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2019 QMUL Survey on International Arbitration in Construction

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Key Take-aways

1.
Arbitration remains the most popular process for the resolution of disputes arising in international construction projects.

2.
The Survey reflects that arbitration users call for improvements in efficiency, more expeditious proceedings and reasonable costs. The main causes of inefficiency in construction arbitration are attributed to obstructive party tactics, poor case management, large amounts of evidence, lack of experience in construction disputes of arbitrators and counsel, and the general factual and technical complexity of construction disputes.

3.
Arbitration users in the field value specialist construction dispute knowledge. In light of the uniqueness of construction projects and disputes, they appreciate proactive efforts by arbitrators (and counsel) to adjust their case management to the specific needs of the individual case.

1 Introduction

In November 2019, the School of International Arbitration at Queen Mary University of London (the "School") in partnership with Pinsent Masons LLP published the results of its 2019 International Dispute Resolution Survey entitled "International Arbitration Survey – Driving Efficiency in International Construction Disputes" (the "Survey").

The Survey is the School's first major empirical study to focus exclusively on construction and infrastructure disputes. The dedication of this year's Survey to construction disputes is most welcome, given that the construction sector is one of the largest, if not the largest, user of dispute resolution services. Pursuant to the 2018 ICC Dispute Resolution statistics, construction and engineering disputes continue to make up the largest share of all ICC arbitrations, and in fact hit a record high in 2018 with a share of close to 30% of the overall ICC caseload. It is therefore unsurprising that with 646 completed questionnaires and 66 personal interviews, the Survey is the School's largest sector-specific international arbitration study to date.

The stated purpose of the Survey was to research the sentiment of the international construction arbitration community. The Survey targeted a wide range of actors in the dispute resolution community, with respondents including private practitioners, in-house counsel, arbitrators, academics and representatives of arbitral institutions from diverse backgrounds and different jurisdictions.

The Survey therefore delivers a well-rounded picture of the current state of affairs in dispute resolution in the construction and infrastructure sector, and provides valuable insight into stakeholders' experiences and perceptions of international arbitration. Importantly, in a construction context, the Survey also tested the respondents' attitude towards alternative dispute resolution processes, such as dispute boards or mediation.

In this inaugural edition of the Schellenberg Wittmer Construction Insights, we set out the key facts and figures contained in the Survey.

2 Common causes of international construction disputes

The three most common causes of international construction disputes according to the participants of the Survey are late performance (68%), poor contract management (63%), and poor contract drafting (61%). The respondents considered the suspension or termination of the contract (49%) as well as underpricing (37%) and inadequate information at the tender stage (36%) to be other common causes giving rise to a dispute.

It is not surprising that late performance gives rise to most construction disputes. The complexity of large construction projects such as the construction of harbors, airports, bridges, highways or power plants makes them prone to delays to their often tight schedules. Few large projects are completed entirely without disputes relating to the project schedule and costs of delay or mitigating measures.

3 Characteristics of international construction arbitration

As anticipated, the respondents primarily characterize international construction arbitrations by the factual and technical complexity of the disputes (73%). Other defining features of construction arbitrations include the large volume of evidence (66%), multiple claims and multiple parties (49%), and the use of non-lawyers as arbitrators (27%). As arbitration allows the parties to tailor the procedure to the particularities of the case, arbitration is considered better suited than other dispute resolution mechanisms to cope with these specific features.

4 Arbitration as the preferred dispute resolution mechanism to resolve international construction disputes

The Survey reveals that international commercial arbitration is by far the most frequently chosen mechanism to resolve international construction disputes (71%). Other alternative dispute resolution mechanisms that are used less frequently include negotiation or intervention of senior representatives (34%), mediation (32%), ad hoc dispute boards (22%), expert determination (17%), statutory adjudication (17%), standing dispute boards (14%) and investor-state arbitration (13%).

According to the Survey respondents, the popularity of arbitration stems from some of its core features: arbitration between international parties is perceived to be more neutral than litigation in any of the disputing parties' home jurisdictions. Through the arbitrator appointment process, the parties can influence the composition of the tribunal and ensure the necessary level of expertise both in matters of construction law and the technical issues at stake. Additional advantages are the confidentiality and privacy of arbitration proceedings and the international enforceability of arbitral awards under the New York Convention.

5 Minimum amount in dispute commercially suitable to resolve dispute through arbitration

The Survey further enquired which minimum amount in dispute respondents considered commercially suitable for international arbitration. The answers were wide-spread and ranged from below USD 1 million to above USD 100 million. Most respondents (42%) though considered a minimum amount in dispute between USD 1 and 10 million to be commercially adequate. Interestingly, most in-house counsel (43%) thought that the minimum amount in dispute should be higher – between USD 11 and 25 million, which reflects the general concern voiced in the Survey that arbitration is too time-consuming and costly.

6 Pre-arbitral process and decisions

The answers provided in the Survey on compliance with pre-arbitral decisions were mixed. 41% of the respondents reported that parties did not voluntarily comply with pre-arbitral decisions at all, whereas 28% said that such decisions were complied with frequently, and another 31% answered that parties complied at least half of the time.

Asked how often the outcome in an arbitral award did not differ from the result of the pre-arbitral dispute resolution step, the answers were mixed again: 40% of the respondents said the results were often the same, 36% answered that this was the case half of the time, and 25% reported that this was the case only infrequently. This reflects that arbitration and other dispute resolution mechanisms are not unlikely to lead to different outcomes. In particular, for high value and complex disputes, the Survey participants considered it worthwhile to subsequently pursue arbitration proceedings.

7 Arbitral seats and institutions

The Survey reports that the most common arbitral seats for international construction disputes are London (46%) and Paris (35%), followed by Dubai (26%) and Singapore (22%). The dominant role of London, Paris and, to a lesser extent, Singapore is consistent with the results in non-sector specific surveys of previous years. By contrast, Dubai seems to play a more significant role in construction disputes in comparison to other types of disputes. This might be explained by the comparatively high amount of large construction projects in the Middle East. Unfortunately, the survey does not reveal further common arbitral seats. It would have been interesting to know Switzerland's ranking, given its general (non-sector-specific) popularity as seat in international arbitration, as e.g. confirmed by the School's arbitration survey of 2018.

According to the Survey participants, the two most frequently used institutions for international construction disputes are the International Chamber of Commerce (ICC) (71%) and the London Court of International Arbitration (32%). One reason for the ICC's leading role in construction disputes is that the International Federation of Consulting Engineers (FIDIC) standard contract forms, which are widely used in international construction projects, refer to ICC arbitration as the default arbitration option. The Survey further records that ad hoc arbitration, i.e. proceedings conducted without the administrative support of an arbitral institution, was used in 27% of construction disputes.

8 Arbitrator selection

The Survey also examined the factors considered in the selection of arbitrators for international construction disputes. According to the Survey, the most important qualification is experience in international construction arbitration (76%), followed by a combination of legal and technical expertise (60%), and construction industry experience (57%). This result mirrors the Survey's finding that factual and technical complexity constitutes the most characteristic feature of international arbitration in the construction sector. Other factors that the respondents consider important include arbitrator availability (46%) and familiarity with the applicable substantive law (44%).

The Survey further revealed that 38% of the respondents had experienced technical experts being appointed as arbitrators. The majority view, however, was that such appointments remained exceptional presumably because the required technical expertise could be provided by party-appointed or tribunal-appointed experts.

9 Perceived causes of inefficiency in construction arbitration

Time and costs of international construction disputes are the main sources of dissatisfaction among users. Hence, the Survey participants see room for improvement in terms of efficiency and flexibility of the arbitral process.

The top five reasons for inefficiency as determined by the respondents are: party tactics (53%), poor case management by arbitrators (51%), large amounts of evidence (42%), arbitrators and/or counsel inexperienced in handling construction disputes (42%), and factual and technical complexity (36%).

10 Call for efficient actors in international construction arbitration

Respondents would like to see arbitrators take a more pro-active approach to managing cases, e.g. by undertaking work and providing guidance at an early stage of the proceedings to focus counsel's minds on key issues. Some respondents consider "due process paranoia" as one reason why arbitrators may not take a more robust approach to case management. Another recurring issue is delays in rendering the final award. This concern is reflected in the respondents' answers to the question which characteristics they find most important in an arbitrator from an efficiency perspective: issuance of the award within a reasonable period of time (70%), willingness to make difficult (procedural) decisions (68%), case and counsel management skills (68%), technical knowledge of construction disputes (63%), good availability (61%), knowledge of the facts of the case (61%), and facilitation of settlements (45%).

Other actors in international construction arbitration also have their part to play when it comes to driving efficiency. According to the respondents, clients and users should have an "efficient arbitral mindset" and focus on resolving the dispute rather than leaving no stone unturned (62%), approach settlement with an open mind (52%), and participate in the proceedings (46%), e.g. by attending case management conferences, interacting efficiently with their lawyers, or by providing documents and making witnesses available.

Naturally, respondents also have a wish list for the characteristics that efficient counsel in construction disputes should bring to the table, such as the ability to get to the point in a clear and focused manner, i.e. concentrating on winning the case rather than dealing with every point (63%), distilling complex facts and technical issues into bite-size pieces and drafting succinct submissions (61%), technical knowledge and experience in both international arbitration and the construction field (60%), case management skills (59%), and full engagement with client teams (58%).

11 Procedural initiatives to increase efficiency

Further, respondents were asked which due process elements they would be prepared to forego to save time and money. Their answers offer interesting insight as to where arbitration users may be prepared to adjust the fine balance between efficiency and the preservation of the parties' procedural rights.

In terms of submissions and hearings, many respondents

would welcome advance identification by arbitrators of issues to be addressed (55%), presentation by the parties of agreed statements of facts and/or chronologies, including admission of non-contentious issues (53%), time-capped opening and/or closing arguments (51%) (with one fifth of respondents seeking to dispense with oral arguments altogether), capped written submissions (41%), avoidance of multiple rounds of submissions (40%), time-capped cross-examination of witnesses (38%), and the arbitrators posing questions to the witnesses (36%).

Another means of increasing efficiency contemplated by the respondents is the disposal of unmeritorious claims or defences at an early stage of the arbitration (44%). One approach would be for the parties to encourage arbitrators to dismiss unmeritorious claims (or for institutional rules to mandate the arbitrators to do so), although split results suggest concerns about this idea. Another suggested approach is imposing punitive costs against the party bringing the unmeritorious claim or defence.

It further emerges that a significant number of respondents would be prepared to forego or limit document production and disclosure (33%). To improve the efficiency of the disclosure process, respondents suggest appointing a member of the tribunal to liaise with the parties on electronic disclosure, and using a common platform for such disclosure.

Whereas the majority of respondents are of the view that cost orders can be used to improve efficiency (93%), varying views were advanced as to how this could be achieved. The most widely supported approach was for the tribunal to inform parties at the outset of the proceedings that costs would be used to encourage efficient behavior (46%).

On the subject of costs, respondents were invited to name factors which would justify a construction arbitration costing more than USD 3 million and lasting more than two years. Unsurprisingly, the top answer was high-value disputes (64%). This was followed by high-profile construction projects (42%), and complex facts and technical issues (41%).

12 Technology

On a final note, technology continues to be a hot topic within the arbitration community. In light of the document-heavy nature of construction arbitration, respondents acknowledge that technological automation could facilitate the review of large volumes of evidence. Although there is an appetite for the use of more technological automation, there remains a resistance to the idea of automating the entire decision-making process.

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