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Cross-border Contracts - Dispute resolution, law and forum clauses

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## Cross-border Contracts - Dispute resolution, law, and forum clauses

### Introduction

The theme for ALFAI's 2026 International Client Seminar concerns global perspectives for legal practice. For many of the lawyers attending the ICS, we and our companies or clients are engaged in business in multiple jurisdictions. We frequently are involved in corporate or commercial transactions with counterparties located in different countries, where relevant third parties are in different places or where the subject matter of a transaction involves more than another jurisdiction. Goods or services may be sourced in or supplied from a jurisdiction to be deliverable in a different jurisdiction. Accordingly, transaction documents must be drafted taking into account multi-jurisdiction circumstances and legal considerations. Trade practices and legal frameworks vary significantly across different jurisdictions.

To mitigate risks in international transactions, lawyers frequently insert clauses in contracts specifying the agreed-upon, step-by-step process for managing potential conflicts. It also is common for these contracts to specify the law of a particular jurisdiction that is to be applied to the interpretation of the contract provisions and the forum in which disputes are to be resolved. For convenience, this paper refers to a provision dealing with dispute resolution procedures as a "dispute resolution clause" and a provision dealing with the applicable law and forum for dispute resolution as a "law and forum clause."

Particularly in connection with contracts between parties in different jurisdictions or in contracts that have some other nexus with more than a single jurisdiction, it is common for lawyers to include a law and forum clause and a dispute resolution clause. Schedule 1 to this paper includes some examples of standard law and forum clauses and dispute resolution clauses.<sup>1</sup>

It may well be that a contract drafter has worked hard at drafting all of the so called "material" contractual terms. By the time the "boilerplate" section of the contract is reached, there is a sense of relief and a lower application of consideration for the appropriateness of the boilerplate provisions. This paper seeks to show that a lower level of application with respect to dispute resolution and law and forum clauses is a risky approach. While the multitude of operational provisions in a contract are important for the parties in regulating their arrangements when things are working well, the provisions regulating how and where disputes are dealt with become highly important when things are not working well and the parties are at loggerheads. Inadequate drafting of clauses, lack of appreciation of how dispute resolution clauses will operate in a relevant jurisdiction, or even how a resolution of a dispute may be enforced could partially or entirely disrupt the value of the original deal.

### Law and forum clauses

The default position taken by many contract drafters is to specify in the law and forum clause, the law of the jurisdiction in which the drafter is located as the law governing the interpretation of the contract and the courts in that jurisdiction as the forum in which disputes, particularly litigation, will be determined.

However, this default approach may need to be carefully considered. Drafters must align terms with the subject matter and commercial context, prioritizing provisions that protect their client(s) if a dispute arises. There is much to be considered beyond what is most familiar or what is (initially) thought to be most convenient.

Each party to the contract and that party's lawyer will be familiar and comfortable with the laws of their own jurisdiction and the dispute resolution processes, particularly litigation, in their home jurisdiction. The drafter will prioritize and focus on contract terms to ensure alignment with domestic judicial interpretation.

Alternatively, the parties may agree that a dispute resolution process is to occur in another jurisdiction, often one considered to be independent of the parties and that the rules of that jurisdiction will apply. This occurs not infrequently with respect to agreements to arbitrate disputes. If the parties are not familiar with the procedures in that independent jurisdiction and how the chosen rules operate, the dispute resolution process may “misfire.”

There are several factors to be considered.

- A drafter will know how the laws of her jurisdiction would be applied to the interpretation of contract terms. The drafter typically will choose her own law and forum. However, on several occasions, we have seen a counterparty to a contract located in another jurisdiction disregard contract provisions and refer a dispute to the courts of that other jurisdiction. We have seen those courts accept jurisdiction, contrary to a forum clause in the contract and then interpret contract terms or make determinations in the dispute pursuant to the laws of that jurisdiction. This may occur because the laws of that other jurisdiction expressly confer jurisdiction on its local courts in a particular type of matter, notwithstanding a contract nominating an alternative law and forum.

An example is a termination of an agency agreement involving an Australian supplier of goods and a European agent that had acted as the supplier’s agent for several years. The agency agreement allowed for termination without cause upon either party providing three (3) months’ notice. No compensation was payable to the agent on termination of the agreement. The law and forum clause specified Australian law and forum. The supplier gave the agent the three (3) months’ notice of termination. At the expiry of the notice period, the supplier treated the agreement as terminated and commenced steps to appoint another agent. The former agent applied to an Italian court for orders that the agreement be treated as not terminated, or in the alternative, that the supplier pay the agent a substantial amount of compensation for termination of the contract. Under Australia’s common law, the agreement was validly terminated and no compensation was payable. The agreement did not expressly state that no compensation would be payable on termination. Despite the law and forum clause, the Italian court agreed to hear the agent’s claim and ordered the supplier to make a substantial compensation payment to the former agent. The outcome may have been different had the drafter been aware of this risk and more carefully drafted the termination clause to expressly state that no compensation would be payable and to set out the reasons for that agreement between the parties.

- The contract drafter should consider the obligations of the respective contract parties, which of the parties is more likely to breach its obligations, and what are the consequences of a breach. For example, in a cross-border distribution agreement, the supplier’s primary obligation may be to supply product pursuant to an order from the distributor. However, the supplier may have a relatively low level of other obligations. For example, the supplier may not need to make supply if, for example, it does not have stock readily available or if it cannot get a carrier arranged. Whereas, if product is delivered then the distributor has an entire obligation to pay for the stock. The distributor may have sales targets, marketing and servicing obligations, and a range of reporting obligations. Thus, if a breach of the contract were to occur, it may be more likely that it would be the distributor that commits the breach.

If it is the supplier’s lawyer drafting the contract, the default thinking may be that the forum for any dispute about non-payment ought to be the supplier’s jurisdiction. However, the decision may not be so straightforward. The supplier should consider that if it must sue the distributor for payment and the supplier does so in its own jurisdiction, where will any judgment in the supplier’s favour have to be enforced? Does the distributor have any assets in the supplier’s jurisdiction such that the judgment can be easily enforced in that jurisdiction? If the distributor’s assets are all in the distributor’s jurisdiction or a

third jurisdiction, will the supplier be able to register and enforce its judgment in that other jurisdiction? While the initial action may be more convenient and cost effective for the supplier in its home jurisdiction and the outcome of the proceedings more predictable, will that convenience and cost saving be outweighed by the effort, cost, time and risk of seeking to register the judgment in the other jurisdiction and then enforce it in that jurisdiction?

- In addition to the above, the contract drafter should consider the dispute resolution processes in each relevant jurisdiction. In other words, which jurisdiction has a higher occurrence as to:
  - benefits in terms of speed, flexibility, and cost of the dispute resolution process itself?
  - well developed, reliable, consistently applied and trustworthy courts or other relevant processes?
  - effective enforcement processes?
  - relevant processes, including judges who understand the subject matter of the contract, the issues involved and any expert aspects?
  - availability of any experts whose testimony may be required?
  - a transparent and unbiased system?

Other questions to consider include:

- Notwithstanding the agreed choice of forum, is there a risk that the courts in that jurisdiction may decline to hear a matter based on *forum non conveniens*?
- Will the courts in the chosen forum recognise the cause of action?
- Will those courts grant punitive or exemplary damages if appropriate?
- Do those courts make adverse costs orders against the unsuccessful party?
- Would the trial proceed with a jury waived or would a jury trial be ordered?
- Does the chosen forum proceed on a common law or a civil law basis and what is the impact of that? Jurisdictions have dramatically different procedure rules including those dealing with the conduct or administration of discovery, including interrogatories, requests for admissions, document production, depositions, etc.

Answers to these questions may point to a choice of law and forum that is other than the drafter's home forum.

If a party assesses that it is the counterparty, who is more likely to breach the contract and it chooses its home jurisdiction law and forum, the party will need to carefully consider whether, in the event that it seeks and obtains a judgment against the counterparty, where the counterparty's assets are located, assuming that resort to those assets must be had in order to successfully enforce the judgment and make a recovery. The party obtaining the judgment may need to be able to register and enforce the judgment against the counterparty in another jurisdiction. This may be the counterparty's home jurisdiction, or it may be a third jurisdiction. For convenience, we refer to this other jurisdiction as the "target jurisdiction." Is there any legislation, convention, or treaty between the jurisdictions that facilitates the enforcement of the judgment in the target jurisdiction? Will the laws of the target jurisdiction operate so that, notwithstanding the choice of law provision in the contract, the counterparty is able to readily contest an application to register and enforce the foreign judgment in its jurisdiction? Obviously, it would be nice to be able to act and obtain a judgment in one's own jurisdiction, but will

that process best facilitate making a recovery for the loss and damage suffered through the counterparty's breach?

There are several statutory frameworks and conventions that deal with recognition and enforcement of foreign judgments as between countries. Notably, the Hague Convention on the Recognition of Foreign Judgments in Civil and Commercial Matters 1994 has been ratified by many countries, but not by all. For example, there is no such legislation between Australia and the U.S. Indeed, neither country has ratified the Hague Convention. This means that a U.S. party seeking to register a U.S. judgment and enforce it in Australia would have to rely on common law enforcement principles, which may mean that the U.S. party would have to file new proceedings in Australia to sue on a debt arising from the U.S. judgment.

We have seen examples where the law of the target jurisdiction gives the defendant relatively easy grounds to contest the registration of the foreign judgment. Grounds include:

- the defendant alleging it did not have adequate opportunity to make out a defense in the first jurisdiction;
- the first jurisdiction had a court system or rules of evidence and procedure that the target jurisdiction does not;
- the judgment jurisdiction ordered punitive/exemplary damages that the target jurisdiction does not recognize;
- the judgment jurisdiction recognized a cause of action or a claim that is not recognized or accepted in the target jurisdiction. An example is a cause of action that is considered in the target jurisdiction to be contrary to public policy.

These are all aspects that a contract drafter should consider.

The counterparty and its lawyer should also consider these issues from the potentially opposite perspective. In our distribution agreement example above, if the supplier is responsible for the drafting of the contract and wants its own law and forum specified, the distributor may well be prepared to agree to that on the basis that if the supplier wants to sue it in due course, the enforcement of a judgment obtained by the supplier in its jurisdiction will be very difficult or can be easily defended in the distributor's jurisdiction. The distributor may have no assets in the supplier's jurisdiction.

Are there political considerations in other jurisdictions that need to be taken into account in terms of either initial legal proceedings or proceedings to enforce a foreign judgment?

We have referred above to the risk, that courts in the forum agreed to by the parties in a transaction document may decline to accept jurisdiction to hear a matter on the basis, that the chosen forum is *forum non conveniens*. This is a doctrine more commonly applied in common law rather than civil law jurisdictions, though some civil law jurisdictions have similar mechanisms. It is common for choice of forum clauses to include a provision that the parties expressly agree to the choice of forum notwithstanding inconvenience to one of the parties or a perceived (or argued) lack of nexus of the parties or the transaction with the nominated or designated forum.

In considering the choice of forum, will the clause express the choice to be exclusive or non-exclusive? Does a party (the plaintiff) want to keep its options open so that if it initiates proceedings in the nominated jurisdiction, the other party is unable to argue non-submission to that jurisdiction but the plaintiff preserves the right to take

action against the defendant in another jurisdiction (typically the defendant's jurisdiction) if the plaintiff judges that that would be more effective in all the circumstances? If the plaintiff commences proceedings in a jurisdiction other than the one to which the parties have designated in their contract, the plaintiff may have to deal with the defendant objecting to that forum.

Will the parties select an "independent" law and forum? We have seen examples of construction contracts between an Australian builder and an African or a Middle East based client that have specified English law and forum, so that neither party is favoured by its own law and forum and recognizing that England is a common law jurisdiction, has well developed construction laws, and a sound and reliable judicial system.

The choice of law and forum clause may be coupled with a clause that provides that a party will not on any basis contest the registration and enforcement of a judgment against it in its jurisdiction or another jurisdiction, for example, a jurisdiction other than its "home" jurisdiction, but one in which it owns assets. These clauses are not watertight. Particularly where the judgment jurisdiction or the target jurisdiction is not a party to the Hague Convention or there is no other mutual recognition of foreign judgment law in effect between the jurisdictions, we have seen cases where the courts in the target jurisdiction will entertain argument from the defendant as to why the judgment should not be registered and enforced against it.

### Dispute resolution clauses

Schedule 1 gives some examples of a range of dispute resolution clauses. Note that these examples are jurisdiction-specific and should be tailored to account for the circumstances of a particular matter.

Schedule 2 to this paper contains very helpful details regarding typical forms of dispute resolution mechanisms, especially mediation, arbitration, and litigation.

In assessing whether a contract should include a dispute resolution process that specifies either mediation or arbitration, the parties should consider whether the subject matter of the contract – and more particularly, the nature of a dispute that may arise in connection with the contract – would be more amenable to resolution by mediation or arbitration. In a cross-border disputes, the processes for enforcing a resolution agreement or determination should be considered when choosing a dispute resolution mechanism. Alternatively, would such a dispute be better resolved by litigation?

Dispute resolution clauses often contain a provision that mandates a discussion between senior executives of the parties. This is relevant where the parties are typically larger and their senior executives will not have been involved in discussions concerning operational or contract disputes. Such a provision may be less relevant where the parties are smaller and their senior executives have been involved in day-to-day operations or at least have become involved if disputes arise.

Similarly, a party may have an internal policy that already elevates disputes in specified circumstances to a more senior executive.

It is common for a mediation or arbitration clause to allow parties to seek legal recourse prior to the mediation or arbitration in the event that urgent or interlocutory relief is sought. The need for exigent injunctive relief to preserve the status quo of the parties' circumstances pending the dispute resolution process is an example.

A drafter also must consider the correlation between the dispute resolution process and the law and forum clause. It is common for a clause(s) in a contract to designate the governing law and to specify that the parties submit to the jurisdiction of the *courts* of that jurisdiction. If the parties wish to agree that the law of a particular jurisdiction will govern the interpretation of their contract, regardless of the form of dispute resolution utilized, the drafting should make that clear. For example, the governing law provision and the submission to forum provision may be set out in separate clauses or subclauses. The submission to forum provision may commence with words such as “Subject to clause [the ADR clause], any litigation proceedings will be commenced in . . . .” This drafting assumes that the ADR clause, typically mediation or arbitration, specifies the location of mediation or arbitration.

### Mediation

Jurisdictions have significantly differing approaches to the manner in which mediations are conducted, how the parties approach mediation, the role that mediators play, and the procedures including the volume of materials and the formality of evidence that is presented.

A mediation clause should specify the location in which the mediation is to be conducted. The clause may allow for mediation in person or by audio visual means, provided that those audio visual means enable all parties to be heard and or seen at least during times in the mediation where that is required. The rules governing the mediation procedure also should be specified or identified. Several jurisdictions have model rules of mediation. Commonly, the mediation agreements preferred by a mediator will be consistent with the rules of jurisdiction in which the mediator usually works, albeit some mediators have their own preferred mediation rules or terms. As discussed above, the parties should consider how those mediation conduct rules interact with law and forum clause.

Contract drafters need to be familiar with the organisation’s rules they specify as governing a mediation or if no such rules are specified, then the rules or procedures typically applied in the jurisdiction in which the nominated seat is located.

In addition to specifying the place of mediation and the applicable rules, a mediation clause should specify:

- that the parties will approach mediation in good faith. Some clauses go further and specify that the parties must also approach mediation with a genuine intention to seek a reasonable settlement. In this case, there is typically no attempt to define what constitutes “reasonable”. In truth, this falls into the category of a cliché or a boilerplate, well-meaning phrase that amounts to platitude.
- how is the mediator appointed and by whom? If the parties cannot agree on a mediator, is there a person or organization nominated as the appointer of the mediator? Does the mediator have to have any particular experience or qualifications?
- what is the time frame within which the mediator is to be appointed? That would take into account any provisions dealing with prior referral to senior executives, if applicable.
- how are costs to be paid? Typically, the parties agree to each bear half of the mediator’s costs and to bear their own costs of mediation.
- are the parties entitled to be accompanied by their lawyers? Typically, the parties must appear personally or be represented by senior personnel, who have the authority to negotiate and agree to settlement terms.

- what materials are to be provided to the mediator and are the parties entitled to provide information to the mediator prior to the mediation that is not provided to the other party? We have seen several mediator's agreements that contain terms dealing with this issue.
- can the parties have experts participate in the mediation where that is appropriate?
- when will the mediation be considered concluded? Will a deadline for settlement be specified so that if settlement is not achieved by that deadline, the mediation will be over, or will it be a matter for the mediator to declare that the mediation is complete? This may be relevant for determining the point at which a party can proceed to litigation.

As discussed above, the mediation clause may include a provision that specifies that a party will not contest the enforcement in any jurisdiction against it of a settlement agreement reached in mediation. This type of clause may be subject to choice of law issues. Will the courts in the target jurisdiction enforce this clause? In practice, a party that participates in and reaches settlement in mediation is less likely not to comply with the agreement reached. Notwithstanding the inclusion in the agreement of a good faith mediation clause and the participation in mediation by a party, it is not unheard of for a party to fail to comply with the terms of a settlement agreement reached in a cross border mediation and for the party then to contest the enforcement of those terms against it in its home jurisdiction. The party seeking to enforce the agreement will have to undertake proceedings in the target jurisdiction to sue on the mediation agreement.

See Schedule 2 for comments on the enforcement of mediation settlements, particularly pursuant to the Singapore Convention.

### Arbitration

Contracts that involve large values, complex contractual arrangements, significant technical elements where a dispute may require significant expert evidence or a decision maker with expertise may be better suited to arbitration than to mediation. The benefit of enforcement of a foreign arbitral award pursuant to the New York Convention (the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) may be a compelling factor. In Schedule 2, there are comments regarding the enforcement of arbitral awards pursuant to the New York Convention.

In many jurisdictions, an arbitral process is not distinguished substantially from traditional litigation in terms of complexity of evidence and overall cost. Since in arbitration, the parties typically will be liable for the costs of the arbitrator and the arbitration venue, the overall cost of arbitration may well exceed costs of comparable litigation. However, the conduct of the arbitral proceedings and the arbitral award will typically be confidential, and the parties will have the choice or at least be involved in the choice of the arbitrator(s). Generally, an arbitral process also occurs more speedily than traditional litigation. Arbitral awards are frequently final and not subject to appeal perhaps, except in the case of manifest error on the part of the arbitrator.

An arbitration clause must be clearly drafted as an agreement by the parties to refer a defined dispute to arbitration in clearly defined circumstances. It is important to avoid an argument by a party seeking to avoid arbitration that there is no clear agreement to arbitrate.

An arbitration clause should address the following matters.

- In what circumstances and in what timeframe will the referral to arbitration arise?

- How many arbitrators (typically either one [1] or three [3] individuals) are to be appointed and how is the arbitrator(s) appointed? Are the parties to agree on the arbitrator(s) and if they cannot agree within a specified time, who appoints the arbitrator(s)? Typically, that will be one of the arbitration bodies.
- Where will the location of arbitration be and which rules of arbitration will apply? In cross-border contracts, particularly those involving higher values, it is not uncommon for the seat of the arbitration and the rules of arbitration to be specified as those of an independent jurisdiction. If this is the case, then it is incumbent on the parties and their advisors to be familiar with the chosen rules of arbitration. It is very uncomfortable to become involved in an arbitration and find that the rules are significantly different from that one is accustomed to or expected.
- How are the parties to be represented and can the arbitration be conducted by video conference?
- Is an arbitral award binding, binding absent manifest error, or is an arbitral award appealable?
- Will the parties agree not to challenge the recognition and enforcement of an arbitral award against them in their own or another jurisdiction?
- Is there to be an agreement between the parties as to the bearing of the arbitrator's costs or is that matter to be left to the arbitral award?

### Exclusions from a dispute resolution clause

A dispute in relation to some clauses in an agreement may not be best dealt with under a standard dispute resolution clause. Where a clause already contains definitive terms as to how it is to operate or what is to occur pursuant to it procedurally may be excluded from the application of a dispute resolution clause. Examples include:

- a provision that contains a clear, formulaic process. In a distribution agreement, a supplier may have a contractual right to apply pricing adjustments at set times, for example annually, in accordance with a set formula, for example a defined Consumer Price Index measure. While discussions between the parties about a price increase may well ensue, the distributor having the right to trigger a formal dispute resolution process to stay a price increase may be inappropriate.
- valuation provisions. For example, a shareholder agreement or a company constitution (or articles of incorporation) may provide a process for the sale or other disposal by a shareholder of its shares in a company. The disposal process may include expert valuation provisions pursuant to which the shares are to be valued. The clause often will specify that the valuer is to act as an expert and not an arbitrator and that his determination is final. A dispute between the parties as to the valuation arrived at by the expert should not then be dealt with pursuant to a typical dispute resolution clause.
- a shotgun clause. A shotgun clause is a process by which a dispute in the management of a company either at board level or at shareholder level might be resolved. There are various forms of a shotgun clause, but they typically follow a pattern such as the following.
  - A defined deadlock in the management or decision making of a company occurs either at board level or at shareholder level.
  - In order for the deadlock to be resolved, a party (the offeror) can offer its shares to the other party or parties at a price the offeror determines. The price typically is nominated by the offeror and is not determined by a third party valuer.

- The other shareholders being the recipients of the offer from the offeror have a certain period of time in which to decide whether they will purchase the offeror's shares at the price nominated by the offeror.
- If the offeree shareholders do not purchase the shares at the price proposed within the stipulated period, the offeror may then purchase the shares held by the offeree shareholders at the same price at which the offeror proposed to sell its shares. If the offeror does offer to buy the offeree shareholders' shares, they are bound to sell them at that price.

The advantage of this type of shotgun clause is that the offeror will not put too low a price on its shares since the offeree shareholders would then get a cheap purchase. Likewise, the offeror will not put too high a price on its shares because it knows that if the offeree shareholders think the price is too high, they will not buy the shares. The offeror then would be disinclined to purchase the offeree's shares because it would have to pay that same too-high price it put on its shares. Thus, the deadlock would not be broken.

A dispute between the parties about this process, and particularly the price first proposed by the offeror, should not be subject to the standard dispute resolution process. Instead, the mechanism in the shotgun clause should address the process.

We note in passing that clauses in the latter two (2) categories above need to be carefully drafted in order to be effective and to take account of the company's circumstances and its corporate governance practices and procedures, including its constituent documents.

### Dispute Review Boards and Expert Determinations

Some industries, most notably the construction industry, have developed dispute avoidance strategies that may be included in contracts. These mechanisms are designed to avoid disputes or at least manage them at an early stage before they become highly contentious or destructive of a contractual relationship or a project. In the context of projects involving parties from different jurisdictions, it will be attractive to establish contractually a mechanism that is intended to avoid a party having to become involved in a more formal dispute resolution process in another jurisdiction.

In the United States, this type of contractual mechanism may take the form of a dispute review board (DRB). It is beyond the scope of this paper to discuss DRBs in detail. In summary, in the context of a large construction project, the owner and the principal contractor will include provisions in the contractual documentation to establish and regulate the conduct of a DRB, some of the key features of which include:

- The number of people who will comprise the DRB and their qualifications, which may be a combination of industry expertise, legal, or other dispute management or resolution experience and general business acumen. In projects involving parties in different jurisdictions, there may be representation from those jurisdictions;
- The conduct of regular meetings, perhaps monthly depending on the size of the project and the needs of the parties and perhaps sometimes held on site, between the DRB members and representatives of the owner and the principal contractor. Provision may be made for meetings via videoconference. Other stakeholders such as key subcontractors and financiers may be invited to attend;
- Meetings provide a forum for discussion of project progress or holdups and any emerging or existing issues or disputes, the aim being to discuss and resolve matters before they become difficult and potentially expensive to manage;

- Meetings may be conducted informally or with varying degrees of formality;
- The process by which a party may refer a matter to the DRB;
- The DRB may be called upon to make a formal or informal recommendation or determination about how an issue or dispute may be addressed or determined. Board recommendations typically will be advisory. The parties may agree that subject to delineated areas or values, DRB determinations will be treated as binding, possibly subject to “appeal” in the form of referral to arbitration or litigation;
- The fees charged by DRB members and how costs associated with the DRB are met.

In Australia, historically DRBs have not been particularly prevalent. That said, the widely-used standard form construct-only contract, AS4000 (first issued in 1997) was revised in 2025 to include an optional DRB regime. If selected by the parties, the DRB regime obliges the parties to enter into a Dispute Avoidance Board Agreement in the form published by the Dispute Resolution Board Foundation Region 3 (see <https://www.drpf.org/drpf-model-documents-australia-new-zealand>) and to follow its processes. The extent to which such regime will be taken up in Australia remains to be seen.

Expert determination is an alternative dispute resolution regime that is commonly found in Australian contracts. The intent is to refer the dispute to a subject matter expert, so that the expert can use their own expertise in determining the dispute. With the benefit of the expert’s own knowledge, the thinking is that a dispute can be resolved quicker and cheaper than through arbitration, while still having one expert (or a panel of experts) perform the function of “decider”.

Such expert determinations can be binding or non-binding, depending on the terms of the parties’ agreement. Given that the expert determination process and rules are often (intentionally) less fulsome than those applicable to arbitration or litigation, parties sometimes expressly limit the disputes that can go to expert determination to those which are particularly ripe for determination by subject matter experts (*e.g.* dispute over design → expert architect; dispute over quantum → expert quantity surveyor; etc.) or relatively small in value.

A non-binding expert determination can be thought of as advisory in nature and (unless expressly made “without prejudice” by the terms of the parties’ agreement) would likely be informative in any subsequent binding dispute resolution process. For that reason, even a non-binding expert determination assists parties to realistically assess their respective positions while working towards resolution of the dispute.

### Activating a dispute resolution clause

If a party is activating a dispute resolution clause and in particular, an agreement to arbitrate, it is essential that the party very carefully observes the procedures, including the notice provisions set out in the clause and in the notice clauses that are typically included in most contracts. The failure by a party to observe strictly the provisions dealing with the providing notice to the other party may prejudice the rights of the party and may even mean that the enforcement of an arbitral award can be put in jeopardy. We were involved in a matter where a party invoked an agreement to arbitrate. The arbitral panel was convened, but the counterparty refused to participate. Interlocutory proceedings were issued but the counterparty did not participate. The arbitrators proceeded with the arbitration and made an award in favour of the first party in absence of any appearance by or communications from the counterparty. The first party then sought to register and enforce the arbitral award in the jurisdiction of the counterparty under the New York Convention. After being successful at first instance, the first party was then unsuccessful on appeal solely because the first party had not strictly followed the process in the arbitration clause of giving the counterparty an initial notice of intention to invoke the agreement to arbitrate.

This was so, notwithstanding that the counterparty received numerous requests from the arbitrators inviting it to participate in the arbitration.

## Schedule 1– Standard Clauses

### LAW AND FORUM CLAUSES

This Agreement will be governed by and construed according to the laws of [country/state]. Subject to clause [the ADR clause], any litigation proceedings will be instituted in [country/state/county] courts or the [alternative court/jurisdiction if relevant]. The parties submit themselves [exclusively/non-exclusively] to the jurisdiction of those courts and competent appeal courts.

This Agreement is governed by the laws of the Territory. Each party irrevocably submits to the exclusive jurisdiction of the courts with jurisdiction in the Territory and waives any right to object to proceedings being brought in those courts on the basis that proceedings have been brought in an inconvenient forum.

## DISPUTE RESOLUTION – NEGOTIATION/MEDIATION

### 28. Dispute resolution

- 28.1 All disputes or differences between the parties in connection with the interpretation, effect or any other matter in any way relating to this Agreement (“Dispute”) will be dealt with in accordance with this clause 28, other than for Deadlocks under clause 18 [shotgun clause] which are not required to be dealt with under this clause 28,
- 28.2 A party (“Notifying Party”) will, within 15 Business Days after a Dispute arises, give a notice to the other party (“Notified Party”) setting out the details of the Dispute and any other matter that may, in the reasonable opinion of the Notifying Party, be relevant to the resolution of the Dispute.
- 28.3 Within 10 Business Days of the date of the clause 28.2 notice, the Notifying Party and the Notified Party (“Dispute Parties”) will use their respective best endeavours to meet and resolve the Dispute.
- 28.4 If the Dispute is not resolved in accordance with the provisions of clause 28.3:
- 28.4.1 the Dispute Parties will either agree (preferably during the clause 28.3 meeting) to appoint a mediator or failing such agreement, a Dispute Party may request the President of the Law Society of South Australia (or the President’s nominee) to appoint a mediator to mediate the Dispute;
  - 28.4.2 the Dispute Parties will ask the mediator to convene an initial mediation meeting of the Dispute Parties within 10 Business Days of the mediator being appointed, in an attempt to resolve the Dispute;
  - 28.4.3 if the Dispute is not resolved at that initial meeting, the Dispute Parties will participate in such further mediation meetings as the mediator may convene during the subsequent 20 Business Days for the purpose of attempting to resolve the Dispute;
  - 28.4.4 the Dispute Parties must approach the mediation in good faith and with the intention to settle the Dispute by mediation and within the framework determined by the mediator;

28.4.5 the Dispute Parties may be assisted by their respective professional advisers in the mediation process; and

28.4.6 the mediator's costs will be paid equally by the Dispute Parties but otherwise, the Dispute Parties will pay their own costs of the mediation.

28.5 If the mediator determines that the mediation is at an end without the Dispute being settled, the parties may institute litigation.

28.6 Clauses 28.3 and 28.4 will not prejudice the right of a party to institute proceedings to seek injunctive or urgent declaratory relief.

## 24. Dispute resolution

### 24.1 Dispute Notice

24.1.1 Any dispute or disagreement in relation to or in connection with this Agreement in any matter ("Dispute") is to be resolved in accordance with the procedure provided in this clause 24.

24.1.2 In the event of a Dispute, the party seeking to have it resolved must issue to the other party a notice setting out all details relevant to the Dispute ("Dispute Notice").

### 24.2 Negotiation

Within 21 days of receipt of a Dispute Notice, an authorised representative of the parties to the Dispute (respectively) must meet in [place] or any such place agreed by the parties or by video conference means to negotiate resolution of the Dispute. The parties agree that those negotiations must be conducted in good faith.

### 24.3 Mediation Notice

If the Dispute is not resolved within 14 days after the date upon which the representatives of the parties met in accordance with clause 24.2 (or, in the event no meeting was held in accordance with clause 24.2, then within 21 days from the date of the Dispute Notice), a party seeking to have the Dispute resolved may serve on the other party a notice referring the matter to mediation ("Mediation Notice").

### 24.4 Mediation

24.4.1 Within 14 days of service of a Mediation Notice, the parties must endeavour to agree upon and appoint a mediator and any procedure or rules to be adopted for the mediation, including as to the time and place of the mediation.

24.4.2 In the absence of agreement referred to in clause 24.4.1, a party can have the President for the time being of the Law Society of South Australia appoint a mediator.

24.4.3 Any mediator appointed pursuant to this clause 24.4 may determine the procedure or rules for conduct of the mediation, including the time and place of the mediation, in the event the parties do not so agree.

24.4.4 Unless otherwise agreed in writing, the parties agree to be liable for the fees and expenses of the mediator as to 50% payable by [party 1] and 50% payable by [party 2].

#### 24.5 Further Steps

In the event that the Dispute is not resolved by mediation, the parties may take any further steps to resolve the Dispute, including commencement of legal proceedings. A mediator may at any time, in the mediator's absolute discretion, issue a certificate that the Dispute has not been resolved by mediation. In that event, the parties agree that the Dispute is deemed not to have been resolved by mediation and the mediation will be at an end.

#### 24.6 Urgent Relief

Nothing contained in this clause 24 will prevent a party from seeking urgent interlocutory relief.

## DISPUTE RESOLUTION – ARBITRATION

Except with respect to disputes arising under Section [X – clause dealing with supplier rectification process for defective product] (which shall be addressed as set forth in Section [X]), the parties shall first attempt in good faith to settle any dispute arising hereunder promptly by negotiations between representatives of the Customer and the Supplier who have authority to settle the controversy. If the parties are unable to resolve such dispute within 30 days following the referral of the dispute to such representatives, such dispute shall be solely and finally settled by arbitration, which shall be conducted in New York City, New York, by a single arbitrator (“Arbitrator”) designated by the American Arbitration Association. The parties hereby renounce all recourse to litigation and agree that the award of the Arbitrator shall be final and subject to no judicial review. The Arbitrator shall conduct the proceedings pursuant to the Commercial Arbitration Rules of the American Arbitration Association, as now or hereafter amended. All substantive questions of law shall be determined under the laws of the State of New York, USA (without regard to the principles of conflict of laws). Judgment on the award of the Arbitrator may be entered into any court having jurisdiction over the party against which enforcement of the award is being sought, and the parties hereby irrevocably consent to the jurisdiction of any such court for the purpose of enforcing any such award. The Arbitrator shall divide all costs (including, without limitation, fees of counsel) incurred in conducting the arbitration in their final award in accordance with what the Arbitrator deems just and equitable under the circumstances.

## SHAREHOLDERS AGREEMENT – DEADLOCK OR SHOTGUN CLAUSES

### 18. Deadlock

- 18.1 This clause 18 has application if but only if a Deadlock has arisen. A Deadlock will be taken to have arisen if for a period of at least 3 consecutive calendar months:
- 18.1.1 the Directors have not been able to agree upon a course of conduct material for the Business or that is proposed in any of the areas or matters where under this Agreement, the Board's decision, approval or consent to a matter is required; or
  - 18.1.2 a Securityholder wishes to Dispose of its Securities but either the other Securityholder will not purchase those Securities on terms they can agree or at all or the other Securityholder's Appointed Director(s) has/have indicated that they will not consent to registration of the transfer on Disposal of those Securities to a third party specified by the Securityholder wishing to dispose of its Securities.
- 18.2 If a Deadlock has arisen, a Securityholder (in this clause 18 "Proposing Transferor") may by notice ("Deadlock Notice") to the other Securityholder ("Other Securityholder") offer to sell all (but not some) of the Proposing Transferor's Securities (in this clause 18 "Deadlock Securities") to the Other Securityholder at a price the Proposing Transferor reasonably considers to be the fair value for the Deadlock Securities and on other terms the Proposing Transferor reasonable considers to be fair. The Deadlock Notice will provide a period of not less than 15 Business Days within which the offer, if not accepted, will be deemed to have been declined by the Other Securityholder.
- 18.3 If the Other Securityholder accepts the offer, it will so notify the Proposing Transferor within the acceptance time fixed in the Deadlock Notice and will be bound to pay for the Deadlock Securities within 10 Business Days after the notification of acceptance.
- 18.4 Within the acceptance time fixed in the Deadlock Notice, the Other Securityholder may notify the Proposing Transferor that it declines to purchase the Deadlock Securities. Alternatively, if within the acceptance time fixed in the Deadlock Notice, the Other Securityholder fails to notify the Proposing Transferor that it will purchase the Deadlock Securities on the terms in the Deadlock Notice, the Other Securityholder will be deemed to have declined to purchase the Deadlock Securities.
- 18.5 If the Other Securityholder declines or is deemed to have declined to purchase the Deadlock Securities then within 10 Business Days after the Other Securityholder declines or is deemed to have declined to purchase the Deadlock Securities, the Proposing Transferor may serve notice ("Purchase Notice") on the Other Securityholder, requiring the Other Securityholder to sell all (but not some) of the Other Securityholder's Securities to the Proposing Transferor on the terms that were contained in the Deadlock Notice. Upon receipt by the Other Securityholder of the Purchase Notice, the Other Securityholder will be bound to sell and transfer the Other Securityholder's Securities to the Proposing Transferor and the Proposing Transferor will be bound to pay for those Securities within 10 Business Days after the service of the Purchase Notice on the Other Securityholder.

15. **Deadlock**

15.1 **Limitation on proceedings**

A party must not commence court proceedings (except proceedings seeking injunctive or urgent declaratory relief) in respect of a Deadlock unless it has complied with this clause 15.

15.2 **When a deadlock arises**

A Deadlock arises if:

15.2.1 a resolution that requires a resolution of the Directors in order to be passed has an equal number of votes cast for and against the resolution (assumes the chair has no casting vote);

15.2.2 a resolution that requires a resolution of the Shareholders in order to be passed has an equal number of votes being cast for and against the resolution;

15.2.3 the quorum for an Adjourned Directors' Meeting is not present in accordance with clause [a clause automatically adjourning a directors' meeting to a later time and place where a shareholder-appointed director does not attend the meeting and thereby frustrates the quorum requirement]; or

15.2.4 the quorum for a Adjourned Shareholders' Meeting is not present in accordance with clause [a clause automatically adjourning a shareholders meeting to a later time and place where a shareholder does not attend the meeting and thereby frustrates the quorum requirement].

15.3 **Deadlock resolution process**

15.3.1 In the event of a Deadlock, parties (through their respective senior management) must meet within 5 Business Days of the Deadlock arising and for a period of at least 10 Business Days, in good faith attempt to resolve the Deadlock. Such meeting may be conducted via any technological means, provided the parties can hear and be heard by each other, or at a mutually convenient location agreed to by the parties.

15.3.2 If the Deadlock is not resolved in accordance with clause 15.3.1, a party may by notice to the other party, immediately refer the Deadlock to mediation to be convened and conducted in accordance with clause [the mediation clause]. A notice under this clause 15.3.2 constitutes a "Mediation Notice" for the purposes of clause [the mediation clause].

15.4 **Shareholder may sell**

Within 15 Business Days after a Deadlock arises, a Shareholder ("Offeror") may give the other Shareholder ("Recipient") notice ("Offer Notice") stating:

15.4.1 that it offers to sell all its Securities to the Recipient ("Offer"); and

15.4.2 the cash price per Security ("Specified Price").

If a Shareholder or a Director appointed by that Shareholder does not form part of the quorum of the meeting referred to in clause 15.2.3 or 15.2.4 (as the case may be), that Shareholder is not entitled to give a notice under this clause 15.4.

## 15.5 Independent Valuation

15.5.1 Within 10 Business Days of receiving the Offer Notice, the Recipient may request that the Board instruct an Independent Valuer to determine the Fair Market Value (per Security).

15.5.2 If clause 15.5.1 is enlivened, the Board must:

15.5.2.1 within 20 Business Days after receiving a notice in accordance with clause 15.5.1, instruct the Independent Valuer to determine the Fair Market Value and obtain such valuation in accordance with Schedule [the schedule that sets out provisions dealing with the appointment of an independent expert valuer and the valuation conduct provisions]; and

15.5.2.2 immediately give a copy of the independent valuation to the Shareholders when the Board receives it.

15.5.3 If clause 15.5.1 is enlivened, the Offeror is deemed to have made an additional offer to the Recipient to sell all of its Securities at the Fair Market Value per Security (“Alternative Offer”).

## 15.6 Other Shareholder must decide to accept or reject the Offer or Alternative Offer

Within 15 Business Days after receiving the Offer Notice or (if applicable) the later of 15 Business Days after receiving the Offer Notice and 15 Business Days after receiving the independent valuation (“Decision Period”), the Recipient must notify the Offeror whether the Recipient:

15.6.1 accepts the Offer on the terms contained in the Offer Notice; or

15.6.2 accepts the Alternative Offer (if applicable); or

15.6.3 rejects the Offer and (if applicable) the Alternative Offer.

Neither the Offer nor the Alternative Offer can be partially accepted or rejected. If the Recipient does not give any notice to the Offeror before the end of the Decision Period, the Recipient is deemed to have rejected the Offer and (if applicable) the Alternative Offer.

## 15.7 Acceptance of Offer or Alternative Offer

If the Recipient accepts the:

15.7.1 Offer, the Recipient unconditionally agrees to buy, and the Offeror unconditionally agrees to sell, each of the Offeror’s Securities at the Specified Price; or

15.7.2 the Alternative Offer (if applicable), the Recipient unconditionally agrees to buy, and the Offerer unconditionally agrees to sell, each of the Offerer's Securities at Fair Market Value (per Security).

#### 15.8 Rejection of Offer or Alternative Offer

If the Recipient rejects (or is deemed to have rejected) the Offer and the Alternative Offer, the Recipient is automatically taken to have:

15.8.1 unconditionally offered to sell to the Offeror each of the Recipient's Securities at the Specified Price; and

15.8.2 unconditionally offered to sell to the Offeror each of the Recipient's Securities at Fair Market Value (per Security).

#### 15.9 Offeror response

15.9.1 In the event that clause 15.8 applies, within 15 Business Days thereafter, the Offeror must notify the Recipient whether or not the Offeror agrees to buy all of the Recipient's Securities at the:

15.9.1.1 Specified Price; or

15.9.1.2 Fair market Value (if applicable).

15.9.2 If the Offeror fails to give such notice within 15 Business Days, the Offeror is taken to have declined to buy the Recipient's Securities.

#### 15.10 Completion of sale

If the Recipient agrees to buy the Offeror's Securities under clause 15.7 or the Offeror agrees to buy the Recipient's Securities under clause 15.9, completion of the sale of Securities must take place no later than 10.00am on the date that is [X] Business Days after the sale and purchase obligation arose. At that time:

15.10.1 the selling Shareholder must give the purchasing Shareholder:

15.10.1.1 duly executed transfers for the Securities held by it in favour of the purchasing Shareholder; and

15.10.1.2 certificates for those Securities;

15.10.2 those Securities must be free from Encumbrances; and

15.10.3 the purchasing Shareholder must pay to a bank account nominated by the selling Shareholder the Specified Price or Fair Market Value, as the case may be, for the Securities in cleared funds.

16. Appointment of Company as attorney
  - 16.1 In consideration of the mutual promises in this Agreement (among other things), each Shareholder:
    - 16.1.1 severally and irrevocably appoints each Director of the Company as its attorney with power to:
      - 16.1.1.1 complete any sale as contemplated by clause 15.10;
      - 16.1.1.2 receive money from the sale and hold that money on trust for the selling Shareholder;
      - 16.1.1.3 complete and execute any necessary documents to complete the sale on behalf of the selling Shareholder; and
      - 16.1.1.4 do anything necessary to give effect to clause 15.10 and the transactions contemplated by that clause;
    - 16.1.2 must ratify and confirm whatever its attorney lawfully does or causes to be done under clause 16.1.1; and
    - 16.1.3 indemnifies the attorney against any Claim that the attorney may suffer or for which it is liable, to the extent arising from a lawful exercise of all or any of its powers under clause 16.1.1.
  - 16.2 Each Party acknowledges that any power of attorney granted pursuant to this Agreement is irrevocable and is granted to secure an interest of the other Parties.
  - 16.3 The appointment of attorney in this clause 16 takes effect from the date of this Agreement, provided that the attorney can only exercise its powers if:
    - 16.3.1 the appointer is bound to transfer Shares under this Agreement and defaults in transferring them; and
    - 16.3.2 the attorney has notified the appointer that it intends to exercise its powers and authorities under the appointment set out in clause 16.1.
  - 16.4 The attorney may receive the purchase money in trust for the appointer and must cause the transferee to be registered as the holder of the relevant Shares and pay the purchase money to the appointer.

## Schedule 2 – Dispute resolution in cross-border contracts

### I. Executive Summary

This memorandum provides practical guidance for drafting effective dispute resolution clauses in international commercial contracts, with emphasis on arbitration and mediation provisions. It examines the comparative strengths and weaknesses of different dispute resolution mechanisms, key drafting considerations for enforceability, and the international enforcement frameworks available through the New York Convention and Singapore Convention. Sample clauses are provided in the Appendix for immediate reference.

### II. Mediation v Arbitration v Litigation

#### A. Strengths of Each Mechanism

##### Mediation

- Cost-effective and typically faster than arbitration or litigation
- Preserves business relationships through collaborative problem-solving
- Flexible process allowing creative solutions beyond legal remedies
- Confidential proceedings protect sensitive commercial information
- Party control over outcome – no binding decision imposed

##### Arbitration

- Confidential proceedings suitable for sensitive technology and commercial matters
- Final and binding awards with limited grounds for appeal
- Flexibility in procedure, evidence rules, and selection of arbitrators
- International enforceability through the New York Convention (170+ countries)
- Arbitrators can be selected for technical or industry expertise
- Neutral forum for parties from different jurisdictions

##### Litigation in Courts

- Predictability and familiarity with established procedural rules
- Access to full appellate review process
- Court enforcement mechanisms (subpoenas, contempt powers)
- Lower costs for straightforward disputes
- Established precedent and legal certainty

#### B. Weaknesses of Each Mechanism

##### Mediation

- Non-binding unless parties reach settlement agreement

- Settlement agreements may be difficult to enforce internationally (without Singapore Convention ratification)
- Requires court ratification for enforceability in many jurisdictions
- May be used tactically to delay resolution
- No guaranteed outcome – parties may invest time without resolution

### Arbitration

- Higher costs than court litigation for complex cases
- Limited grounds for appeal – potential for unreviewable errors
- Risk of challenges if clause is ambiguously drafted
- Potential jurisdictional conflicts (*e.g.*, commercial agency disputes in UAE)
- Discovery may be more limited than court proceedings

### Litigation in Courts

- Public proceedings – loss of confidentiality
- Potentially lengthy resolution timelines
- Language and procedural barriers for foreign parties
- Forum shopping risks and parallel proceedings
- Judgments may be difficult to enforce across borders
- Less flexibility in procedure and decision-maker selection

### C. Practical Drafting Tips

1. **Clarity and Specificity:** Use precise language to avoid ambiguity. Specify the forum, rules, seat, and language explicitly.
2. **Mutual Agreement:** Avoid unilateral clauses giving only a single party choice of forum – these are frequently invalidated.
3. **Consistency:** Ensure dispute resolution clause aligns with governing law clause and overall contract structure.
4. **Scope Definition:** Clearly define which disputes are subject to arbitration/mediation (*e.g.*, “any dispute arising out of or relating to this Agreement”).
5. **Consider Multi-Tier:** Build in escalation steps (negotiation → mediation → arbitration) to encourage early settlement while preserving binding resolution.
6. **Sector-Specific Rules:** Be aware of mandatory laws that may override arbitration clauses (*e.g.*, commercial agency law, consumer protection).

### III. Arbitration Clauses – Drafting clear, enforceable terms

#### A. Essential Elements for Enforceability

##### 1. Designation of Arbitration Rules

Specify recognized institutional rules to ensure procedural clarity and administrative support. Leading international arbitration institutions include:

- ICC (International Chamber of Commerce)
- LCIA (London Court of International Arbitration)
- SIAC (Singapore International Arbitration Centre)
- AAA/ICDR (American Arbitration Association/International Centre for Dispute Resolution)
- HKIAC (Hong Kong International Arbitration Centre)
- DIAC (Dubai International Arbitration Centre)
- SCAI (Swiss Chambers' Arbitration Institution)
- WIPO (World Intellectual Property Organization) – for IP disputes

Alternatively, parties may select UNCITRAL Rules for ad hoc arbitration.

##### 2. Seat of Arbitration

The seat (legal place) determines the procedural law governing the arbitration and the courts with supervisory jurisdiction. Choose a seat in a jurisdiction:

- That is party to the New York Convention
- With modern, arbitration-friendly legislation
- That is neutral and convenient for both parties
- With reliable judicial infrastructure

Common seats include Singapore, London, Paris, Geneva, Hong Kong, New York, and Dubai.

##### 3. Language of Arbitration

Specify the language to avoid disputes and ensure all parties can fully participate. English is most common in international commercial arbitration.

##### 4. Number of Arbitrators

- **Sole Arbitrator:** More cost-effective and efficient for lower-value disputes
- **Three Arbitrators:** Standard for complex, high-value disputes; allows each party to appoint one arbitrator

### 5. Arbitrator Qualifications

For technical or specialized disputes (*e.g.*, software, biotechnology, engineering), specify required expertise:

"The arbitrator(s) shall possess recognized expertise and at least [X] years of professional experience in [technology field]."

This ensures the tribunal can understand complex technical evidence and issues efficiently.

### B. Avoiding Common Pitfalls

- **Ambiguous Language:** Vague terms like “disputes may be arbitrated” create uncertainty about mandatory arbitration
- **Pathological Clauses:** Contradictory terms (*e.g.*, specifying both arbitration and court jurisdiction without clear priority)
- **Unavailable Institutions:** Naming defunct or inaccessible arbitration providers
- **Incomplete Clauses:** Failing to specify seat, rules, or language
- **Unilateral Options:** Giving only one party the right to choose arbitration or litigation

## IV. Multi-Tier Mediation and Arbitration Clauses

Multi-tier clauses require parties to attempt resolution through negotiation or mediation before proceeding to arbitration. These clauses encourage early settlement while preserving access to binding resolution.

### A. Advantages

- Encourages good-faith settlement discussions before costly arbitration
- May narrow issues requiring arbitral determination
- Demonstrates commitment to amicable resolution
- Widely accepted in international commercial practice

### B. Disadvantages

- May cause procedural delays if used tactically
- Failure to comply with preliminary steps may result in dismissed claims
- Adds complexity to drafting and enforcement
- Requires clear time limits to prevent indefinite delay

### C. Drafting Considerations

1. Specify clear timeframes for each tier (*e.g.*, 30-45 days for mediation)
2. Define what constitutes compliance with preliminary steps
3. Make arbitration clearly available if earlier steps fail
4. Consider whether preliminary steps are mandatory or permissive
5. Address confidentiality of mediation discussions

## V. Selecting Institutional Arbitration Rules

### A. Leading International Arbitration Institutions

#### ICC (International Chamber of Commerce)

- Most frequently used for high-value, cross-border commercial disputes
- Global reputation and comprehensive administrative support
- Detailed procedural framework with scrutiny of awards

#### LCIA (London Court of International Arbitration)

- Widely used for transnational commercial disputes
- Known for efficiency, confidentiality, and flexibility
- Popular for contracts involving UK or European parties

#### SIAC (Singapore International Arbitration Centre)

- Increasingly popular for Asia-Pacific and global disputes
- Known for technology, investment, and commercial disputes
- Offers expedited procedures and strong enforceability

#### AAA/ICDR (American Arbitration Association/International Centre for Dispute Resolution)

- Preferred for US-linked international matters
- User-friendly, modern rules with strong administrative oversight
- ICDR is the international division of AAA

#### HKIAC (Hong Kong International Arbitration Centre)

- Frequently used for Greater China and Asian cross-border deals
- Recognized for innovation, neutrality, and commercial expertise

#### DIAC (Dubai International Arbitration Centre)

- Common for UAE, MENA, and Gulf region contracts
- Familiar with local commercial practices and UAE law

#### Other Specialized Institutions

- SCAI (Swiss Chambers) – European commercial disputes
- WIPO – Intellectual property and technology disputes
- SIMC (Singapore International Mediation Centre) – For mediation

### B. Selection Criteria

Choose an institution based on:

- Geographic convenience and neutrality for parties
- Reputation and expertise in relevant industry sector

- Administrative efficiency and cost structure
- Language capabilities and cultural familiarity
- Track record of enforceability in relevant jurisdictions

## VI. Enforcement of Arbitration Awards

### A. The New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), commonly known as the New York Convention, is the cornerstone of international arbitration enforcement.

#### Key Features:

- 172 contracting states as of 2025 (including US, UK, China, India, UAE, EU countries, and most major commercial jurisdictions)
- Requires courts in member states to recognize and enforce foreign arbitration awards
- Awards enforceable without re-litigation of merits
- Limited grounds for refusal of enforcement

#### How It Works:

1. Party obtains arbitral award in one Convention state
2. Party presents award to court in another Convention state for enforcement
3. Court must recognize and enforce award unless narrow exception applies
4. Enforcement proceeds like a domestic court judgment

#### Limited Grounds for Refusal (Article V):

- Invalidity of arbitration agreement
- Lack of proper notice or opportunity to present case
- Award beyond scope of submission to arbitration
- Improper composition of tribunal or arbitral procedure
- Award not yet binding or has been set aside
- Subject matter not arbitrable under local law
- Enforcement contrary to public policy

### B. Practical Enforcement Tips

- Choose seat in New York Convention state
- Ensure arbitration agreement is in writing and clearly records consent
- Follow procedural requirements of chosen institutional rules
- Provide proper notice and opportunity for both parties to participate
- Obtain certified copies of award and arbitration agreement for enforcement proceedings

## VII. Enforcement of Mediation Settlements

### A. Enforcement Challenges

Unlike arbitration awards, mediated settlement agreements are not automatically enforceable under the New York Convention. Settlements are typically treated as contracts, requiring enforcement through local courts – a process that can be complicated and uncertain for cross-border matters.

### B. The Singapore Convention

The United Nations Convention on International Settlement Agreements Resulting from Mediation (2019), known as the Singapore Convention, addresses this enforcement gap.

#### Purpose:

Enables direct enforcement of international mediated settlement agreements across signatory countries, similar to the New York Convention for arbitration awards.

#### Current Status (as of November 2025):

- 58 signatory states (including US, China, India, UK, Turkey, Saudi Arabia)
- 19 states with ratification in force (including Singapore, Qatar, Saudi Arabia, Turkey, Belarus, Ecuador, Georgia, Honduras, Kazakhstan, Uruguay, Sri Lanka, Japan)
- Notable signatories that have not yet ratified: US, China, UK, India, Australia

#### Scope:

- Applies to written settlement agreements resulting from mediation
- Must be international in nature (parties have places of business in different states)
- Commercial disputes only
- Does not apply to settlements already enforceable as court judgments or arbitral awards

#### Enforcement Mechanism:

Party presents mediated settlement agreement to court in signatory state for direct enforcement, subject to limited defenses (incapacity, settlement not binding, serious breach of mediation standards, public policy).

### C. Alternative: Arbitration Consent Awards

A reliable method to access New York Convention enforcement for mediated settlements:

1. Commence arbitration formally (or include in multi-tier clause that arbitration may be commenced)
2. Parties participate in mediation and reach settlement
3. If settlement achieved, request arbitral tribunal to issue a “consent award” recording the settlement terms
4. Consent award is enforceable under New York Convention like any other arbitral award

This approach provides certainty of international enforcement regardless of Singapore Convention ratification status.

#### D. Practical Recommendations

- For cross-border mediated settlements, check whether both countries have ratified Singapore Convention
- If Singapore Convention unavailable, structure mediation within arbitration framework to access consent award mechanism
- Include explicit language about enforceability intentions in multi-tier clauses
- Consider court ratification requirements in relevant jurisdictions
- Be prepared to enforce mediation settlements as contracts through local courts if necessary

### VIII. Legal Theories for Unenforceability of Arbitration Clauses

Courts may refuse to enforce arbitration clauses based on several contract law principles and public policy grounds:

#### A. Unconscionability

**Procedural Unconscionability** (unfairness in formation):

- Lack of meaningful choice or bargaining power
- Hidden or obscure arbitration terms
- Absence of notice or opportunity to review
- Adhesion contracts with no negotiation opportunity

**Substantive Unconscionability** (unfair terms):

- Excessive costs or fees imposed on weaker party
- Biased arbitrator selection favouring one party
- Limiting available remedies (*e.g.*, waiver of punitive damages, attorneys' fees)
- Unreasonably short claim or notice periods
- Unilateral modification or termination rights
- Prohibitive or inaccessible forum location
- Overly broad confidentiality preventing regulatory reporting

Courts frequently invalidate arbitration clauses in consumer and employment contexts based on unconscionability, but commercial contracts may also be challenged if terms are extremely one-sided.

#### B. Lack of Proper Form or Consent

- Parties lacking legal capacity (minors, incapacitated persons)
- Fraud, duress, or misrepresentation in contract formation
- Missing signatures or written record where required by law
- Unclear whether parties agreed to arbitrate

### C. Ambiguity or Defective Drafting

"Pathological clauses" may be unenforceable:

- Vague or incomplete specification of arbitration process
- Contradictory terms (arbitration AND court jurisdiction without priority)
- Failure to specify applicable rules, seat, or institution
- Reference to defunct or unavailable arbitration provider
- Internal inconsistencies that render clause unworkable

### D. Illegality or Public Policy

- Disputes not legally arbitrable (criminal, family law, certain statutory rights)
- Violation of mandatory legal provisions
- Enforcement would violate public policy
- Subject matter reserved exclusively for courts

### E. Unilateral or Unfair Provisions

- Only one party has option to choose arbitration or litigation
- Terms that effectively deny other party access to dispute resolution
- Provisions that give one party procedural advantages

UAE courts have recently invalidated unilateral option clauses as unenforceable.

### F. Failure to Meet Statutory Requirements

- Jurisdictions may require specific language, notice, or formatting
- Consumer protection statutes may impose special requirements
- Failure to comply with local arbitration law formalities

### G. Severability Considerations

Courts may either:

- Sever (remove) only the offending provision and enforce remainder, or
- Declare entire arbitration clause void if defect is fundamental

The outcome depends on severity of defect and applicable law.

## IX. Disputes That Generally Cannot Be Arbitrated

Certain categories of disputes are reserved for courts due to public policy, statutory requirements, or protection of vulnerable parties:

### A. Non-Arbitrable Subject Matters

### Criminal Matters

- Criminal liability and prosecution reserved for public authorities
- Cannot be delegated to private arbitration

### Family Law

- Marriage, divorce, child custody, and support
- Adoption and guardianship
- Reserved for courts due to public interest and protection of vulnerable parties

### Certain Statutory Rights

- Bankruptcy and insolvency proceedings
- Antitrust and competition law (in many jurisdictions)
- Securities regulation and fraud
- Subject to mandatory court oversight

### Real Property and Probate

- Disputes over title to real estate
- Probate of wills and estate administration
- Guardianships and conservatorships

### Public Law and Administrative Matters

- Government exercise of sovereign or regulatory powers
- Licensing and administrative enforcement
- Tax disputes (in most jurisdictions)

### Employment Rights (Jurisdiction-Specific)

- Certain employment disputes involving statutory protections
- Collective bargaining agreements
- Varies significantly by jurisdiction

## B. Jurisdictional Variations

Different countries have different rules about arbitrability:

- Some jurisdictions exclude consumer disputes from arbitration
- Commercial agency matters may be non-arbitrable (e.g., UAE)
- Franchise disputes may have special treatment
- Intellectual property validity disputes (varies by jurisdiction)

### C. Guiding Principle

Arbitration is generally limited to “commercial” and “private” disputes between parties with capacity to contract. When disputes involve:

- Public policy concerns
- Vulnerable parties requiring special protection
- Statutory rights with mandatory procedures
- Criminal or regulatory enforcement

Courts typically retain exclusive jurisdiction and will not enforce arbitration clauses even if mutually agreed.

### D. Due Diligence Requirement

Always research the specific jurisdiction’s law on arbitrability before drafting arbitration clauses, particularly for:

- Regulated industries (financial services, healthcare, telecommunications)
- Consumer-facing contracts
- Employment agreements
- Intellectual property disputes
- Contracts involving government entities

## X. Conclusion

Effective dispute resolution clauses are critical to international commercial contracts. Key takeaways for practitioners:

1. Choose the Right Mechanism: Consider confidentiality needs, cost, enforceability, and relationship preservation when selecting mediation, arbitration, or litigation.
2. Draft with Precision: Use clear, specific language. Specify institution, rules, seat, language, and arbitrator qualifications. Avoid ambiguity and pathological clauses.
3. Ensure Mutual Agreement: Avoid unilateral options that courts frequently invalidate.
4. Leverage International Frameworks: Use New York Convention arbitration for reliable enforcement across 170+ countries. Consider Singapore Convention for mediation if both countries have ratified.
5. Build in Flexibility: Multi-tier clauses encourage early settlement while preserving binding resolution options.
6. Understand Limitations: Know which disputes cannot be arbitrated and respect mandatory local law requirements.
7. Select Appropriate Institutions: Choose recognized arbitral institutions (ICC, LCIA, SIAC, AAA/ICDR, HKIAC, DIAC) based on geographic, sectoral, and cost considerations.
8. Plan for Enforcement: Structure clauses to facilitate enforcement. Consider consent awards for mediated settlements.

Careful attention to dispute resolution drafting at the contract formation stage prevents costly jurisdictional battles and ensures efficient, predictable resolution of international commercial disputes.

## APPENDIX: SAMPLE DISPUTE RESOLUTION PROVISIONS

### A. STANDARD ARBITRATION CLAUSE (ICC)

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce. The seat of arbitration shall be [City, Country]. The language of the arbitration shall be [English]. The number of arbitrators shall be [one/three]. The award rendered by the arbitrator(s) shall be final and binding upon the parties and enforceable in any jurisdiction.

### B. STANDARD ARBITRATION CLAUSE (SIAC – Singapore)

Any dispute arising out of or in connection with this Agreement, 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 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 [one/three] arbitrator(s). The language of the arbitration shall be [English].

### C. STANDARD ARBITRATION CLAUSE (AAA/ICDR)

Any controversy or claim arising out of or relating to this contract shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. The seat of arbitration shall be [City, Country]. The number of arbitrators shall be [one/three]. The language of the arbitration shall be [English]. Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

### D. STANDARD ARBITRATION CLAUSE (LCIA – London)

Any dispute, controversy, or claim arising out of or relating to this contract shall be referred to and finally resolved by arbitration under the LCIA Rules, which are deemed to be incorporated by reference into this clause. The seat of arbitration shall be London, England. The number of arbitrators shall be [one/three]. The language of the arbitration shall be English. The award shall be binding and enforceable in accordance with the New York Convention.

### E. STANDARD ARBITRATION CLAUSE (DIAC – Dubai/UAE)

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 Arbitration Rules of the Dubai International Arbitration Centre (DIAC), which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat of arbitration shall be [Dubai], United Arab Emirates. The language to be used in the arbitration shall be [English]. The governing law of the contract shall be the substantive law of the United Arab Emirates.

### F. ARBITRATION CLAUSE WITH TECHNICAL EXPERTISE REQUIREMENT

Any dispute, controversy, or claim arising out of or relating to this Agreement shall be finally resolved by arbitration administered by [Name of Arbitral Institution] in accordance with its rules in force at the time the arbitration is initiated.

The tribunal shall consist of [one/three] arbitrator(s). The parties agree that the arbitrator(s) shall possess recognized expertise and at least [10] years of professional experience in [software engineering/cloud computing/information security/specify technology field], and preferably, prior experience as arbitrator in similar technology-related disputes.

The seat of arbitration shall be [City, Country]. The language of the arbitration shall be [English].

#### G. MULTI-TIER CLAUSE: MEDIATION THEN ICC ARBITRATION

In the event of any dispute, controversy, or claim arising out of or relating to this Agreement, the parties shall first seek to resolve the dispute amicably by mediation administered by the International Chamber of Commerce (ICC) under its Mediation Rules, in effect at the time of commencement of mediation.

If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of the request for mediation, or within such other period as the parties may agree in writing, the dispute shall be finally settled by arbitration administered by the ICC according to its Rules of Arbitration, in effect at the time of the commencement of arbitration.

The seat of arbitration shall be [City, Country]. The number of arbitrators shall be [one/three]. The language of arbitration shall be [English]. The award rendered shall be final and binding on the parties.

#### H. MULTI-TIER CLAUSE: MEDIATION THEN SIAC ARBITRATION (SINGAPORE CONVENTION CONSIDERATION)

Any dispute, controversy, or claim arising out of or relating to this contract, including any question regarding its existence, validity, or termination, shall be resolved as follows:

- 1. Mediation:** The parties shall first attempt in good faith to resolve any dispute by mediation administered by the Singapore International Mediation Centre (SIMC) in accordance with its Mediation Rules in force at the time of commencement of mediation. Any settlement agreement resulting from such mediation shall be in writing. If the settlement agreement is international in nature and the relevant states are parties to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"), the parties agree that the settlement agreement may be directly enforced under the Singapore Convention in such jurisdictions.
- 2. Arbitration:** If the dispute has not been settled pursuant to mediation within [45] days from the filing of the request for mediation, or such other period as the parties may agree, the dispute shall be finally resolved by arbitration administered by the Singapore International Arbitration Centre (SIAC) in accordance with the SIAC Rules in force at the time of commencement of arbitration. The seat of arbitration shall be [Singapore]. The number of arbitrators shall be [one/three]. The language of the arbitration shall be [English].
- 3. Consent Award:** If the parties reach settlement in mediation during an ongoing arbitration, the arbitral tribunal may record that settlement in the form of a consent award, which shall be enforceable under the New York Convention.

#### I. MULTI-TIER CLAUSE: NEGOTIATION, MEDIATION, THEN ARBITRATION

Any dispute arising under or related to this Agreement shall be resolved as follows:

- 1. Negotiation:** The parties shall first attempt to resolve the dispute through good faith negotiations between senior executives with authority to settle, for a period of [30] days from written notice of the dispute.
- 2. Mediation:** If the dispute is not resolved through negotiation, the parties shall submit the dispute to mediation under the [ICC/JAMS/AAA] Mediation Rules. The mediation shall be conducted by a single mediator mutually agreed upon by the parties. The parties shall share equally the costs of mediation. Mediation shall continue for [45] days unless earlier terminated by either party or the mediator.
- 3. Arbitration:** If the parties do not reach a settlement through mediation, the dispute shall be finally resolved by binding arbitration under the rules of [arbitration institution]. The seat of arbitration shall be [City, Country]. The language shall be [English]. The number of arbitrators shall be [one/three]. The arbitration award shall be final and binding and may be enforced in any court of competent jurisdiction.

#### J. UNCITRAL RULES (AD HOC ARBITRATION)

Any dispute arising out of or in connection with this Agreement shall be resolved by arbitration under the UNCITRAL Arbitration Rules. The seat of arbitration shall be [City, Country]. The language of arbitration shall be [English]. The number of arbitrators shall be [one/three]. The appointing authority shall be [name institution or authority]. The award rendered by the arbitrator(s) shall be final and binding, and may be entered in any court having jurisdiction thereof.

#### K. DISPUTE RESOLUTION CLAUSE FOR UAE-GOVERNED CONTRACT

Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the Dubai International Arbitration Centre (DIAC), which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat of arbitration shall be Dubai, United Arab Emirates.

The language to be used in the arbitration shall be English.

The governing law of the contract shall be the substantive law of the United Arab Emirates.

### REFERENCES

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
2. United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention, 2019).
3. ICC Arbitration Rules (2021).
4. LCIA Arbitration Rules (2020).
5. SIAC Arbitration Rules (2016).
6. AAA/ICDR International Arbitration Rules (2021).
7. DIAC Arbitration Rules (2022).
8. UNCITRAL Arbitration Rules (2013).
9. Singapore International Mediation Centre (SIMC) Model Clauses.
10. UAE Federal Arbitration Law No. 6 of 2018 (replaced by Federal Decree-Law No. 42 of 2022).

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<sup>i</sup> All examples of clauses in Schedule 1 to this article are examples only. The circumstances pertaining to any particular contract will be likely to influence the wording of a law and forum clause or a dispute resolution clause. Parties should always consider the wording of these clauses to ensure that they are appropriate for the particular circumstances associated with their contract.