The impact of arbitration

Shane Howe, associate director in our Portland office, discusses the impact of arbitration in the construction industry.

Construction is a complex and diverse business. Multiple partners — designers, consultants, builders, owners, public authorities and others — are involved in the lifecycle of a project. Inevitably, this means there is always the potential for dispute.

The best remedy to any formal disagreement may be arbitration. This removes the effort, time and expense of taking an action to court. It is a formal process, often involving a tribunal and a legally binding award, and can be an extremely effective way of achieving a settlement.

Clearly, where there is a process such as this, there have to be strong rules. The parties involved can agree comprehensive provisions within their original contract at the outset, but unfortunately this rarely happens as it requires additional negotiation at the start and can complicate and delay the contract.

Another approach is to use professional arbitration bodies with institutional rules. These vary by country. Some of the main organisations are the Chartered Institute of Arbitrators (CIArb); the International Chamber of Commerce (ICC); the London Court of International Arbitration (LCIA); the American Arbitration Association (AAA); and the Hong Kong International Arbitration Centre (HKIAC).

Other bodies operating in this area and ensuring fair protection for all parties include the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes.

In each case, unless an expedited process is adopted, these professional institutions allow for cases to be heard by an arbitral tribunal, which is a panel consisting of one or more arbitrators. The general principle is to allow a fair resolution by impartial decision-makers without unnecessary delay or expense. Each party to the dispute can introduce expert determination.

This system is relatively common and works well where a quick resolution is wanted or needed — provided the arbitrating body allows this within its rules — and where those involved in the dispute are not matched in terms of their economic capability.

In some cases, costs are controlled by caps on fees, incidental expenses and recoverable legal charges. Apart from exceptional cases, the aim is usually to determine an award within a maximum period of 180 days. This relatively short deadline can be important when one or more of the parties are seeking a speedy resolution because they are in a difficult financial position.

It clearly makes sense to draw up a robust agreement at the outset to minimise the risk of dispute and arbitration further down the line. A principal rule is to ensure that every contract is considered on a project-by-project basis.

No single set of rules should be adopted without considering the specifics of the work in question, such as geographic location, client relationships, the level of confidentiality required, economic strength and willingness to litigate.

It is also important to examine the rules of the initial contract carefully and be prepared to amend or add to them, looking at a variety of sources to ensure that your specific needs are properly addressed. In other words, research and due diligence are key.

Different arbitration bodies have different rules about areas such as seeking an expedited outcome, so it is important to choose a settlement solution that best meets your company's circumstances and bargaining position.

The HKIAC, for instance, allows for the arbitrator to shorten time limits or decide the case by using documentary evidence only. This may suit you, but if you are relying on oral evidence or legal arguments, it could put you at a disadvantage.

The ICC rules are among the most frequently used when it comes to international arbitration, and they can also be used for domestic cases. This organisation also provides guidance on case management techniques in order to achieve disciplined control of costs and schedules.

The expedited arbitration process is relatively common within many of the professional body procedures and is beneficial if economic strength is not balanced between the parties and quick resolution is desired. Many of the institutions allow for this process. The LCIA, however, only allows for the parties to expedite the formation of the arbitral tribunal, and the UNCITRAL, with no option to expedite the procedure, is an outlier in this instance.

Similarly, the UNCITRAL framework is intended to be used when a more personalised approach is desired. If this is the intention, the framework should be reviewed carefully and amended appropriately.

As general guidance, I would recommend implementing the CIArb or AAA rules with appropriate amendments aligning with the HKIAC, LCIA and ICC regulations, as these allow for more control over the schedules and fees mentioned above. These bodies also offer flexibility over the number of arbitrators and the submission of evidence, allowing documentary-only hearings as well as those which need oral evidence and legal arguments to be presented.

Adding amendments at the start may seem burdensome and overcomplicated, but the importance of doing this simply cannot be underestimated. Because these additions tailor a contract to specific circumstances, they are extremely valuable and minimise the likelihood of a company adopting general rules that could put it at risk.

Get the arrangements right at the outset could avoid major expense, effort and possible reputational damage at a later date. Arbitration may be less painful than using the courts, but it is still a process that involves considerable preparation and management time.

There is always potential for disputes but, as in all things, prevention is better than cure. And that is something all parties in the construction industry should take heed of and prepare for.