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Arbitration in China

The use of arbitration in China is not a new development and the establishment of a foreign-related commercial arbitration commission has long been in place. With the increase of foreign investment, China's institutions have become increasingly keen to promote the use of arbitration.

Arbitrations in China are governed by "The Arbitration Law of the Peoples' Republic of China" ("the Law"), which came into effect on 1 September 1995. Despite the early establishment of several bodies, prior to this there was no comprehensive set of arbitration legislation in China.

Under the Law, if there is an arbitration agreement in place between the parties, recourse to the courts is precluded (except for in very limited circumstances, for example, where the arbitration process violates legal procedure or where issues decided fall outside the scope of the arbitration agreement).

To commence an arbitration, the party requesting it must submit an application

to an arbitration commission (see below) providing the facts and evidence (and its sources). The arbitration commission will write to both parties, indicating whether the application fulfils the necessary requirements. It will then provide the names of the arbitration tribunal (comprising either one or three arbitrators), and a copy of the arbitration rules. The arbitration shall comply with the rules of the commission.

The procedure adopted in the remainder of the arbitration will depend on the nature and complexity of the dispute. In cases below a certain value (or where the parties agree), a summary procedure may be used. The arbitration tribunal will render an award within a relatively short period (usually within two months) from the date on which the arbitration tribunal is formed. Any award made by an arbitration tribunal has the same legal effect as a final judgement of the court and the award can be enforced by the courts.

An interesting feature of the Law is that it allows the arbitration tribunal to also act as a mediator prior to making its award (with the parties' agreement). Any agreement becomes legally binding after the tribunal has drawn up a written mediation that is signed and accepted by both parties.

There are now over 160 arbitration commissions in China (with an over-arching Arbitration Association in the process of being set-up).



There are special provisions for International disputes. For example, under the rules of the Wuhan Arbitration Commission there are special arbitration proceedings for foreign involved arbitration. A foreign arbitrator may be appointed that has professional knowledge in fields such as law, economic and trading, scientific knowledge, etc. The parties may agree the Law to apply but in the absence of agreement the Laws of the Peoples Republic of China will apply.

In relation to international disputes, it is also worth noting that China has been one of the contracting countries to the 1958 New York Convention, meaning that any award made in the territory of another contracting country should be enforced in China pursuant to the Convention.

It is clear that as China's economy continues to expand and attract foreign business, its arbitration laws will play a major part in meeting the needs of foreign investors.

Tom Ellis is a partner at Aughton Ainsworth solicitors in Manchester, UK and a member of the Chartered Institute of Arbitrators and an International Arbitrator for the Wuhan Arbitration Commission in China.

He can be contacted on
T: +44 (0)161 51 877 8555
F: +44 (0)161 877 8557
E: tomellis@aughtonainsworth.com.



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A brief review of commercial issues relevant to the construction, engineering and energy industries.

David Wileman, Senior Consultant, Stapleton International Limited

Documents, documents, documents.

When do you start preparing for a dispute?

Upon receipt of a claim, at contract completion, a week before sailaway or even two months before handover?

Unfortunately, the answer to that question should be, "on the day the tender hits your front door mat!".

To this answer one may reply, quite reasonably, "Why should we?".

In the perfect world of on time and on budget projects it would be reasonable to state "Why should we?". Unfortunately, this is not a perfect world and even the seemingly friendliest of client contractor relationships can breakdown by a mixture of bad luck, unforeseeable circumstance, unfortunate mistake or even a hidden agenda.

Therefore, the most important question we should ask is "How should we?".

The "How" part is very important and fortunately one primary ingredient does not necessitate in increased costs or time, but is simply related to ensuring

that the way we proceed will leave us in good stead should a dispute arise.

Whilst every good estate agent will tell you that the three rules to house buying are location, location location; the very same could be said for retrospective quantum or delay analysis. Although in this case the mantra is documents, documents, documents.

Time and time again unnecessary costs are incurred by the consultant (which are then passed onto the client) in the pursuit, collation, recreation and, more often than not, fruitless search for data that was readily available throughout the lifecycle of a project.

This mantra needs to be enforced by any project team with regular occurrence, and at the very least at the start of every project they undertake.



The benefits that an accurate audit trail of documentation can provide during a project is obvious as the client contractor relationship can be strained to breaking point if data relating to the reasons why you are in the position you currently find yourself in is unavailable.

Stapleton International Limited

Stapleton is a long established firm of consultants investigating contractual, financial and management issues within the construction, engineering and energy industries.

For further information please contact Mark Stewart.

Head Office:
Tel: +44 (0) 1325 488048
Fax: +44 (0) 1325 281245
E-mail: info@stapleton.co.uk
Website: www.stapleton.co.uk

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If you have any comments on the issues raised in this edition or there are any subjects you would like to see addressed in future issues of this newsletter please contact Mark Stewart.
 Email: mark.stewart@stapletonint.com

Stapleton International is a multi-disciplinary consultancy working to provide professional services to our clients.

We assist our clients in the effective management of complex technical and commercial issues related to large engineering and construction projects, providing solutions in:

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- Planning and Scheduling**
- Cost Management**
- Dispute Resolution**
- Expert Witness Services**

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Therefore, if we then apply this lack of relevant factual data to two parties in post contract completion dispute we can quite easily see that the basis by which agreements are to be made and therefore issues narrowed (thus costs reduced) has been potentially lost forever. Thereby, turning what was a slight crack in the relationship into a permanent fracture.

However, when we are reciting our documents mantra it is worth keeping a couple of basic pointers in mind.

- The level of detail contained within the document. For example, high level board reports are very nice whilst giving an overview to the progress of the contract but they provide very little by way of detailed information that will be useful when determining, for example, cause and effect or liability.
- One copy of a thousand documents is preferable to a thousand copies of one document (and even more so to a thousand copies of a thousand documents)

From day one, the first contact between client and contractor provides the reasonable project team with an opportunity to excel in a few months (or more often than not years) time. Generally, throughout the tender stage to the early formation and agreement of the contract, data that may become like gold dust, if not retained, in the terms of retrospective analysis will be forgotten, lost and remembered incorrectly.

At the earliest stages, and throughout the project, it is vital for any project team to ensure that the correct data is retained. Agreements to scope, client deliverables, contractor promises, etc. should all be recorded, maintained and hived away for the unfortunate day when the happy couple turn sour and start arguing over the family silverware. Whilst this may seem like a negative, "we are doomed to fail" attitude, it is this very proactive attitude towards documentation which will keep the two parties from spending money and time ripping each other apart at a later date.

If the relevant, correct documentation is maintained this will provide both sides the opportunity to actually

retrospectively review and agree were the problems or contentious issues did actually lie and proceed towards a speedy agreement or settlement whilst still surviving with enough dignity and camaraderie to pursue further projects at a later date.

During the course of the project the team should be conscious of certain factors with respect to the documentation. These factors include, but are not limited to:

- Level of data – Overall high level documents are very nice as a management tool but it is the detailed level of information that will provide the successful cause and effect tools.



- Quality of documents – whilst this may seem obvious photocopies degrade with every subsequent reproduction and on disputes that last longer than the original project the quality of documents can be severely limiting if the base document was inadequate.
- Accessibility of data – The advantages of a well organised electronic archive of data reaps great rewards over the recreation of hardcopy data into a user friendly format.



- Correct Storage – ten thousand important documents can quite quickly seem less important if not in date order or collated accordingly.
- Documents outwith your control. In general, with today's technology, it is

As discussed previously, the management and maintenance of documentation, if carried out as part of the everyday project systems, should not increase costs or incur time. However, it is a dereliction of duty not to take the opportunity available to maintain said

Stapleton was established in 1972 to provide professional consultancy services to clients in the engineering and construction industries.

Specialising in the resolution of disputes on major projects, we gained a reputation for superior technical analysis of the problems encountered on large construction projects.

During the 1980s we expanded our role in the management of engineering and construction projects across the Shipbuilding, Offshore, Power, Petrochemical, Industrial, Building and Civil Engineering sectors. This experience developed and enhanced our expertise in delivering successful projects.

The 1990s saw us progress further into the international arena, working predominantly on large, complex international projects with some of the world's foremost engineering and construction companies.

- Bespoke computer package data. It is essential that any data or software in relation to any bespoke software package should be maintained and, in the case of the software, kept from becoming obsolete.

quite simple to electronically store many inhouse documents. However, documents that are only received in hard copy format should be retained in an orderly manner and even electronically scanned if this facility is available.

documentation as ultimately these are the building blocks of the prosecution of or defence to any claim. Finally, as with most aspects of life if you do keep all the correct documentation in a well managed and organised system then sod's law will probably take over and every project will be well run and will not end up in dispute. Well, one can dream!

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