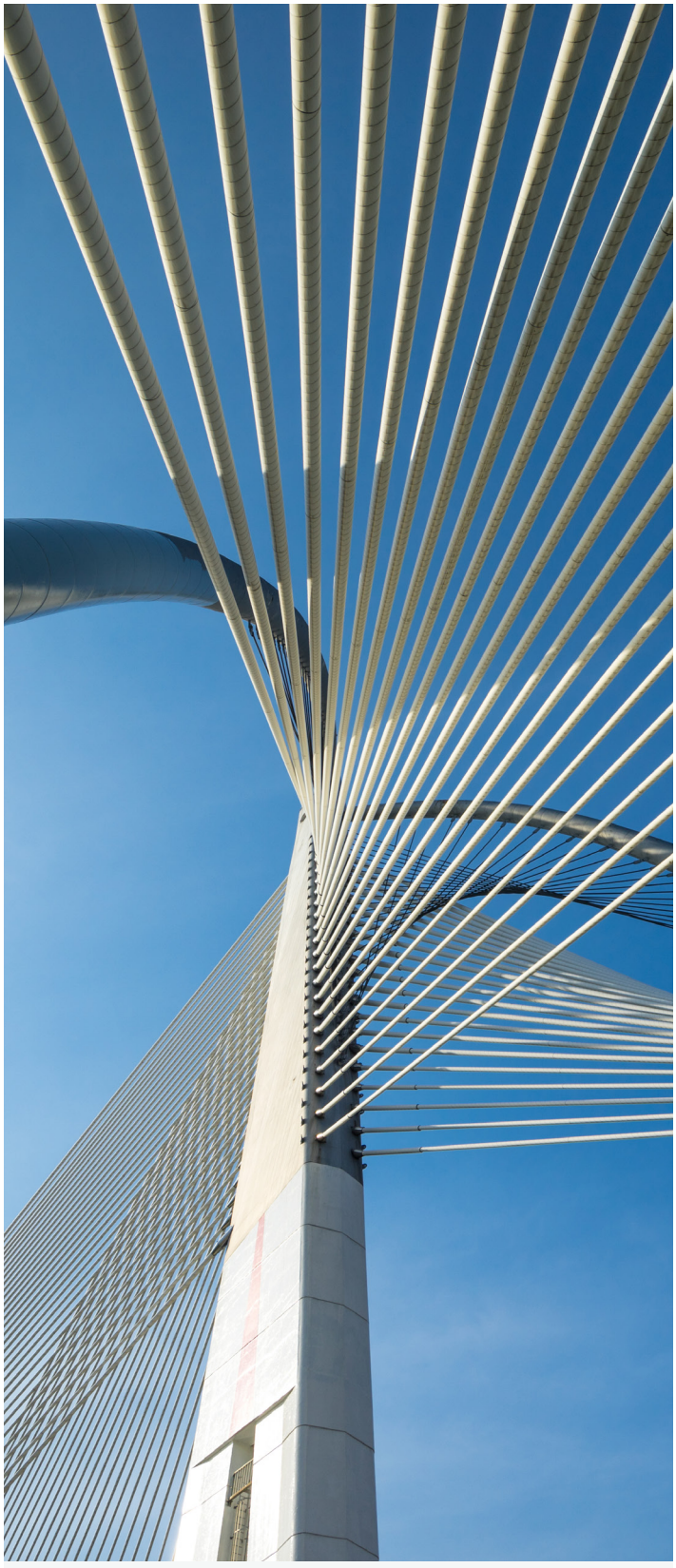
Key questions before beginning a draft arbitration agreement

Prior to commencing the process of drafting an arbitration agreement, it is useful to consider some key questions that help inform the drafting. These include:

- What is the likely nature and value of any potential claim(s)?
- What is the likely complexity of any potential claim(s)? Is the dispute likely to involve technical matters in a specialist field?
- What is the nature of the parties' relationship? For example, are the parties entering into a long-term relationship which requires ongoing cooperation? Or is it a one-off transaction?
- What is the most appropriate forum for the resolution of any potential disputes? Is it preferable to arbitrate all disputes that may arise between the parties? Would it be beneficial for the parties to attempt to resolve the dispute by other forms of alternative dispute resolution (**ADR**) because many regard arbitration itself as a form of ADR as well?
- Are the potential disputes likely to involve a substantial amount of evidence?
- Where are the relevant parties located? Are the parties from different jurisdictions? If so, what is the preferred legal 'seat' of the arbitration and what is the preferred language?
- Are there multiple parties or contracts in play?
- Is confidentiality important to the parties?
- Is the resolution of any potential dispute time and/or cost sensitive?
- Are there any other peculiarities in play – e.g. is the counter-party to the agreement a state or state instrumentality?

While it can be difficult to accurately predict the nature of any potential dispute(s), giving careful thought to the likely needs of the parties should a dispute arise (or when a dispute has arisen), and tailoring the arbitration agreement accordingly, can offer many benefits to the parties. Some benefits include giving the parties at the inception of any dispute the best chance possible to save time and cost in resolving the dispute and ensuring that, where arbitration is necessary, it is conducted in the most efficient and cost-effective manner possible.



03

Essential components of an arbitration agreement

Intention to arbitrate

An arbitration agreement must clearly demonstrate an intention on behalf of the parties for all or part of any dispute that arises between them to be resolved by arbitration. The most effective way to demonstrate an unambiguous intention to arbitrate is by the use of mandatory language ('shall be submitted to arbitration'), rather than permissive wording ('may'). This is particularly critical as courts in some jurisdictions have rejected arguments that the use of the word 'may' creates a right to compel arbitration.

Similarly, parties should avoid the inclusion of competing jurisdiction clauses (e.g. an arbitration clause and an exclusive jurisdiction clause in favour of the courts of a particular country), which could be taken to demonstrate a lack of intention to arbitrate. Depending on the circumstances and drafting, such clauses may have the effect of invalidating the arbitration agreement. Also, inclusion of a jurisdiction clause is not necessary to provide parties with access to the courts of the seat, for example, to award interim or urgent relief in respect of an arbitration. Choice of the seat of arbitration includes the choice of the arbitration law of the seat, which almost always allows parties to apply to the courts for interim measures.[1]

Scope of the arbitration agreement

It is essential for an arbitration agreement to define the type and ambit of the disputes that are within its scope. Absent special circumstances, it is advisable to define the scope of the arbitration agreement broadly so that all disputes (including all claims, be they contractual, tortious, or statutory) can be resolved by arbitration. This avoids aspects of the dispute being unnecessarily hived off to different fora, which can greatly delay and increase the cost of resolving a dispute. The easiest way to achieve this is by defining the scope to include not only disputes 'arising out of' the contract, but also disputes 'in connection with' or 'relating to' the contract. The scope should also include any question regarding the contract's existence, validity or termination.

Clauses defined to include disputes 'arising out of' or 'in connection with' the contract, including its existence, validity and termination, ensure that the clause is broad enough to cover contractual and non-contractual claims that may arise between the parties, as well as any disputes about the enforceability of the contract. This also prevents parties from seeking to circumvent arbitration by alleging formation issues or contending that the matrix contract (including the agreement to arbitrate) is terminated. In conjunction with the principle of competence-competence and the principle of severability of the arbitration agreement, this also ensures that any preliminary disputes concerning the enforceability of the agreement to arbitrate are also resolved by arbitration.

In some circumstances, the parties may wish to narrow the scope of the arbitration agreement by excluding some types of disputes. A narrow scope may be appropriate where, for example, expert determination is more appropriate for some disputes, or where there is a preference for certain types of disputes to be resolved in a public forum. This is permissible, but careful attention needs to be given to the drafting of the clause's scope to minimise the risks of preliminary jurisdictional disputes and overlapping claims before different fora.

Seat of the arbitration

The parties must either directly or indirectly connect the arbitration to a legal system (i.e. designate the 'seat' of the arbitration). The legal seat of the arbitration need not be the same as the physical location of any hearings or the substantive law governing the contract. Nor does it need to be the location of the main activities performed under the contract.

The chosen seat can be clearly stipulated in the arbitration agreement (e.g. 'the seat of the arbitration will be Melbourne, Australia'). Alternatively, the seat can be determined by reference to the arbitration rules selected by the parties or by the arbitrator(s). The arbitration rules of most arbitral institutions identify the seat of the arbitration.[2]

1 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), Articles 9,17J.

2 See e.g. the ACICA Rules 2021, Article 27, which designates Sydney, Australia as the place of arbitration where the parties have not previously agreed on a seat of arbitration and, if within 15 days after commencement of the arbitration they cannot agree.

The United Nations Commission on International Trade Law (**UNCITRAL**) Arbitration Rules (**UNCITRAL Arbitration Rules**) provide that, if the parties have not agreed on the seat of the arbitration, the arbitrator is empowered to determine the seat 'having regard to the circumstances of the case'.[3] However, it will always be preferable for the parties to expressly identify the seat in the arbitration agreement.

The law of the seat dictates several important procedural matters, such as the extent to which the proceedings and award are confidential, the tribunal's power to order consolidation and/or joinder, and the tribunal's power to order interim measures or security for costs. Importantly, it also identifies the courts with supervisory jurisdiction over the arbitration, which can issue orders that facilitate the conduct of the arbitration, appoint arbitrators absent party agreement and assist with gathering evidence through issuing subpoenas or ordering document production. The law of the seat of the arbitration may also dictate other critical matters, such as the parties' rights to an appeal, the grounds upon which an award may be challenged and annulled, and whether certain disputes are arbitrable (i.e. deemed by that legal system to be capable of settlement by arbitration). While the parties can agree to exclude the application of some arbitration laws of the seat, many jurisdictions provide mandatory rules of procedure, which the parties cannot contract out of.

For those and several other reasons, the choice of the arbitration seat is consequential. It is therefore important that the parties understand the arbitration law of the seat, and how its provisions have been interpreted by the local courts, before selecting a seat in their arbitration agreement.

Language

It is prudent to specify the language of the arbitration in the arbitration agreement. Specifying the language is particularly important if the parties operate in different languages and there is therefore likely to be a question about which language governs. In the absence of such a provision, the language of the contract will typically be chosen by the arbitrator as the language of the arbitration. However, leaving this decision to the arbitrator could risk unnecessary delay and costs.

It is recommended that only one language is selected. While multi-lingual arbitrations are possible, the need to translate and interpret materials in two languages will add considerably to the cost and length of the proceedings as it is not uncommon for parties to dispute the accuracy of translations. Further, if the hearing is to be conducted in two languages, the parties will need to provide and bear the cost of interpreters.

Number of arbitrators

The parties may wish to specify the number of arbitrators to hear and determine their dispute(s). Typically, disputes will be resolved by one or three arbitrators depending on the nature and complexity of any potential dispute. There should always be an odd number of arbitrators.

While it is not essential to specify the number of arbitrators in the arbitration agreement, the parties may consider it preferable to do so as the number of arbitrators will have an impact on the overall cost and duration of the proceedings. Proceedings before a sole arbitrator will be less expensive and typically more expeditious. This will be suitable for smaller, factually simpler disputes of a lower quantum. A three-person tribunal is more appropriate for resolving complex factual or legal issues. It provides the parties with greater control over the composition of the panel, as each party will normally select an arbitrator, with the presiding arbitrator selected by the party-appointed arbitrator(s), by agreement of the parties or, in the case of institutional arbitration, by the designated institution.

Where the parties have not specified the number of arbitrators in their arbitration agreement and cannot agree once a dispute has arisen, the arbitration rules will dictate the number of arbitrators. Some arbitration rules provide for a default tribunal of one arbitrator,[4] others provide for a default of three[5] and some provide that the institution will determine the number of arbitrators having regard to the relevant circumstances of the case.[6]

The importance of the arbitration rules: Institutional vs ad hoc

Ideally, the arbitration agreement should specify the rules that govern the arbitration. Arbitration rules provide the procedural framework for the arbitration. They contain default provisions on important matters which will apply in the absence of an express agreement otherwise, such as the:

- seat of the arbitration;
- language of the arbitration;
- method of commencing the arbitration;
- number of arbitrators;
- appointment of the arbitrator(s) and the process for challenging their appointment;
- process for challenging the jurisdiction of the tribunal;
- confidentiality and privacy of the arbitration and the arbitral award;
- procedure for the arbitration;
- procedures for multi-party disputes (i.e., provisions for joinder, consolidation and concurrent hearings);
- appointment of an emergency arbitrator;

3 See Article 18 of the UNCITRAL Arbitration Rules 2021.
4 See e.g. Article 12(2) of the Rules of the International Chamber of Commercial 2021.
5 See e.g. Article 7 of the UNCITRAL Arbitration Rules 2021.
6 See e.g. Article 11 of the ACICA Rules 2021.

- procedures for expedited arbitration;
- time limits imposed on arbitrators rendering an award;
- review (or scrutiny) of the award by an institution;
- tribunal's power to order security for costs;
- tribunal's power to order costs and on what basis; and
- the tribunal's power to order disclosure of any third-party funding.

There are many arbitration rules available for parties to adopt. While most leading arbitration rules share certain common features, there are also important differences that the parties should be aware of before making their choice. When selecting arbitration rules, it is important to compare the available rules and select those which best cater to the unique circumstances of the parties' relationship and anticipated disputes. For example, if the parties envisage that multiple parties and/or multiple contracts are likely to be at play in any potential dispute, they should ensure that the chosen rules provide for joinder, consolidation, concurrent hearings, and multi-contract arbitration. This is discussed in further detail below. For a comparison of arbitration rules, see *Corrs Introduction to Arbitration: A User's Guide*.

One important factor to consider when choosing the arbitration rules is whether the parties prefer institutional or ad hoc arbitration. If institutional arbitration is preferred, the parties can select the rules issued by the arbitral institution of their choice. That institution will in turn provide administrative assistance with running the proceeding in exchange for a fee. It will assist with practical matters such as constituting the tribunal, facilitating communications between the parties and the arbitrators, organising hearings, handling payments to the arbitrators and, in some cases, scrutinising the award before it is issued to the parties. Such assistance may be particularly beneficial for parties with limited experience in international arbitration. Where institutional arbitration is preferred, the parties should clearly specify that the arbitration will be in accordance with the rules of a particular institution and/or that the arbitration is to be administered by a particular institution.

It is usually recommended for the parties to adopt the model arbitration agreement provided by the institution[7] (although they may need to agree to additional terms if required in the circumstances).

Alternatively, the parties may decide that ad hoc arbitration is preferable. Ad hoc arbitration is a form of arbitration that is not managed by an arbitral institution. It requires the parties to attend to the administrative details of the arbitration themselves, such as the appointment of a neutral third party (an 'appointing authority') to select the arbitrator(s) in the absence of the parties' agreement. Ad hoc arbitration is better suited to parties with experience in international arbitration. Where ad hoc arbitration is chosen, the UNCITRAL Arbitration Rules are the preferred rules.

For a detailed discussion on the advantages and disadvantages of institutional and ad hoc arbitration see *Corrs Introduction to Arbitration: A User's Guide*.

Model arbitration clauses

Most arbitral institutions have prepared model arbitration clauses to be adopted and tailored as necessary. The main benefit of using a model clause as a starting point is that they contain all the basic components of the arbitration agreement, thereby ensuring its enforceability, but they leave room for the parties to make provision for features that cater to the particular circumstances of their case.

An example of a model clause providing for institutional arbitration is as follows:

"Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the [insert institutional arbitration rules]. The seat of arbitration shall be [insert location]. The language of the arbitration shall be [insert language]. The number of arbitrators shall be [one or three]."

An example of a model clause providing for ad hoc arbitration is as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. The appointing authority shall be [name of institution or person]. The number of arbitrators shall be [one or three]. The place of arbitration shall be [town and country]. The language to be used in the arbitral proceedings shall be [language]."

Annexure 1 includes a selection of model arbitration clauses prepared by the major arbitral institutions.

7 See e.g. the ACICA Model Arbitration Clause.

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Optional components – Tailoring your arbitration agreement

The arbitrator

Requirements of the arbitrator

Parties may choose to include provisions that specify requirements of the arbitrator in the arbitration agreement.

Nationality

The clause could, for example, specify nationality requirements of the arbitrator(s). The nationality of the arbitrator(s) may be important where the parties are of different nationalities. In those circumstances, the parties may wish to specify in their arbitration agreement that the sole arbitrator or the chair of the tribunal must be of a different nationality to that of the parties. Alternatively, where the parties intend to select institutional arbitration, the clause should incorporate rules that provide that, if the parties are of different nationalities, then the sole arbitrator or chair of the tribunal must be of a nationality different from the parties[8] or that the institution will consider the nationality of the arbitrator and the parties when appointing an arbitrator.[9]

Independence, impartiality and disclosure of conflicts of interest

It is an established standard that all arbitrators should be independent and impartial. This standard applies equally to an arbitrator nominated by a party and an arbitrator nominated by an institution (or a supervisory court). The rules of the leading arbitral institutions and most national arbitration laws expressly provide that arbitrators are to act with independence and impartiality. However, in the absence of an express provision in the applicable rules or the arbitration law of the seat, it may be desirable to include an express statement in the arbitration agreement that 'arbitrators shall be independent and impartial'.

Additionally, the IBA Guidelines on Conflicts of Interest in International Arbitration provide a comprehensive set of standards for impartiality and independence, and requirements for disclosure by the arbitrators of circumstances that could reasonably give rise to a perception of bias or conflict of interest.

The Guidelines are widely used in international arbitration and are often incorporated in the rules of most leading arbitral institutions. Where the chosen rules do not incorporate the Guidelines, the parties may wish to make express reference to the Guidelines in their arbitration agreement.

Qualifications or required expertise

The arbitration agreement may specify that the arbitrator is required to possess certain expertise or specific qualifications. The qualifications may be academic or technical in nature, they may require membership of particular professional bodies, or provide that the arbitrator(s) must be admitted to practise in certain jurisdictions. The parties may also specify a minimum number of years in practice.

Mandating arbitrator qualifications may be advisable where any dispute is likely to involve complex technical matters in a specialist field. However, parties should be careful not to impose excessively stringent qualification or expertise requirements that may make it difficult (or even impossible) to locate an arbitrator with the requisite expertise. In the same vein, it is generally not advised to designate a specific person as the arbitrator in the arbitration agreement.

Method of selecting and replacing the arbitrator

Default mechanisms for selecting and replacing arbitrators will typically be provided by the chosen institutional or ad hoc arbitration rules. For instance, in institutional arbitrations, where the parties fail to nominate or agree on an arbitrator, the institution will typically be responsible for the appointment. In ad hoc arbitrations, the parties should select an appointing authority in the arbitration agreement. Where the parties fail to designate an appointing authority and then cannot agree on an appointing authority once a dispute has arisen, the UNCITRAL Rules provide that the Secretary-General of the Permanent Court of Arbitration (**PCA**) will serve as the appointing authority.[10]

The parties can elect to vary the default method if desired. For example, while institutional rules typically provide that the chairperson of a three-arbitrator panel will be selected by the two co-arbitrators or by the institution, the parties may choose to select the chairperson themselves.

8 See e.g. Article 6.1 of the LCIA Rules 2020, Article 17(6) of the SCC Rules 2023, and Articles 11.2 and 11.3 of the HKIAC Rules 2024.
9 See e.g. Articles 12.3 of the ACICA Rules 2021.
10 Article 6(2) of the UNCITRAL Arbitration Rules 2021.

If the parties wish to depart from the institutional rules, the arbitration agreement should set out the method and time limits for the appointment of the arbitrators to avoid time wastage.

Multi-tiered dispute resolution clauses

The parties may wish to give themselves the option of attempting to resolve disputes by another form of ADR, such as negotiation, mediation or conciliation, prior to resorting to arbitration. In those circumstances, it is advisable to incorporate a multi-tiered dispute resolution clause into their contract. Multi-tiered dispute resolution clauses are commonly found in commercial contracts. They provide a tiered process for resolving disputes involving one or more forms of ADR, which must be attempted by the parties. Only if the dispute remains unresolved can the parties refer it to arbitration.

The main benefit of a multi-tiered dispute resolution clause is that the parties give themselves the option of resolving their dispute through ADR. This can often provide a faster, less expensive, and more flexible method for resolving disputes. However, it preserves the ability to compel binding arbitration should the dispute not be capable of resolution through ADR. Multi-tiered clauses are particularly common in contracts that envisage long-term relationships and a need for ongoing cooperation, such as in complex construction contracts or energy projects. However, multi-tiered clauses are not without challenges and careful drafting is essential.

One of the main challenges with multi-tiered clauses is determining the consequences (if any) of a failure to comply with pre-arbitral step(s). Historically, courts and tribunals viewed pre-arbitral mechanisms as a condition precedent to the tribunal assuming jurisdiction over the dispute, as opposed to a question of admissibility. That is to say that, historically, where the parties failed to comply with the pre-arbitral mechanism, the tribunal did not have the power to hear and determine their dispute until the pre-arbitral mechanism had been complied with.

Recent years have seen a growing trend towards pre-arbitral mechanisms being treated as a question of admissibility unless the agreement makes clear that it should be treated as a jurisdictional condition precedent.[11] When treated as a question of admissibility, if the tribunal concludes that there has been a failure to comply with the multi-tiered clause, it can order a stay of proceedings pending completion of the preconditions, deal with the failure to comply through an adverse costs order, or dismiss the claim as having been commenced prematurely. This is critically important because, when treated as a jurisdictional condition precedent, if the tribunal dismisses a jurisdictional objection based on a party's failure to comply with a pre-arbitral step and then proceeds to hear and determine the dispute, the award may be susceptible to being set aside for lack of jurisdiction.

The jurisprudence on this point is unsettled in Australia. Australian courts have arrived at contradictory conclusions as to whether a party's failure to complete the preliminary steps in a multi-tiered dispute resolution clause before resorting to arbitration will be treated as a question of jurisdiction or admissibility.[12]

As non-compliance with pre-arbitral steps can have significant consequences depending on the seat of the arbitration, it is essential to take great care when drafting a multi-tiered clause. The clearer the parties' intention, the better. For example:

1. The parties should clearly define the dispute(s) to be submitted to the pre-arbitral mechanism(s).
2. The parties should specify what specific event triggers the commencement of the pre-arbitral mechanism(s) (e.g. a written request to mediate).
3. The parties should clearly define each pre-arbitral step in full detail. This would include the procedure for the pre-arbitration mechanism(s),[13] whether the same individual or a neutral is to be used for both, and the period of time over which the pre-arbitral mechanism is to take place before the dispute can be submitted to arbitration. It should also specify a definitive event that triggers the conclusion of the pre-arbitral steps (e.g. the expiration of a certain period of time).
4. The parties should ensure that arbitration remains mandatory, not permissive – i.e. the parties should use the word "shall" not "may".

11 See e.g. the Hong Kong Court of Final Appeal's landmark judgment that pre-arbitration conditions should be considered a matter of admissibility, rather than a jurisdictional condition precedent: *C v D* [2023] HKCFA 16. As Hong Kong adopts the UNCITRAL Model Law on arbitration, this decision has persuasive effect across the 118 jurisdictions with arbitration legislation based on the Model Law, including Australia.

12 See e.g. *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* [2022] NSWSC 505 [119], [121] (Rees J) (finding tiered dispute resolution mechanisms are not issues of jurisdiction); *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2021] SASCA 8 (finding that the parties' choice of conciliation in a tiered clause constituted a jurisdictional pre-condition to arbitration).

13 Several of the arbitral institutions provide rules for mediation and conciliation. See e.g. the ACICA Mediation Rules 2007.

5. If the parties would like to ensure that the multi-tier clause operates as a condition precedent to the commencement of an arbitration, they should expressly and unequivocally say so. Conversely, if they would like the possibility of participating in the pre-arbitration process, but do not wish for it to act as a condition precedent to arbitration, that should be made clear.
6. The parties should avoid using vague and superfluous words (e.g. "good faith", "best endeavours", "genuinely" or "amicable"). These can lead to protracted preliminary disputes about whether the parties participated in the pre-arbitral mechanism in a satisfactory manner.

Multi-party and multi-contract scenarios

One of the challenges of arbitration is its inability to deal with situations of multi-party and multi-contract disputes simply. Unlike the courts' very broad jurisdiction to order the joinder of parties or the consolidation of concurrent hearings of multiple disputes, the consensual nature of arbitration means that the arbitrator's power to make orders that bring the parties and/or disputes together is hamstrung by the need for consent. For that reason, careful drafting is required when concluding arbitration agreements that will cater for complex multi-party and multi-contract scenarios.

To a certain extent, the rules of the major arbitral institutions offer some solutions to multi-party and multi-contract disputes by incorporating provisions dealing with:

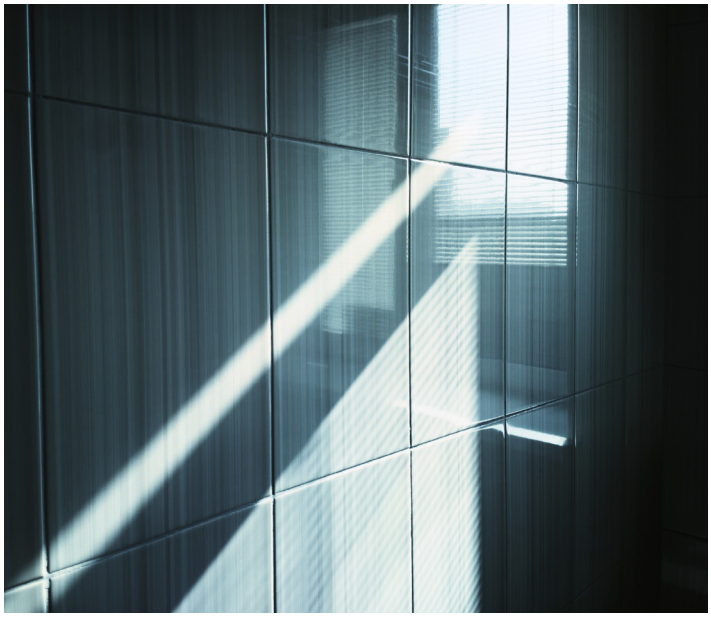
- the joinder of third parties to existing proceedings;
- the consolidation of two or more arbitrations;
- the commencement of a single arbitration under multiple contracts; and
- the concurrent hearing of two or more arbitrations.

However, there are often important limitations on the scope of these provisions. For example, joinder is permissible under Article 17 of the Australian Centre for International Commercial Arbitration Rules (**ACICA Rules**). However, this is only where the additional party is bound by the same arbitration agreement between the existing parties to the arbitration,[14] or all parties, including the additional party, expressly agree to joinder.[15] This requirement means that the provision on joinder is of limited assistance in a chain of contractual structures. Similarly, under Article 16.1 of the ACICA Rules, ACICA will only order consolidation where:

a. the parties have agreed to consolidation;
b. all the claims are made under the same arbitration agreement; or
c. the claims in the arbitrations are made under more than one arbitration agreement, but:
    i. a common question of law or fact arises in both or all of the arbitrations;
    ii. the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions; and
    iii. ACICA finds the arbitration agreements to be compatible.

The national laws of some jurisdictions also provide solutions to multi-party and multi-contract disputes. The arbitration legislation in Australia, for example, does not address the joinder of third parties to existing proceedings. Nor does it deal with the question of commencing proceedings against multiple parties in a single arbitration or concurrent arbitrations. However, in certain circumstances, both the domestic and international arbitration legislation empower tribunal(s) to order the consolidation of one or more arbitrations into a single proceeding.

When faced with a multi-party and multi-contract project, it is essential for the parties to consider whether the proposed arbitration rules and arbitration law of the seat of the arbitration provide solutions to resolve multiple, separate disputes in a single arbitration. Where parties foreshadow the need to join a third party to an arbitration or to consolidate separately commenced arbitrations, the best possible outcome is achieved by all parties signing up to a joint arbitration agreement. If that is not possible, the next best option is to adopt the same arbitration clause of an arbitral institution in all related contracts. This will ensure that the arbitration clauses are compatible. Short of this, there are very limited opportunities to join third parties to an arbitration.



14 Article 17.1(a) of the ACICA Rules.
15 Article 17.1(b) of the ACICA Rules.

Conduct of the arbitration

Evidence

One of the key benefits of arbitration is the broad discretion afforded to the parties and the tribunal to determine the applicable rules of evidence. That broad discretion is often found in the national laws and arbitration rules of most institutions. For instance, Article 19(2) of the UNCITRAL Model Law,[16] on which many national arbitration laws are based, expressly confers on arbitral tribunals 'the power to determine the admissibility, relevance, materiality and weight of any evidence'. Similarly, most institutional rules provide tribunals with the authority to order document production from the parties where the documents sought are shown to be relevant and material to the dispute.

Several institutional rules also make express reference to the application of the International Bar Association Rules on the Taking of Evidence in International Arbitration (**IBA Rules**), which will therefore apply where the parties have chosen those rules – unless they have expressly agreed otherwise.[17] The IBA Rules are regularly relied upon in arbitration as they provide a comprehensive set of evidentiary rules that cater to parties from different legal traditions and ensure both procedural fairness and efficiency. Where the chosen rules do not provide for the application of the IBA Rules, the parties can agree to the application of the Rules in their arbitration agreement. Parties and tribunals can also subsequently adopt the IBA Rules, in whole or in part, to govern arbitration proceedings.

Expedited arbitration

The parties may wish to provide for access to expedited arbitration by selecting institutional rules with expedited procedure provisions. Typically, expedited arbitration is considered appropriate in circumstances where the quantum in dispute is below a particular monetary threshold, or the dispute is relatively simple. Several institutions provide for expedited arbitration, including the ACICA Expedited Arbitration Rules and the International Chamber of Commerce (**ICC**) Expedited Procedure Rules. These rules seek to streamline the arbitral proceeding to reduce any unnecessary cost and delay.

If the parties wish for expedited arbitration to be available, their arbitration agreement should provide that the arbitration will be conducted in accordance with chosen expedited arbitration rules, or adopt institutional rules that allow a party to apply to the arbitral institution for the proceedings to be expedited.

Annexure 1 provides an example of a model clause providing for expedited arbitration. However, it is important to be aware of the limitations of expedited arbitration, including the possibility that a dispute will be determined on the papers without an oral hearing, and more compressed timelines.

Confidentiality

Most institutional rules and national laws contain provisions concerning the confidentiality of arbitral proceedings and the resulting award. However, the detail and scope of confidentiality obligations and any exceptions to confidentiality vary considerably among national laws and arbitration rules. This makes it important to carefully consider the confidentiality provisions contained in the arbitration laws of the chosen seat of the arbitration and any chosen arbitration rules when drafting an arbitration agreement.

In Australia, for instance, the provisions on confidentiality that apply to domestic arbitration proceedings are different to those that apply to international arbitrations seated in Australia.[18] Under the domestic regime, there is a statutory duty of confidence unless the parties agree otherwise. As such, the parties are required to refrain from disclosing confidential information except in the limited circumstances set out in the states' and territories' respective uniform Commercial Arbitration Acts (**CAA**).

The confidentiality regime applicable to international arbitrations seated in Australia is more complicated. Under the *International Arbitration Act 1974* (Cth) (**IAA**), if the arbitration agreement was concluded **before 14 October 2015**, the parties will need to have expressly opted in to the confidentiality provisions under the IAA for those provisions to apply. If the arbitration agreement was concluded **after 14 October 2015**, the confidentiality provisions in the IAA will apply by default, unless the parties agree (in the arbitration agreement or otherwise in writing) that they do not apply.[19] This means that, where the parties have chosen arbitration rules that provide a confidentiality regime that is distinct from the confidentiality regime under the IAA and the arbitration agreement post-dates 14 October 2015, the confidentiality regime in the chosen rules will apply. Further, the applicable confidentiality obligations are often subject to certain exceptions, which may also be different depending on the chosen arbitration rules and the applicable arbitration legislation.

16 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006).

17 See e.g. Article 35.2 of the ACICA Rules 2021.

18 An arbitration will be international where the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or one of the following places is situated outside the state in which the parties have their places of business; or the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country: Model Law, article 1(3) as applied in Australia by the *International Arbitration Act 1974* (Cth) (IAA), Section 16.

19 This is due to a change in the IAA which took effect in late 2015.

Given the variety of different confidentiality regimes that may apply, it is important to carefully consider whether the arbitration agreement being negotiated in fact achieves the desired result in terms of confidentiality. If the parties do not wish to be bound by confidentiality obligations, this should be expressly stated in the arbitration agreement.

Conversely, if confidentiality is important to the parties, it is prudent to consider whether the national law and/or the chosen rules provide acceptable confidentiality provisions and, if not, whether a desired confidentiality regime should be expressly provided for in the arbitration agreement.

Where confidentiality is considered important, it will be equally important for the parties to turn their minds to the circumstances in which they may need to disclose the existence of the arbitration, or details about it, to enforce their rights or to comply with certain legal obligations. For instance, the parties may need to disclose the existence of the arbitration to certain third parties such as auditors or insurers. Most arbitration rules and national laws make provision for disclosure to, for example, a professional or other adviser of a party, to enforce an arbitral award or where it is necessary to establish or protect a party's legal rights in relation to a third party.

However, the parties should ensure that their specific disclosure requirements are catered for under the relevant rules or applicable arbitration laws, and where they are not, make provision for such disclosure in the arbitration agreement.

Cyber security

Cyber security and data protection are becoming increasingly important issues in arbitration. The often commercially sensitive nature of arbitrations, coupled with virtual hearings and electronic records, makes arbitration particularly susceptible to cyberattacks. It is prudent for parties to consider how they can best protect themselves prior to the commencement of the arbitration.

Arbitral institutions are increasingly adopting provisions that either require or encourage arbitral tribunals to consider appropriate measures or issue binding directions to ensure information security and protect personal data.[20] However, several institutional rules remain silent on the issue of cyber security.[21]

Therefore, parties may want to include requirements in their arbitration agreement to mitigate the potential impact of cyberattacks. This could be in the form of an express reference to best practices and procedures protocols with respect to the transfer, storage, disclosure or use of sensitive information.

One example of such protocols is the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration,[22] which provides a framework for tribunals, parties and (where applicable) arbitral institutions to determine what information security measures are reasonable to apply to individual arbitrations. It also includes a series of suggested procedural steps to address information security issues in an arbitration and sets out some examples of specific information security measures and processes that might be adopted for particular arbitrations.

Powers of the tribunal

Emergency arbitration

Many arbitral institutional rules provide for emergency arbitration, which allows the institution to appoint an emergency arbitrator to decide on applications for urgent interim relief prior to the constitution of the tribunal. Typically, the institution will appoint an emergency arbitrator within 24 hours. The arbitrator will establish the procedure for a brief hearing and will render a decision within a short time period (for example, within five business days under the ACICA Rules).[23] Emergency arbitrators have the power to order interim relief, which can be reviewed, modified or terminated by a subsequently appointed tribunal.

Where the selected institutional rules do not provide for emergency arbitration, the parties may wish to expressly provide for access to emergency arbitration in their arbitration agreement. Alternatively, if the parties do not wish for emergency arbitration to be available, they can choose to affirmatively opt out from the relevant provision in the institution's rules in their arbitration agreement. Practically speaking, however, in circumstances where urgent and immediately enforceable relief is required, particularly on an *ex parte* basis, an application to court may be preferable (provided the arbitration law of the seat or the parties' arbitration agreement preserve the courts' jurisdiction to order interim relief).

20 See e.g. Article 30A of the LCIA Rules 2020, Article 3(e) of the HKIAC Rules 2024.

21 See e.g. SIAC Rules 2016, DIFC-LCIA Arbitration Rules 2016; cf Article 45A of the HKIAC Administered Arbitration Rules 2024.

22 International Council for Commercial Arbitration, *ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration* (The ICCA Reports No 6, 2022).

23 Article 3.1 in Schedule 1 of the ACICA Rules 2021.

Interim measures

Interim measures in arbitration are orders that seek to preserve the status quo and protect parties from harm during the course of proceedings. Arbitral tribunals typically have the power to order provisional measures pending a decision on the merits, which is provided for in the chosen arbitration rules[24] and the law of the seat of the arbitration.[25]

However, if the relevant arbitration law restricts the availability of interim relief in arbitration, or if the availability of interim relief is of special concern to the parties, the authority to order interim measures may be stated explicitly in the arbitration agreement. Either way, in Australia, courts retain the power to order interim measures in relation to arbitration proceedings.[26]

Relief

Limitations on damages

Arbitration rules do not typically provide limitations on the amount and type of damages that can be awarded by the tribunal. In fact, most arbitration rules are silent on the issue of damages.[27] The parties can choose to include limitations on available damages by expressly stating so in their arbitration agreement. They could, for example, agree to limit the quantum of damages by specifying the maximum amount of recoverable damages under the agreement. The parties could also consider incorporating a heads of loss limitation clause which dictates certain types of damages that are excluded from compensation (e.g. loss of profits or consequential damages). Alternatively, they could expressly waive any right to certain types of damages, such as punitive or exemplary damages, which may otherwise be available to punish or deter unconscionable conduct.

Interest

The parties may wish to include a clause that specifies the interest to be awarded. Several institutional rules, including the London Court of International Arbitration Rules and Singapore International Arbitration Centre Rules[28] empower the tribunal to award interest at any fixed rate it considers appropriate. Other rules, such as the UNCITRAL Rules, Hong Kong International Arbitration Centre Rules and ACICA Rules, are silent on the question of interest. Subject to anything to the contrary under the applicable arbitration law, this gives the tribunal unfettered discretion to award an interest rate that it considers appropriate.

Therefore, parties that desire certainty in respect of the interest rate to be awarded, or wish to limit the tribunal's discretion, may choose to elect either a fixed rate or a rate based on a publicly available reference rate.

Allocation of costs and fees

The types of costs incurred in arbitration typically fall within two categories:

1. costs of the arbitration (such as the arbitrators' fees and expenses, registration and administration fees and other charges associated with the relevant arbitral institution); and
2. party costs (such as legal fees, counsel fees, expenses relating to lay witnesses, fees and expenses related to party-appointed experts, translation costs, document production and travel and accommodation costs).

Most institutional rules afford broad discretion to arbitrators when allocating costs and fees between the parties.[29] If parties wish for costs to be shared, they should specify that in their arbitration agreement. For example, the parties may choose to state that each party will bear its own costs, or that the losing party shall bear the costs of the prevailing party.

Finality and enforceability

Time limitation for issuing the award

Some institutional rules require that the final award be rendered within a certain timeframe. For example, the ACICA Rules provide that the final award should be rendered within either three months from the date the arbitration proceedings were closed or nine months from the date the file was transmitted to the arbitral tribunal, whichever is earlier.[30]

Where the chosen rules do not provide a time limitation on issuing the award, the parties may stipulate in the arbitration agreement that the tribunal's award must be issued within a specified time period. However, the parties should be careful to ensure that the time limit is capable of being extended where there is a reasonable request from the tribunal, or if the institution otherwise deems it necessary. This will avoid the risk of the award becoming unenforceable if it is issued after the expiry of the timeframe.

24 See e.g. Article 37 of the ACICA Rules 2021, Article 25 of the LCIA Rules 2020, Article 23 of the HKIAC Rules 2024, Rule 30 of the SIAC Rules 2016 and Article 28 of the ICC Rules 2021.

25 See e.g. Article 47 of the *International Arbitration Act 1974* (Australia), Article 12(1)(i) of the *International Arbitration Act 1994* (Singapore).

26 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) s 17J.

27 One exception is found in Article 31(5) of the International Centre for Dispute Resolution Arbitration Rules 2014 which expressly excludes 'punitive, exemplary, or similar damages' unless the parties agree otherwise.

28 Article 26 of the LCIA Rules 2020, Rule 32.9 of the SIAC Rules 2016.

29 See e.g. Article 51 of the ACICA Rules 2021, Rule 35 of the SIAC Rules 2016, Article 28 of the LCIA Rules 2020, Article 34.4 of the HKIAC.

30 Article 39.5 of the ACICA Rules 2021.

Appeal and other recourse against an award

One of the key benefits of arbitration is the finality of the resulting award, because of the limited grounds provided for review. Most major arbitral institutional rules typically exclude a right of appeal. Similarly, most national arbitration laws do not provide for an appeal to local courts and limit recourse against an arbitral award to applications for setting aside on certain narrow jurisdictional or due process grounds. This means that there is generally no need to expressly exclude the parties' ability to appeal an award in the arbitration agreement. However, there are a few exceptions to this general rule. The parties should consider the availability of a right of appeal or grounds for challenging an award under the law of the seat of the arbitration prior to concluding their arbitration agreement.

For example, under section 69 of the English *Arbitration Act 1996*, an award may be subject to review by the English courts for substantive errors of law unless the parties have agreed otherwise. The parties will have been deemed to have agreed otherwise if they agree to institutional rules that limit the right of appeal to the extent permitted by law. Several arbitration rules limit the rights of appeal in this way.[31]

Under the IAA, the Australian courts do not have jurisdiction to hear an appeal of an award. However, for domestic arbitrations, the parties may preserve the power to appeal an award on a question of law (with leave of the court) if they have agreed that an appeal may be made under section 34A of the CAA. In other words, for Australian domestic arbitration, if the parties wish to preserve their ability to appeal to the courts, they should say so in their arbitration agreement.

Sovereign (foreign state) immunity

When contracting with a foreign state or a state instrumentality (e.g. a company or organisation owned or controlled by a state), it is important to have regard to the possibility that a defence of sovereign immunity will be raised in proceedings to recognise and enforce an award and to execute against the assets of that foreign state. The doctrine of foreign state immunity is a principle of public international law, which provides that:

- a sovereign state cannot be compelled to submit to the jurisdiction of the courts of another state; and
- the authorities of one state are precluded from taking measures of constraint against the property of another state to satisfy the demands of creditors under court decisions, arbitral awards, and other similar instruments.

The scope of the doctrine (and its exceptions) is typically found in domestic legislation and varies from state to state.

The principle of state immunity does not extend to arbitral proceedings. This is because the arbitral tribunal is not exercising powers of a sovereign state, and the arbitrator's jurisdiction derives from the parties' agreement to arbitrate, which constitutes a waiver of immunity.

Immunity from jurisdiction

States are typically not immune from proceedings where the court is exercising its supervisory jurisdiction in respect of arbitral proceedings (e.g. where the court is asked to determine a question as to the validity or operation of an arbitration agreement or proceedings concerning the setting aside of an award).[32]

A state's immunity from the jurisdiction of the courts for the purposes of enforcement is more complicated and depends on the scope and interpretation of the domestic legislation at the place of enforcement. In Australia, the *Foreign States Immunities Act 1985* (Cth) (***FSI Act***) provides for exceptions to foreign state immunity in proceedings for recognition and enforcement of arbitral awards. First, where the foreign state would not be immune in a proceeding concerning the underlying transaction or event that was the subject of arbitration (such as, for example, if the dispute concerned a 'commercial transaction'), the foreign state is also not immune from the jurisdiction of the courts for the purposes of the recognition and enforcement of the resulting arbitral award.[33] In addition, the Australian courts have held that, by becoming a party to the *1985 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards* (**New York Convention**),[34] a state submits to the jurisdiction of the court within the meaning of section 10(2) of the *FSI Act* 'by way of clear and unmistakable necessary implication'.[35] In other jurisdictions, such as the United Kingdom and Singapore, the domestic legislation provides a broad exception to immunity from jurisdiction for proceedings that relate to arbitration, which would include proceedings to recognise and enforce an arbitral award as long as the agreement is not between states.[36]

If arbitration is seated, or recognition and enforcement is to be sought, in jurisdictions which provide for relevant exceptions from immunity, there is no need for the arbitration agreement to include an express waiver of jurisdictional immunity for the purposes of either the seat courts' exercising supervisory jurisdiction, or for recognition and enforcement.

31 See e.g. Article 26.8 LCIA Rules and Article 35.6 ICC Rules.

32 See e.g. Section 17(1) of the *Foreign States Immunities Act 1985* (Cth) (**FSI Act**).

33 Sections 11 and 17(2) of the *FSI Act*. A 'commercial transaction' means a 'commercial, trading, business, professional or industrial or like transaction' – for example, 'a contract for the supply of goods or services' (see Section 11(3) of the *FSI Act*).

34 There are over 170 parties to the New York Convention.

35 *CCDM Holdings LLC v Republic of India (No 3)* [2023] FCA 1266. See also, *Kingdom of Spain v Easier Infrastructure Ltd* [2023] HCA 11 where the High Court found that a state submits to the jurisdiction of the court within the meaning of s 10(2) of FSI Act by becoming a party to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

36 Section 9 of the *State Immunity Act 1978* (UK); Section 11 of the *State Immunity Act 1979* (Singapore).

However, not all jurisdictions provide for relevant exceptions from foreign state immunity in the context of arbitration. It is therefore important to consider the local laws at the seat of the arbitration and at potential place(s) of enforcement prior to entering into an arbitration agreement with a state or state entity.

Immunity from execution

Even if a foreign state is not immune from jurisdiction for the purposes of recognition and enforcement of an award, the state's assets may still be immune from execution. Immunity from execution will require a separate consideration of foreign state immunity and identification of assets that, pursuant to domestic legislation, are not immune from execution. Under Australian law and the laws of several other jurisdictions, there will be no immunity from execution:

- against commercial property (i.e. property other than diplomatic property or military property that is being used substantially for commercial purposes or property that is apparently vacant or not in use); [37] or
- where a foreign state has expressly waived immunity from execution with respect to all or some of its assets.[38] However, a broadly worded waiver purporting to cover 'all property' will not be interpreted to permit execution against property such as diplomatic or consular property, visiting warships or public vessels or property of a military nature or in the possession of visiting forces.[39] For such property not to be immune from execution, the state will need to have expressly waived immunity in respect of those specific categories of property. This is unlikely in practice. It should be noted that unlike immunity from jurisdiction where waiver can be implied by 'clear and unmistakable necessary implication',[40] there is no scope for a waiver by implication of immunity from execution.

37 Section 32 of the *FSI Act*.
38 Section 31(1) of the *FSI Act*.
39 Section 31(4) of the *FSI Act*.
40 *CCDM Holdings LLC v Republic of India (No 3)* [2023] FCA 1266.

05

Submission agreements

As mentioned earlier in this Guide, a submission agreement is an agreement entered into by the parties to submit existing disputes to arbitration. The key difference between an arbitration clause and a submission agreement is the time at which the agreement is entered into.

The basic and optional components of an arbitration agreement set out above apply equally to a submission agreement. For example, for a submission agreement to be operable, there needs to be an intention to arbitrate, and the agreement must specify the dispute(s) referable to arbitration, the parties to the agreement, and a clearly identifiable seat.

Other important actions to bear in mind when concluding a submission agreement include:

- considering whether the submission agreement ought to supersede or replace any prior dispute resolution agreement, or whether the submission agreement is intended to operate in conjunction with a prior dispute resolution clause (e.g. to broaden or narrow the scope of that clause);
- where applicable, clearly identifying and referring to the contract(s) relating to the dispute being submitted to arbitration;
- considering whether the scope of the arbitration agreement should be cast broadly to cover 'any dispute, controversy or claim arising out of, relating to or in connection with' the relevant contract(s), in the event further disputes are to arise where the parties may wish to subsequently refer to arbitration; and
- avoiding the temptation of detailing the procedural issues and evidentiary matters in the submission agreement, which are matters that can be agreed on and recorded in procedural orders or (if applicable) the terms of reference concluded with the arbitrator(s).

Annexure 2 sets out two model submission agreements prepared by ACICA: one to submit existing disputes to arbitration and one to refer existing disputes before the Courts to arbitration.

06

Governing law clause

Contracts should include a governing law clause identifying the substantive law governing the contract. It is advisable that the governing law be stated in a separate clause to the arbitration agreement. The governing law will dictate the interpretation and effect of the contractual terms as well as the substantive law to be applied in the event of a dispute. It is to be distinguished from the law applicable to matters of procedure, which is the arbitration law of the seat of the arbitration.

Parties will typically select the governing law of the contract based on relevant features of the transaction in question, such as the place of performance of the key obligations or the subject-matter of the contract, or some other compromise. Parties may also select the seat of the arbitration based on the governing law, to avoid the need to apply the laws of multiple jurisdictions. However, fundamentally important and different considerations apply in selecting the seat, and therefore the procedural law of the arbitration, as explained earlier in this Guide. If the governing law of the contract has undesirable features that the parties wish to avoid, the parties are free to agree to a seat and procedural law that is different to the governing law of the contract (and frequently do).

In Australia, the High Court in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24 (**Tesseract**), has recently confirmed that parties are empowered to pick and choose among rules of law when specifying the substantive law to be applied in the event of a dispute (subject to issues of arbitrability and public policy).[41] This means that, in agreeing to the governing law of the contract, the parties may also agree to incorporate rules of law that are not confined to the laws of a particular state law or legal system, such as the 1980 *Convention on Contracts for the International Sale of Goods*, or INCOTERMS, which a tribunal must then apply in the event of a dispute. Equally, the parties may agree to exclude features of the governing law that they do not want the tribunal to apply in the event of a dispute. In *Tesseract*, for example, the applicable substantive law was the law of South Australia. The High Court held that the parties were free to agree to exclude the application of the South Australian proportionate liability regime,[42] which would otherwise require a claimant to pursue all concurrent wrongdoers individually in order to recover the totality of its loss.

This requirement is particularly problematic in an arbitration context where it may be challenging to join third parties or consolidate arbitrations (for the reasons explained under the heading "Multi-party and multi-contract scenarios" earlier in this Guide).

Where the parties fail to specify a governing law, complex choice-of-law rules may need to be utilised to determine what substantive law should apply. Disputes over which law governs the substantive matters in dispute can be lengthy and expensive. But more importantly, the outcome of the dispute can make or break a party's ability to assert important contractual and non-contractual rights and obligations. For example, the governing law can determine a party's ability to claim certain damages or the circumstances in which a party can elect to terminate a contract, as well as the consequences that follow that election. For that reason, it is strongly advisable for each contract, and in particular the cross-border ones, to include a governing law clause.

An example of a model governing law clause is as follows:

This agreement, and any dispute, controversy or claim arising out of or in connection with this agreement or its formation (including any non-contractual disputes or claims), shall be governed by and construed in accordance with the laws of [Victoria, Australia].

41 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24 at [54], [92].
42 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24 at [92], [374].

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Annexure 1: Model arbitration clauses

ACICA[43]

"Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be [Sydney/Melbourne/Perth/Brisbane/Adelaide], Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on article 11 of the ACICA Arbitration Rules]."

SIAC[44]

"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 administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore]. The Tribunal shall consist of _____ arbitrator(s).

The language of the arbitration shall be _____."

RI[45]

"Any dispute or difference whatsoever arising out of or in connection with this contract or the performance or nonperformance of the obligations of the parties under it shall be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules."

LCIA[46]

"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 [ ]."

HKIAC[47]

"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).

The seat of arbitration shall be ... (Hong Kong).

The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)."

ICC[48]

"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 appointed in accordance with the said Rules."

43 ACICA, ACICA Model Arbitration Clause, available at acica.org.au.
44 SIAC, SIAC Model Clause, available at siac.org.sg.
45 Resolution Institute, Resolution Institute Arbitration Rules, available at resolution.institute/Web.
46 LCIA, Arbitration and ADR Worldwide, available lcia.org.
47 HKIAC, Model Clauses, available at hkiac.org.
48 ICC, Arbitration: Standard ICC Arbitration Clauses (English Version), available at iccwbo.org.

Annexure 2: Model submission agreement

ACICA Sample Short Form of Agreement to Refer Disputes to Arbitration

In consideration of the mutual promises set out below, the Parties agree:

1. Any dispute, controversy or claim arising out of, relating to or in connection with:
   a. the Contract, including any question regarding its existence, validity or termination, and/or
   b. the Project,

   shall be resolved by arbitration in accordance with the ACICA Arbitration Rules, irrespective of whether or not the dispute, controversy or claim arose prior to this Arbitration Agreement.
2. This Arbitration Agreement supersedes and replaces any prior dispute resolution agreement between the Parties in respect of the Contract or the Project, whether contained in the Contract or otherwise.
3. The seat of arbitration shall be Sydney, Australia unless otherwise specified in the Annex. The law governing this Arbitration Agreement shall be the substantive law that applies in the seat of the arbitration.
4. The language of the arbitration shall be English unless otherwise specified in the Annex.
5. The number of arbitrators shall be [one] [or] [three] [or delete this sentence and rely on Article 11 of the ACICA Arbitration Rules].
6. The ACICA Arbitration Rules and the attached Annex initialled by the Parties' representatives form part of this Arbitration Agreement.
7. [The parties agree that any hearing may be held virtually.]
8. In this Arbitration Agreement, reference to a Party includes a successor in title, a permitted substitute or a permitted assign of that Party, and capitalised words or phrases shall have the meaning set out in the Annex.
9. This Arbitration Agreement is made by the Parties named in the Annex on the last signature date set out below. This Arbitration Agreement, including the Annex, may be signed in counterparts and may be signed in electronic form.

Executed BY THE DULY AUTHORISED REPRESENTATIVES OF THE PARTIES

Signature of authorised representative Party 1

Name

Date

Signature of authorised representative Party 2

Name

Date

Signature of authorised representative Party 3

Name

Date

Signature of authorised representative Party 4

Name

Date

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