Alternative dispute resolution methods – arbitration

GRATA International Mongolia

https://gratanet.com/regions/mongolia

ALTERNATIVE DISPUTE RESOLUTION METHODS – ARBITRATION

I. GENERAL UNDERSTANDING

Arbitration

Arbitration is a consensual mechanism to resolve disputes by one or more private decision makers (arbitrators) selected by the parties pursuant to a mechanism agreed by them in an adjudicatory procedure, and resulting in a final and binding decision /arbitral award/ (Tony Andriotis, Emmanuel Jacomy, and Artis Straupenieks). It is one of the out-of-court alternative dispute resolution procedures in many countries, including Mongolia.

International arbitration

An arbitration is international if:

a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
b) one of the following places is situated outside the State in which the parties have their places of business:
   i. the place of arbitration if determined in, or pursuant to, the arbitration agreement;
   ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country (*Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration*).

Commercial arbitration

The term "***commercial***" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road (*Note 2 on Article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration*).

Arbitration in Mongolia

History of arbitration in Mongolia dates back to 1930 when the Government of Mongolia approved an Arbitration Rule for the first time in order to reduce the workload of courts. It is stated in the Rule that any parties involved in a civil dispute including ordinary people and places, cooperatives, unions, and ministries, and offices established by the people may have their disputes reviewed and resolved by three temporarily elected persons. Further in 1960, the foundation of the Foreign Trade Arbitration Commission or today's International Arbitration of Mongolia has been put in place, with the establishment of the Chamber of Commerce, and become the only internationally recognized active and permanent arbitration organization in Mongolia. It has become available to resolve disputes through arbitration following the accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) by Mongolia in 1994, as well as adoption of the Law on Arbitration by the

State Great Khural of Mongolia (the Parliament) in 2003. Moreover, arbitration advanced and brought closer to international trends and standards upon revision of the Law on Arbitration in 2017 in line with the UNCITRAL Model Law on International Commercial Arbitration (*Compilation of Arbitration Legal Documents in Mongolia, Mongolian International Arbitration Center, 2020*).

II. KEY CONCERNS

Commercial contract parties are not new to choosing arbitration as a dispute resolution mechanism primarily because it is deemed more favorable than traditional court proceedings, especially, in terms of speed, flexibility, neutrality, costs, etc. However, there are several key concerns to consider when concluding an arbitration agreement, such as arbitrability of the arbitration agreement or clause and enforceability of the arbitral award.

Arbitrability

In order to resolve any dispute between contractual parties through arbitration (1) an arbitration agreement must have been concluded; and (2) the dispute must not be subject to the exclusive jurisdiction of a court (*Article 9 of the Law on Arbitration, 2017*).

a) *Arbitration agreement*

Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of **an arbitration clause in a contract** or in the form of **a separate agreement** (*Article 7(1) of UNCITRAL Model Law on International Commercial Arbitration*).

Formal requirement: An arbitration agreement must be in writing.

i. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
ii. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
iii. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Components of an arbitration agreement/clause:

The following terms and conditions are the **key components** in an arbitration agreement/clause.

Obligation to arbitrate	Scope	Seat	Arbitration rules	Appointment of arbitrators	Language of arbitration

Obligation to arbitrate: An agreement to binding arbitration must (1) require disputes to be referred to arbitration; and (2) provide for disputes to be finally resolved by arbitration.

Scope: Scope of the arbitration clause should be broad (1) avoids need to resolve disputes in different forums; (2) choose words like "any", "arising out of", "arising in connection with" to cover contractual and non- contractual claims; (3) include the words "existence, validity, or termination" to capture claims like fraud and misrepresentation.

Arbitration rules: Parties should agree on which arbitration rule the dispute would be settled under. It is crucial not to mix an institution with rules of another institution.

Please see model clause for reference:

SIAC model clause

- ***Any*** dispute ***arising out of*** or ***in connection with*** this contract, including any question regarding its ***existence, validity or termination***, ***shall*** be referred to and ***finally*** resolved by arbitration ***administered by*** the Singapore International Arbitration Centre ("SIAC") ***in accordance with*** the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") ***for the time being in force***, which rules are ***deemed to be incorporated by reference*** in this clause.

MIAC model clause

- ***All*** disputes ***arising out of or in connection with*** this contract or related to its ***violation, termination or nullity shall*** be ***finally*** settled in the Mongolian International Arbitration Center at the Mongolian National Chamber of Commerce and Industry in Mongolia ***under its Rules on Arbitration*** in Mongolia.

Seat: Seat (place) of arbitration is a legal concept that determines nationality of award, courts having jurisdiction to hear challenges against the award and to support and supervise arbitration, and default rules on conduct of the arbitration. Parties should ensure that the seat of arbitration is a single place that expressly indicates city and country – for instance: "***The***

seat of the arbitration shall be Ulaanbaatar, Mongolia".

Appointment of arbitrators: The parties are free to determine the number of the arbitrators (***to be odd number***). Usually there are 1 or 3 arbitrator(s) depending on the size of the case – "***The tribunal shall consist of one/three arbitrators***".

Language of arbitration: Parties are encouraged to expressly set forth the language of the arbitration to avoid or substantially reduce translation issues. The language should be consistent with the language of the contract and correspondence between the parties. For example: "***The language of the arbitration shall be English***". If it is not agreed in advance, the tribunal will decide.

The following terms and conditions are **optional** to set forth in an arbitration agreement/clause.

Applicable law: Parties are free to choose which country's law governs their contractual relation.

STANDARD ICC ARBITRATION CLAUSE

- All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

STANDARD HKIAC ARBITRATION CLAUSE

- "Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non- contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

  The law of this arbitration clause shall be ... (Hong Kong law).

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

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

b) Exclusive jurisdiction

Countries have exclusive jurisdiction over certain matters. For Mongolia, the following cases are mandatorily resolved by a Mongolian court (*Article 16 of the Civil Procedure Law*):

a) Disputes concerning ownership, possession, and use of immovable property located in the territory of Mongolia;
b) Disputes concerning reorganization and liquidation of a legal entity residing in the territory of Mongolia, or decisions taken by such a legal entity or its branch and representative office;
c) Disputes concerning validity of registration made by Mongolian court and other competent

authorities;

d) Disputes concerning registration of patents, trademarks, and other intellectual property rights, as well as receipt of application for such rights;
e) Disputes concerning actions taken for enforcement of a court judgment in the territory of Mongolia, or a request made by the corresponding person to do so.

Enforceability

New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), better known as the New York Convention, is one of the most important United Nations treaties in the area of international trade law and the cornerstone of the international arbitration system. Under the New York Convention, States undertake to give effect to an agreement to arbitrate, and to recognize and enforce awards made in other States.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Enforceability in Mongolia

Mongolia has acceded to the New York Convention in 1994, and regulated its recognition and enforceability in the laws.

According to the Law on Arbitration, an arbitration award, irrespective of the country in which it was made shall be recognized as binding and, upon application in writing to the competent court, the award shall be enforced subject to the provisions of Articles 48 and 49 of this Law, and the basic arbitration award in accordance with the procedures set forth in the 1958 New York Convention (§48).

The party relying on the award or applying for its enforcement shall attach **the original award or a duly certified copy thereof**. If the award is not made in a Mongolian language, the court may request the party to provide a **translation** thereof into a Mongolian language.

Recognition or enforcement of an arbitration award, irrespective of the country in which it was made, may be refused only:

- at the request of the party against whom it is invoked, if that party furnished to the competent court where recognition or enforcement is sought proof that:
    - a party to the arbitration agreement does not have legal capacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
    - the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present the case;
    - the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on

matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
    - the composition of the arbitration tribunal or the arbitration procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
    - the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.
- the court determined the following situation:
    - the subject matter of the dispute is not capable of arbitration jurisdiction under the law of Mongolia;
    - the recognition of enforcement of the award would be contrary to the common good of Mongolia.

Parties should take into account the **statute of limitations**. In Mongolia, it is **3 years** from the entry into force of the arbitral award under the Law on Enforcement of Court Judgments. The request for enforcement of award shall be submitted to the respective court where the debtor is resident (Civil Procedure Code).

III. ARBITRATION PROCEEDING

Choosing an arbitrator

Parties are encouraged to consider the following matters when choosing an arbitrator:

Requirements in Arbitration agreement	Law of seat	Fee levels	Availability
Languages spoken	Reputation & Seniority	Open-mindedness & Views on relevant issues	Knowledge of relevant law
	Skills & Industry Expertise	Relevant experience & qualifications	

Approach under SIAC Rules:

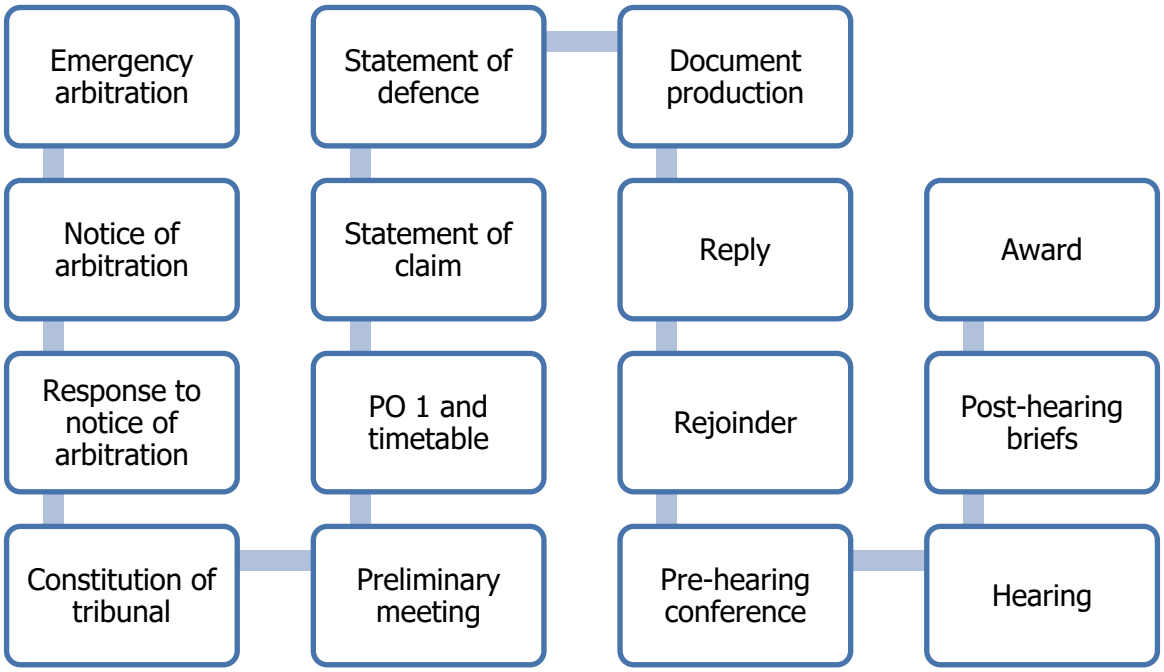
One arbitrator	Three arbitrators
• parties to agree (SIAC Rule 10.1) • if not agreed, the President of SIAC Court appoints (SIAC Rule 10.2)	• each party nominates one arbitrator (SIAC Rule 11.1; IAA, s. 9A(1); Model Law, Art. 11(3)(a)) • if a party fails to nominate, the President of SIAC Court appoints (SIAC Rule 11.2; Model Law, Art. 11(4)(a)) • third arbitrator appointment mechanism to be agreed by the parties (SIAC Rule 11.3; IAA, s. 9A(1)) • if not agreed, President of SIAC Court appoints (SIAC Rule 11.3; IAA, ss. 9A(2), 2(1), and 8(2); Model Law, Art. 11(3)(a))

Challenge and removal of arbitrators

Ground	Model law	SIAC Rule	Who can challenge/remove?
De jure unable to perform his functions	Art. 14(1)	Rule 17.2	Parties and SIAC President
De facto unable to perform his functions	Art. 14(1)	Rule 17.2	Parties and SIAC President
Fails to act without undue delay	Art. 14(1)	-	Parties only
Fails to act or perform his functions in accordance with the Rules or within time limits	-	Rule 17.2	Parties and SIAC President
Does not conduct or participate in the arbitration with due	-	Rule 17.3	SIAC President only

diligence			
Does not conduct or participate in the arbitration in a manner that ensures fair, expeditious, economical, and final resolution of the dispute	-	Rule 17.3	SIAC President only
Justifiable doubts as to his impartiality or independence	Art. 12(2)	Rule 14.1	Parties only
Does not possess qualifications agreed to by the parties	Art. 12(2)	Rule 14.1	Parties only

Example of international arbitral procedure



Notice of arbitration & Response to the notice

Arbitration will commence upon delivery of the notice of arbitration by a claimant to a competent person, as well as the respondent. Depending on which rules parties chose, content of the notice of arbitration may vary. For instance, under the SIAC rules 2016, the following information must be included:

- a demand that the dispute be referred to arbitration;
- the names, addresses, telephone numbers, facsimile numbers and electronic mail addresses, if known, of the parties to the arbitration and their representatives, if any;

- a reference to the arbitration agreement invoked and a copy of the arbitration agreement;
- a reference to the contract or other instrument (e.g. investment treaty) out of or in relation to which the dispute arises and, where possible, a copy of the contract or other instrument;
- a brief statement describing the nature and circumstances of the dispute, specifying the relief claimed and, where possible, an initial quantification of the claim amount;
- a statement of any matters which the parties have previously agreed as to the conduct of the arbitration or with respect to which the Claimant wishes to make a proposal;
- a proposal for the number of arbitrators if not specified in the arbitration agreement;
- unless otherwise agreed by the parties, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator;
- any comment as to the applicable rules of law;
- any comment as to the language of the arbitration; and
- payment of the requisite filing fee under these Rules.

The Respondent shall file a Response with the Registrar within 14 days of receipt of the Notice of Arbitration. The Response shall include:

- a confirmation or denial of all or part of the claims, including, where possible, any plea that the Tribunal lacks jurisdiction;
- a brief statement describing the nature and circumstances of any counterclaim, specifying the relief claimed and, where possible, an initial quantification of the counterclaim amount;
- any comment in response to any statements contained in the Notice of Arbitration under Rule 3.1 or any comment with respect to the matters covered in such Rule;
- unless otherwise agreed by the parties, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators or, if the arbitration agreement provides for a sole arbitrator, comments on the Claimant's proposal for a sole arbitrator or a counter-proposal; and
- payment of the requisite filing fee under these Rules for any counterclaim.

Constitution of arbitral tribunal

As soon as practicable after the constitution of the Tribunal, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case.

The Tribunal may, in its discretion, direct the order of proceedings, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case (§19.3 & §19.4, SIAC Rules, 2016).

Preliminary meeting

- Held shortly after the tribunal has been constituted in person, by phone or videoconference
- Typically attended by the tribunal and parties' counsel

- Typically intended to discuss the conduct of the arbitration going forward, discuss Procedural Order No. 1 and, as the case may be, the Terms of Reference.

Procedural order No.1

Unless the Parties have agreed in advance, the arbitral tribunal shall determine the procedural order upon the Parties' proposal. The content of the procedural order may vary depending on different rules. Generally, the following conditions are set forth in it:

- Applicable rules
- Procedural timetable
- Governing law
- Confidentiality
- Privilege
- Counsel ethics
- Administrative secretary
- Submissions
- Unscheduled applications
- Documentary evidence
- Documents in other languages
- Witness statements and expert reports
- Witness/expert evidence in other languages
- Exchange of submissions and witness statements/ expert reports
- Requests for opposing party's documents
- Production of requested documents
- Pre-hearing conference
- Hearing
- Record of hearings/ other meetings
- Costs

Post-Hearing Briefs and Costs Submissions

Post-Hearing Briefs

- The parties may agree (or the arbitral tribunal may instruct them) to file a post-hearing briefs
- These submissions usually seek to demonstrate how the testimony given by witnesses and experts at the evidentiary hearing supports or contradicts the parties' arguments
- Typically no new evidence may be produced at this stage

Costs Submissions

- Once the evidentiary record is closed, the tribunal may ask the parties to provide their submission on the costs of the arbitration
- This is so that the tribunal may award the losing party to pay some or all of the winning party's costs, e.g. tribunal fees, legal fees, translation costs, etc.

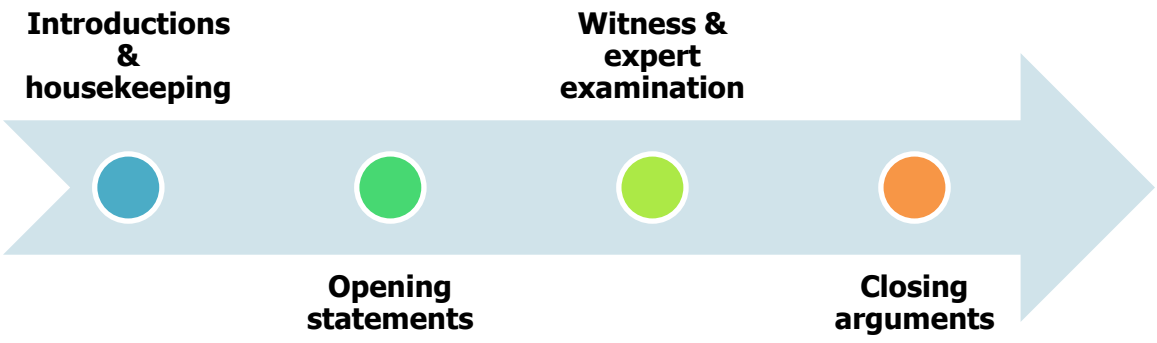
Types of evidence

Hearing

Key purpose of a hearing:

- To hear oral arguments from Parties' counsel
- To test witness and expert evidence through examination
- Direct examination (examination in chief)
- Cross-examination
- Redirect examination (re-examination)
- Witness and expert preparation for a hearing
- In common law systems, often expressly recognised
- In civil law systems, less frequently recognised and may sometimes result in disciplinary measures in case of non-compliance

Typical procedure at a hearing:



Interim measures

Upon the request of parties, the following interim measures may be taken by a competent court:

- maintain or restore the status quo until the dispute is resolved;
- not to act or to take measures to prevent any increase in present or potential damages or difficulties in the arbitration proceedings;
- take asset protection measures as may be necessary to enforce the underlying arbitral award;
- protect evidence that may be relevant to the dispute and is important to the settlement of the dispute.

The party requesting for interim measures must prove the following things:

- unless an interim measure is taken, damages that may be compensated under the arbitral award cannot be satisfied in full and such damage should be greater than the potential damage that may occur to the party to whom the interim measure is taken against;
- there is a reasonable possibility that the dispute will be resolved in favor of the requesting party;
- the request is specific and clear.

Emergency arbitration

Emergency arbitration is provided as an option in most major international arbitration rules and allows for urgent arbitral interim relief prior to the constitution of the tribunal. For example, pursuant to Appendix V of the ICC Rules:

- The President of the ICC Court must appoint an emergency arbitrator within as short a time as possible, normally within 2 days of receipt of the application;
- The emergency arbitrator must rule by way of an order within 15 days of the date when the file was transmitted to him or her;
- The parties agree to comply with any order issued by the emergency arbitrator;
- The tribunal is not bound by the emergency arbitrator's order.

Party representatives

SIAC RULES 2016, RULES 23.1 AND 23.2 23.1	Any party may be represented by legal practitioners or any other authorised representatives.
	The Registrar and/or the Tribunal may require proof of authority of any party representatives.
	After the constitution of the Tribunal, any change or addition by a party to its representatives shall be promptly communicated in writing to the parties, the Tribunal and the Registrar.

Arbitral awards

"Awards are final and binding legal instruments, having immediate legal effects and creating immediate rights and obligations for the parties." - International Commercial Arbitration (Second Edition) (Born; Jan 2014).

Sources:

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
2. Law of Mongolia on Arbitration (2017)
3. Civil Procedure Code of Mongolia (2002)
4. Civil Code of Mongolia (2002)
5. Law of Mongolia on Enforcement of Court Judgment (2017)
6. UNCITRAL Model Law on International Commercial Arbitration (1985)
7. Seminar on Improving the legal environment for business worldwide, Tony Andriotis, Emmanuel Jacomy, Artis Straupenieks, 2023

For further information, please contact V. Bolormaa, GRATA International Law Firm partner at bvolodya@gratanet.com and lawyer T.Buyanjargal at btungalag@gratanet.com or +976 70155031.