JUS CONNECT

INDUSTRY INSIGHTS ISSUE 7

Construction Arbitration Report

June 2023

A report prepared by Jus Connect

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Foreword

This Report is part of Jus Connect's Industry Insights Series, a collection of industry-focused arbitration reports. In each issue, we examine the extensive international arbitration data available on our platform. We aim to provide valuable insights, backed by data, on arbitration within a particular economic sector.

In this issue, we present a goldmine of information based on the data available on Jus Mundi and Jus Connect as of May 2023 to explore the construction industry. Due to the prevalence of confidentiality in arbitration, we cannot be exhaustive and include every existing construction arbitration case document in our analysis.

Still, Jus Mundi is proud to have the most comprehensive database in international arbitration, both in investor-State and commercial arbitration. As of May 2023, over 79,000 case documents are freely available on our platform, which is continuously updated for the most thorough legal research possible. In addition, over 55,000 individual and firm profiles are available on Jus Connect.

We collect data using artificial intelligence through local public resources and open sources. We also have over 20 partnership with major institutions — such as the ICC, AAA-ICDR, HKIAC, CBMA, and LACIAC — as well as collaborative partnerships with leading organizations — such as the IBA, which receives arbitral awards from various contributors globally, the CEA, and the UAA. These partnerships enable us to give you exclusive insights into the diverse commercial arbitration landscape. In fact, some of them are sharing their statistics and insights into their respective regions in this Report, *i.e.,* AAA-ICDR, ICC, SCCA, and SHIAC.

Each edition presents a unique overview of arbitral institutions, arbitral seats, key actors involved, and exclusive statistics in a specific industry based on the data available on Jus Connect and Jus Mundi.

In this issue, you have access to:

- Updated and new statistics and data-backed insights in construction arbitration;
- Select regional rankings of the most active law firms in construction arbitration;
- A range of unique and in-depth construction insights and regional perspectives from leading experts from around the world — including lawyers, experts, and in-house counsel;
- A list of construction arbitration cases filed in 2022-2023, in Annex 1;
- A shortlist of the top construction companies in the world in 2022 and their known lead in-house counsel, in Annex 2.

We hope you enjoy our complimentary Report and learn from the data available on our platforms.

You may also enjoy our other Industry Insights Reports on:

- Mining Arbitration,
- Electricity & Renewables Arbitration,
- Maritime Arbitration, and
- Oil & Gas Arbitration.

Explore emerging trends in construction arbitration. Dig in!

Acknowledgments

We would like to express our gratitude to all the excellent contributors, their firms, as well as the arbitral institutions that have collaborated with us in producing this Report. It has been a true pleasure to work with such esteemed arbitration practitioners from all around the world.

Thank you to the Jus Connect and Jus Mundi teams for making these extensive Reports possible, especially to Helene Maïo, Jewel Archer-Lucas, and Nayla Baly.

Clémence Prévot

Editor-In-Chief of Daily Jus
Senior Content Marketing Manager of Jus Connect and Jus Mundi
Jus Mundi

ABOUT THE CHIEF EDITOR

Clémence Prévot *is a former arbitration lawyer, qualified in New York and Paris, who now manages Jus Mundi's Blog, our content collaborations, our newsletter, and our famous Industry Insights Reports. She is also the Editor-in-Chief of Daily Jus, your all-in-one resource to elevate your career, boost your firm's growth, transform your approach to legal marketing, and more.*

She brings practical insights to the content created at Jus Connect and Jus Mundi, thanks to her all-around experience in arbitration. She has worked in law firms and an arbitral institution, as a mediator, and with third-party funders, in different jurisdictions.

Reach out to her with feedback, content ideas, and suggestions! (She doesn't bill for her time anymore, so don't hesitate to get in touch!)

Introduction

In order to understand construction arbitration, it is necessary to understand what a construction project is, as well as its perks and peculiarities.

Maria Irene Perruccio
In-house counsel
Webuild S.p.A

A construction project (and I will hereinafter refer to the construction of major infrastructures) is a universe of intertwined contracts, and of legal relationships, of workers, brains, and individuals. It is quite an intricated microcosmos that aims at realizing a complex engineering endeavor under time and cost constraints.

In such a complicated panorama, the occasions for mistakes, tensions, and conflicting interests among the different actors are not rare. On top of all this, the amounts at stake are usually rather substantial.

Disputes can typically arise out of:

- Geological issues. For instance, one party did not communicate exact or complete geological data, and the other party must adapt the project accordingly: who will bear the costs for this change?;
- Political issues. For example, the employer is a State entity that suddenly decides to nationalize the highway the constructor was promised to operate for 20 years: who compensates the company for this loss?;
- Financial issues. For example, the client or a JV partner becomes insolvent: how should the additional financial burden be shared?;
- Natural issues, more and more often nowadays. For example, an extraordinary flooding paralyzes a worksite for weeks: is this a force majeure case?;
- and more.

The basis for a physiological construction project is the following: the employer, being the client, should finance the project. Not the constructor. Therefore, the logic of the dispute resolution mechanisms in construction litigation should allow the constructor to receive the funds it needs in the shortest possible time, with the least possible hurdles (or disputes), so that the project is completed on time.

If a company is obliged to bring a claim for lack of alternatives, it seems arbitration is still the best way to go for construction disputes, because:

- arbitration provides for a neutral forum – as opposed to litigating in front of State courts, one of the parties potentially being a State entity;
- parties can usually select arbitrator(s) with specific knowledge of this very technical industry;
- arbitration proceedings can be kept confidential;
- arbitration proceedings are flexible and can be adapted to the parties' needs;
- the New York Convention facilitates the enforcement of arbitral awards in numerous countries around the world.

However, arbitration suffers from some practical genetical flaws that seem difficult to overcome:

- it is expensive, at least more expensive than State courts litigation;
- both merits and procedural results are less predictable than in State courts for lack of publicly available precedents, both in terms of awards and institutions' procedural decisions;
- in practical terms, it still takes a lot of time to monetize the awards.

Instead, all that construction companies long for is predictability. Managers always ask two main questions: when and how much? When can I cash in or do I have to pay, and how much?

Their goal is to keep the balance sheets in equilibrium at the end of the year. In terms of a company's perception, a dispute represents a certain cost and an uncertain result, *i.e.,* a risk and an uncertainty. A company with a low level of disputes is a healthy company, that can re-invest resources into its core business instead of freezing them for the purpose of pursuing claims.

If and when a company manages to settle a dispute, it achieves a double advantage: saving on administrative and legal expenses (including those of lawyers, experts, consultants, etc.) and having a clear result in terms of how much and when the company can cash in / must pay. A settlement avoids the risk of an unpredictable decision, such as the outcome of a dispute.

This is why recently, more and more often, in-house and external counsel are rethinking the world of construction disputes. It is an undisputed fact that a settlement is most often preferred to arbitration for construction companies. Therefore, what is the future of construction arbitration?

Lawyers must be able to use construction arbitration in the most efficient way to achieve the companies' best interest, *i.e.,* to avoid - or at least limit and decrease the number of - disputes.

As mentioned above, typical multi-tiered dispute resolution clauses are designed to reduce the extent and/or the number of disputes and to ensure that the necessary finance flows from the client to the constructor to conclude the project on time. It is not by chance that FIDIC's last review of their contractual models introduced the concept of a DAAB (Dispute *Avoidance* and Adjudication Board).

In detail, dispute lawyers dealing with construction claims should:

- efficiently use Dispute Boards. Not everything decided in a Dispute Board proceedings must automatically be rediscussed in arbitration. Otherwise, it is just a duplication of costs and a waste of resources;
- sincerely lead the clients through genuine and constructive efforts of negotiation/mediation;
- know and explore other ADR mechanisms that might better suit the client's interest and the client's case, such as expert's determination, sealed offers system, etc.

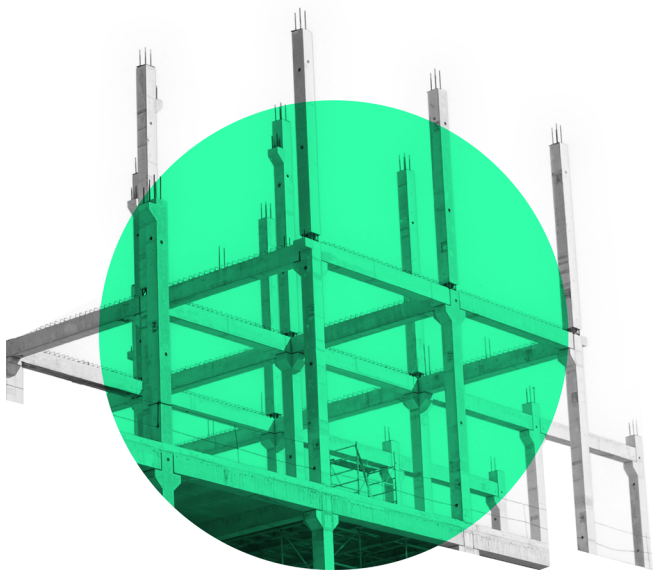
If all the above fails, construction arbitration is still the best and preferred forum for construction disputes. It remains a heavy tool of pressure to potentially settle disputes: in Claudia Salomon's words, a "Sword of Damocles." Nothing prevents the parties from pursuing settlement talks in parallel to an ongoing arbitration: parties can theoretically go in and out of mediation and arbitration proceedings as they deem fit, with the necessary procedural precautions.

To conclude, what could be the role of construction arbitration lawyers in the future? Only an experienced arbitration lawyer can properly advise their clients on the best timing to start or end negotiations and potentially settle. Indeed, only experienced arbitration lawyers know the best alternatives to a negotiated agreement, and only experienced arbitration lawyers can navigate the complexities of arbitration proceedings.

From a more materialistic point of view, when a dispute settles, external lawyers might not be able to charge substantial fees in the short term. But a good settlement can always be compensated with a generous success fee and, in the long run, lawyers who accompany their clients to good settlements would certainly win their clients' loyalty.

DISCLAIMER:

The arguments expressed represent exclusively the opinion of the author, and do not represent the opinions or positions of Webuild S.p.A

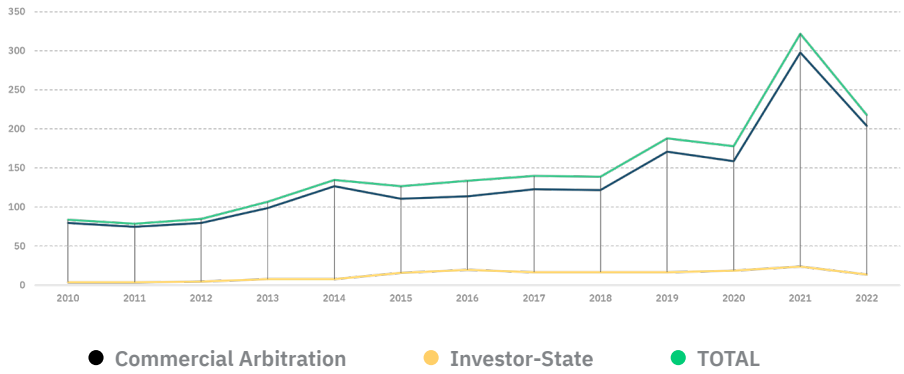


ABOUT THE AUTHOR

Maria Irene Perruccio *is a double-qualified lawyer in Milan, Italy, and Paris, France, as well as a resident in Paris and Milan, where she works as in-house counsel for the International Affairs of Europe and Americas of Webuild S.p.A. (former Salini Impregilo S.p.A.). She previously worked as Deputy Counsel of the Swiss-Italian Team of the Secretariat at the ICC International Court of Arbitration. Before that, Maria Irene worked in the International Arbitration department of White&Case LLP in Paris, where she specialized in international arbitration and litigation in the areas of energy (mainly oil & gas) and construction. She regularly lectures at Paris I University and Turin University. Additionally, Maria Irene is a co-founder and vice-president of the Young Practitioners of Construction in Paris; co-founder and former co-chair of AIA-ArbIt-Below40, the Italian below-40 association for arbitration; member of the In-House Focus Group of ICC Young Arbitrators Forum, member of the ASA Users Council, and member of the BVI International Arbitration Committee.*

Construction Arbitration Cases on Jus Mundi

For this Report, we only surveyed the data you can access, double-check, and monitor on Jus Connect and Jus Mundi. Overall, we have found 2,425 arbitration cases available for construction disputes in our multilingual search engine, of which 2,197 are commercial arbitration cases and 228 investment arbitration cases.



Evolution of the number of Construction Arbitration cases filed between 2010 & 2023

- according to our database as of May 2023 -

REGIONAL CONTEXTS

Over the last decade, international construction arbitration cases have seen an overall increase. The construction industry is prone to disputes due to the complexity of projects, involvement of multiple parties, and cross-border transactions. Arbitration is a common method used to resolve these disputes, offering a neutral and private forum for resolution.

Various factors such as economic development, infrastructure projects, and legal frameworks influence the number of construction disputes in any given jurisdiction. That being said, some regions have traditionally seen a significant number of construction arbitration cases. These include:

- United Kingdom: London has been a major hub for international arbitration, including construction disputes. Many international contracts designate London as the seat of arbitration.
- United Arab Emirates: Dubai, in particular, has experienced substantial growth in construction and infrastructure projects, leading to an increase in related disputes.
- Singapore: Singapore has positioned itself as an arbitration center in Asia, including for construction disputes. Its efficient legal system and supportive legislative framework have attracted many international cases.

- United States: Major cities such as New York and Miami have seen a significant number of construction disputes due to their vibrant construction sectors and involvement in international projects.
- Hong Kong: Hong Kong has been a popular choice for resolving construction disputes involving parties from mainland China and other Asian countries.
- Australia: Given its extensive infrastructure development and natural resources projects, Australia has witnessed an increase in construction disputes, particularly in cities like Sydney and Melbourne.

Our data presented throughout this Report illustrates these trends.

OUR DATA-BACKED INSIGHT

- The construction sector is one of the main users of ADR methods. Adjudication, mediation, arbitration, expert determination are examples of dispute resolution tools used by the construction industry. Users of arbitration in the construction sector are usually proficient in various methods of dispute resolution, as arbitration tends to be the last recourse to resolve a dispute. Any delay in construction projects may lead to a slew of technical issues and financial consequences; time-efficient dispute resolution methods are therefore preferred to arbitration as a first recourse.

- The 2019 Queen Mary University of London and Pinsent Masons' International Arbitration Survey on Driving Efficiency in International Construction Disputes provides valuable insights on the field. 70% of arbitration users in the construction industry mentioned the capacity of arbitrators to issue an award in a time-efficient manner to be the leading attribute they are looking for in arbitrators. This is the top response regarding the improvements respondent seeks to increase the arbitral process's efficiency.

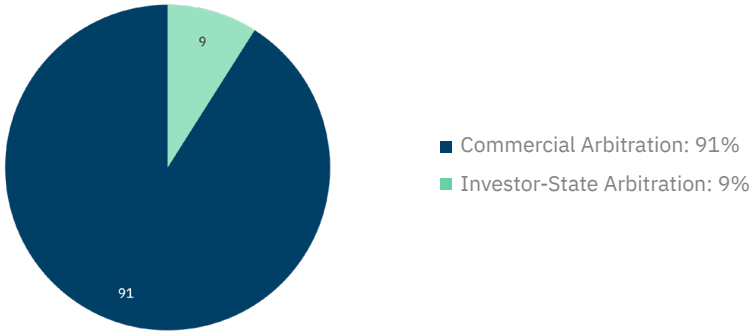
67% also mentioned supporting mandatory compliance with pre-arbitral decisions as a pre-condition to arbitration, illustrating the tendency to revert to arbitration as a last recourse. That said, 41% of the survey respondents conceded that parties do not tend to voluntarily comply with the decisions issued as part of the various ADR processes used to resolve their construction disputes.

The survey also shows that opinions widely differ regarding the minimum amount in dispute that would encourage parties to pursue their construction claims through international arbitration. While some would use arbitration for claims between USD 1 and 10 million, others would not go to arbitration before their claim reached USD 11 million.

- Still, construction arbitration is one of the economic sectors with the most arbitration cases on Jus Mundi.

To find cases in the field, simply use our Industry filter for Construction.

- The majority of construction cases available on Jus Mundi are commercial arbitrations.



Proportion of commercial and investor-State arbitrations in Construction Arbitration overall

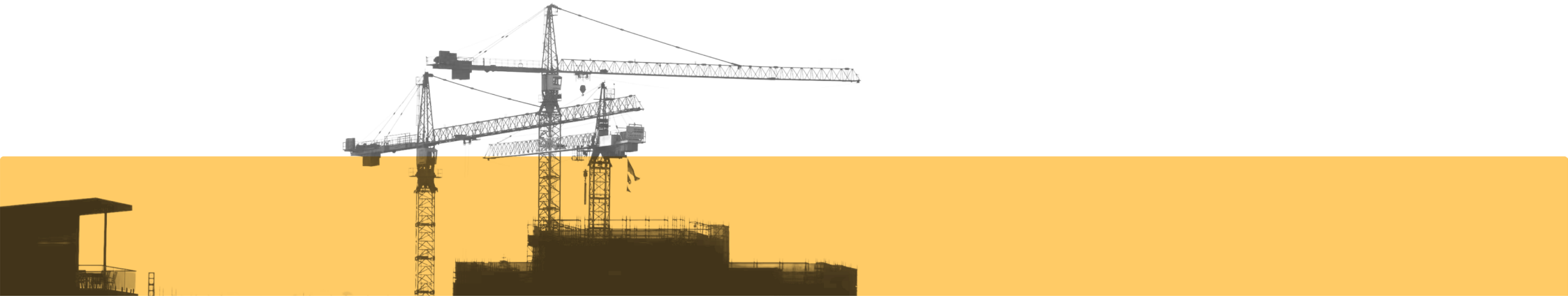
- according to our database as of May 2023 -

Some jurisdictions have very elaborate domestic arbitration landscapes propitious to the efficient and expedient resolution of domestic and international construction disputes. For instance, the United States, India, and Brazil have strong domestic arbitration cultures, which partially explains why seats and arbitral institutions in these jurisdictions are so high in our rankings.

- In the United States, both the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (AAA-ICDR) are among the top arbitral institutions administering construction arbitrations, the former focusing on domestic arbitration while the latter administers international construction arbitrations. According to our database, both exclusively administered commercial arbitrations in the field.

- The statistics presented in various institutions' annual reports give an insight into the developments in construction arbitration:

- In 2022, construction cases represented 9.9% of HKIAC's total caseload, surpassing by far the number of cases filed with the institution in the energy sector. The institution's statistics show a slight uptick from 2021.
- On the contrary, SIAC reports the construction/engineering sector as epresenting 11% of the cases it administered in 2022, which makes the sector one of the least represented in its caseload.
- On the other side of the pond, LCIA reports 5% of its caseload concerned the construction sector in 2022.
- At ICSID, 8% of cases concerned the construction sector in 2022. Its construction caseload also seems to remain steady over the years.



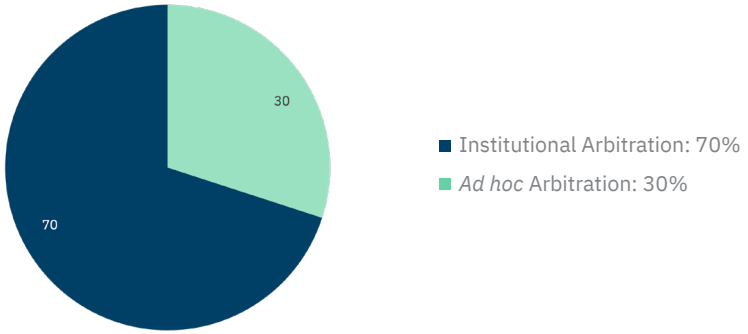
Most Selected Arbitral Institutions

TOOLTIP

Try our institutions and arbitration rules filters.
Use **CiteMap** for rules of arbitration to find related jurisprudence.

We looked at all the construction arbitration cases available on Jus Mundi to gather data showing the popularity of each arbitral institution in the sector.

While parties opted for various local and international arbitral institutions for their construction disputes, a survey of our data revealed 91 main arbitral institutions that have administered construction arbitrations over the years.



Proportion of ad hoc and institutional arbitration in Construction Arbitration overall

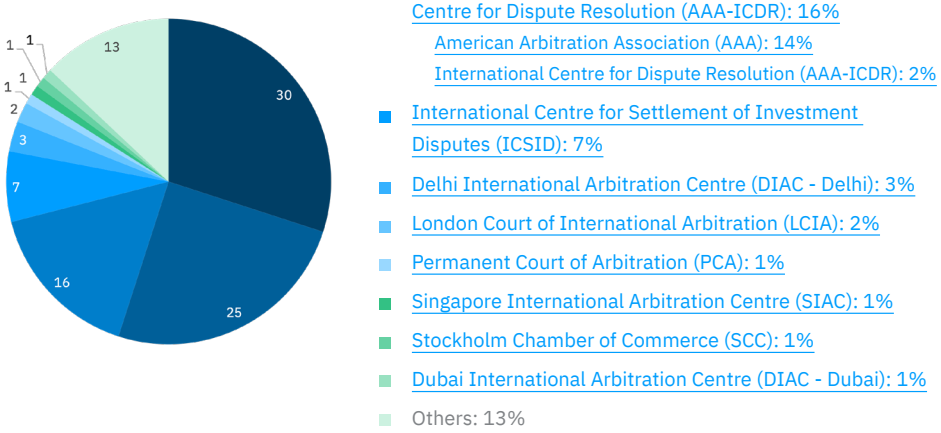
- according to our database as of May 2023 -

- *Ad hoc arbitration* is extremely popular in the construction sector. It surpasses any arbitral institution, according to our data. This can be explained by several factors, both typical to the choice of *ad hoc* arbitration and more specific to the construction sector:

- *Ad hoc* arbitration is said to be more cost-effective than institutional arbitration due to the absence of administrative fees. That being said, administrative fees are usually not the main cost center of an arbitration.
- Removing this administrative layer means parties have to bear the administrative burden of their arbitration. Parties familiar with arbitra-

tion, which is often the case in the construction sector, do not find this to be a disadvantage.

- They can tailor the arbitral process to their needs, interrupt it to attempt to negotiate a settlement, or use other ADR methods, even multiple times during the process if they so wish.



Top 10 most selected arbitral institutions in Construction Arbitration overall (exc. cases with unavailable data)

- according to our database as of May 2023 -

Key Takeaways

The Top 3 **arbitral institutions** – namely the International Chamber of Commerce (ICC), the American Arbitration Association & International Centre for Dispute Resolution (AAA-ICDR), and the International Centre for Settlement of Investment Disputes (ICSID) – **administered** 48% of all construction arbitration cases available on Jus Mundi.

For the first time in our series of Industry Insights Reports, the Delhi International Arbitration Centre (DIAC - Delhi) enters our data-backed ranking of the most selected arbitral institutions. According to our data, DIAC – Delhi exclusively administered commercial arbitration cases in the construction sector.

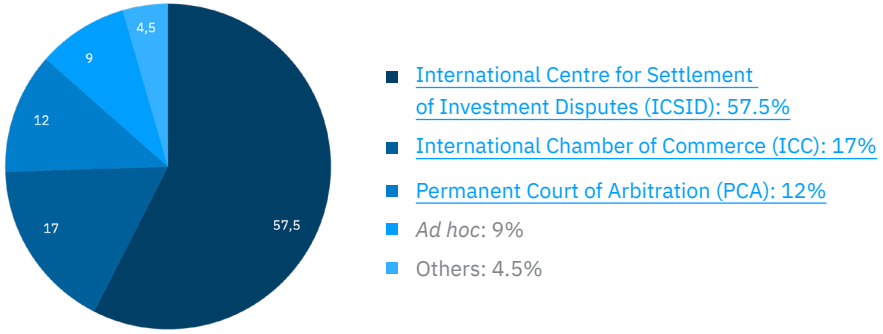
This addition to our ranking is not so surprising: the construction industry in India has been growing exponentially in the last few years. The Indian government has launched multiple initiatives to further increase the infrastructure sector's growth, including a 1.2 trillion national plan for infrastructure. The Indian construction sector significantly contributes to the country's GDP and is one of the fastest-growing industries in the country.

More investments tend to lead to more disputes. Arbitration has therefore emerged as a preferred dispute resolution method in the construction field in the country.

Recent amendments in 2015, 2019, and 2021 to the Arbitration and Conciliation Act 1996 certainly contributed to the development of arbitration in India. Read more about these updates in *Recent Amendments in Indian Arbitration and Conciliation Act: The Winds of Change Have Begun to Blow for the Resolution of Complex Construction Disputes*, by Prateek Jain (Masin).

Recent amendments in 2015, 2019, and 2021 to the Arbitration and Conciliation Act 1996, although partially controversial and contradictory, certainly have contributed to the development of arbitration in India.

Read more about these updates in *Recent Amendments in Indian Arbitration and Conciliation Act: The Winds of Change Have Begun to Blow for the Resolution of Complex Construction Disputes*, by Prateek Jain (Masin).



Most selected arbitral institutions for investor-State arbitration cases in the Construction sector in the last decade

- according to our database as of May 2023 -

- While ICC has administered both commercial and investor-State arbitrations in the construction field over the years, its caseload is more commercial in construction arbitration. In the last ten years, it administered 393 commercial arbitration cases in the sector and a mere 25 investor-State cases, according to our data.

- On the contrary, **ICSID remains the predominant investor-State arbitration institution**, including in the construction industry. According to our data, **ICSID administered 57.5% of all investor-State arbitrations** in the construction sector. This number is relative, however: it represents only 7% of all construction cases on our database, which makes the institution far behind ICC and AAA-ICDR in terms of construction caseload.

- Although ICSID is a staple of the ISDS regime, the regime itself has come under increasing criticism in the last decade, so much so that it has been said to be facing a legitimacy crisis. This was supposedly the reason Bolivia and Venezuela denounced the ICSID Convention in 2007 and 2012 respectively, as well as Ecuador in 2009 (which ended up signing the ICSID Convention again in 2021). It also led to the demise of the intra-EU ISDS system in the wake of the CJEU landmark decision in Slovak Republik v Achmea BV.

The amendment of the ICSID Rules and Regulations –which entered into force earlier last year on July 1, 2022– has therefore been a welcomed development in addressing the ISDS regime's legitimacy crisis. Among other changes, the Rules now provide for greater transparency, which is essential, as noted by the tribunal in Vivendi v. Argentina (II): "*public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function*" (para. 22).

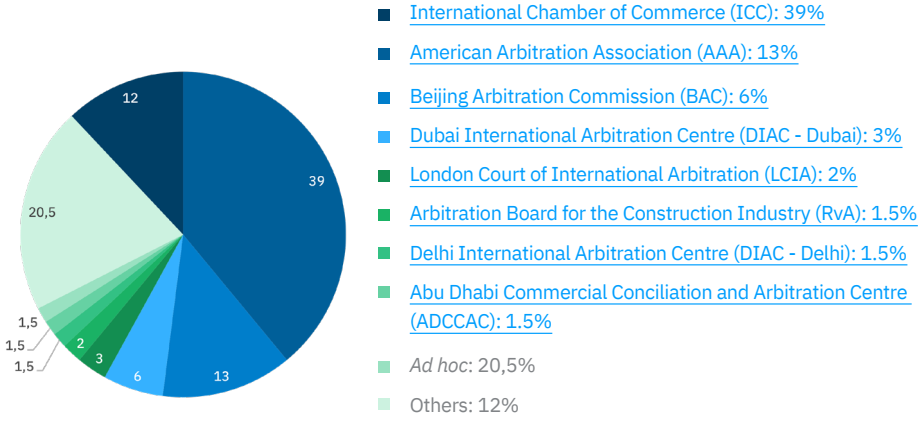
- Most recently, ICSID registered a claim by Autopistas del Atlántico (Adasa) and five other claimants against Honduras regarding the early termination of a contract for the 'Tourist Corridor', a project to develop and rehabilitate highway infrastructure across several regions of the North coast of the country. On June 2, the arbitral tribunal was partially composed (See, Autopistas del Atlántico and others v. Honduras).

- According to The ICSID Caseload – Statistics, Issue 2023-1, **10% of its all-time caseload (*i.e.*, 1966-202) was composed of construction cases, and only 8% in 2022**.

- The Permanent Court of Arbitration (PCA), which comes in third, also predominantly manages investor-State arbitrations in the construction sector.

- According to our data, **only 7 arbitral institutions have dealt with investor-State arbitration** cases in the construction field. For most, these cases were odd occurrences. For instance,

- London Court of International Arbitration (LCIA),
- Moscow Chamber of Commerce and Industry (MCCI),
- Singapore International Arbitration Centre (SIAC), and
- Stockholm Chamber of Commerce (SCC), only dealt with a handful of investor-State cases in construction in the last ten years. In the last two years, only the aforementioned top 3 institutions have administered investor-State arbitrations in construction, according to our data.



Most selected arbitral institutions for commercial arbitration cases in the Construction sector in the last two years

- according to our database as of May 2023 -

- Unlike in investor-State arbitration cases in construction, a diversity of arbitral institutions are involved in commercial arbitration of construction disputes around the world. **In the last two years alone, 27 institutions have administered commercial construction arbitrations**, according to our data.

EUROPEAN INSIGHTS

- ICC is, by far, the **top arbitral institution in commercial arbitration** of construction disputes. It administered 25% of all construction arbitrations cases available on Jus Mundi and 39% of all construction cases filed in the last two years.

In 2022 and up to May 2023 only, out of **231 construction arbitration cases** filed and available on Jus Mundi, **216 are commercial arbitration** cases, including **76 administered by ICC**

ICC highly benefits from the fact that FIDIC's three main standard form contracts (*i.e.,* the Red Book, Yellow Book, and Silver Book) - which are staples in the construction industry -, provide for disputes to be determined by binding adjudication in the first instance, followed by ICC arbitration if a party is dissatisfied with the adjudication determination. Therefore, unless otherwise agreed by the parties, their default dispute resolution clause refers them to ICC to arbitrate their construction dispute.

Discover more from the institution itself in *Construction Arbitration at ICC*, by Elina Zlatanska (International Chamber of Commerce (ICC)).

- In its 2022 Annual Casework Report, LCIA reports that construction cases represented **5%** of its caseload.

APAC INSIGHTS

- Asian institutions are on the rise:

- The Beijing Arbitration Commission (BAC) is a rising arbitral institution in the building industry, according to our data. It became the third most popular arbitral institution in the sector in the last two years.
- **HKIAC** reports **9.9%** of its caseload is composed of construction cases in its 2022 Statistics, which is a slight increase compared to 2021.
- In its 2022 Statistics, **SIAC** reported that construction cases represented **11%** of its caseload.

Discover more about construction arbitration in the region from an institution in *Construction Arbitration in SHIAC and the Outlook*, by Weijun Wang & Tingwei Li (Shanghai International Arbitration Center (SHIAC)).

NORTH AMERICAN INSIGHTS

- AAA-ICDR is the reference to arbitrate construction disputes in the United States but also internationally. The institution provides arbitral rules specifically dedicated to construction disputes, the Construction Rules and Mediation Procedures.

According to its data, **AAA** administered **3,713 domestic construction cases** and **ICDR** administered **55 international construction cases in 2022** alone.

Learn more about construction arbitration in the USA from the institution itself in *Domestic and International Construction at AAA-ICDR*, by Luis M. Martinez, Michael A. Marra & Aisha Nadar (American Arbitration Association – International Centre for Dispute Resolution (AAA-ICDR)).

MENA INSIGHTS

- Dubai International Arbitration Centre (DIAC - Dubai) is MENA's most selected arbitral institution.

- The construction sector is one of the most dynamic in the region, especially in the United Arab Emirates and in Saudi Arabia. The industry contributes to about USD 45.5 billion to Saudi Arabia's GDP and USD 36.8 billion to United Arab Emirates's GDP. Qatar has also significantly increased its activity in the sector with the infrastructure developments required to host the 2022 World Cup.

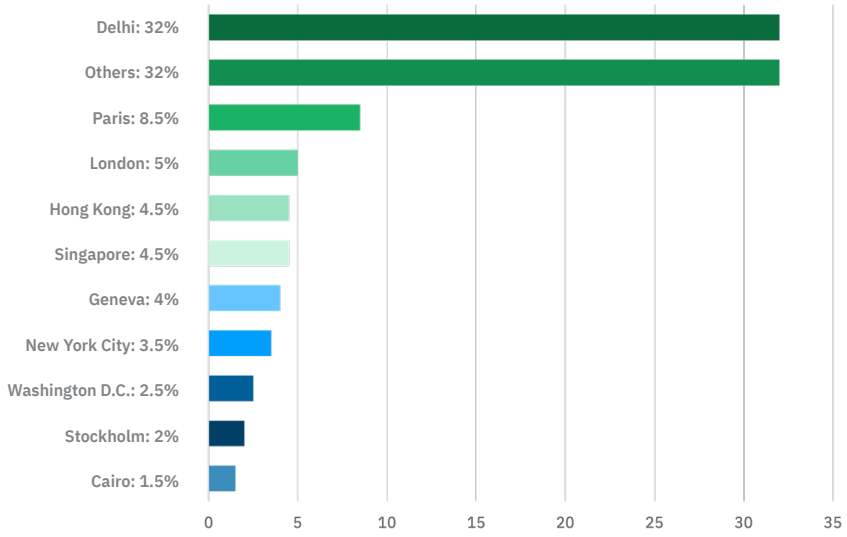
- Arbitral institutions in the region are, therefore, growing their caseload. To learn more, get the institutional insights in *Resolving Construction & Infrastructure Disputes in 'Arbitration-friendly' Saudi Arabia*, by James Macpherson (Saudi Center for Commercial Arbitration (SCCA)).

Discover all the data you need about each arbitral institution through our **Arbitral Institution Profiles**.

Most Popular Arbitration Seats

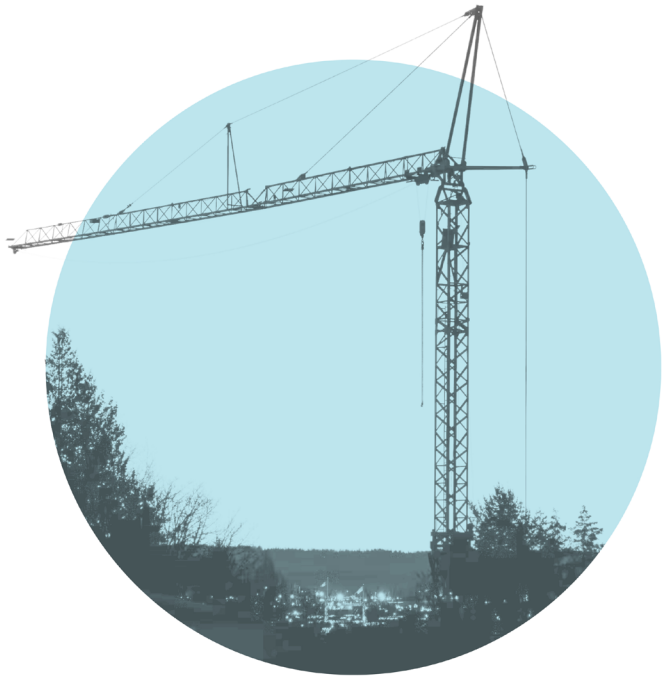
The selection of the seat of arbitration is an important strategic choice, as it determines the law that applies to the arbitral procedure. Selecting an improper seat can result in several procedural and practical difficulties.

Our survey indicated **152 distinct seats** in construction arbitration, some of which are established popular seats of arbitration and others which are growing in popularity as of late. Unfortunately, in many cases, the seat of arbitration is unknown. Confidentiality might be one of the reasons this information is unavailable.

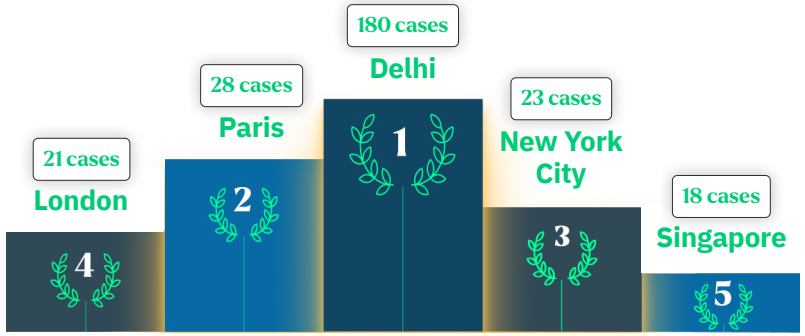


Most selected seats overall for Construction disputes

- according to our database as of May 2023 -



Key Takeaways



Top 5 most selected seats in commercial Construction Arbitration in the last five years

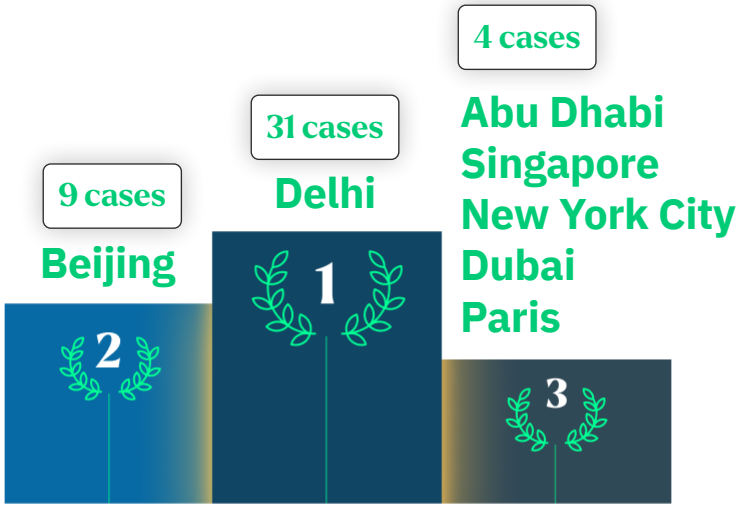
- according to our database as of May 2023 -

- Delhi is the most represented arbitral seat in construction arbitration in our database. Efforts have been made in the last decade to make the jurisdiction more arbitration-friendly, including through amendments in 2021 to the country's Arbitration and Conciliation Act 1996. Although recent amendments to this Act in the last decade have sometimes been controversial, it is believed that India inspires to catch up with other prominent seats in the region, *e.g.,* Singapore and Hong Kong, and become an international arbitration hub.

The country has made improvements to appear more open internationally and attract foreign parties to arbitrate their cases in India. For now, the jurisdiction still has many restrictions that may make it appear less arbitration-friendly than other major hubs in the region.

- The usual suspects follow, namely **Paris, New York City, and London**. They are arguably the biggest global arbitration hubs, so it makes sense they would once more appear as some of the most popular seats. They are trusted seats within arbitration-friendly jurisdictions.

- **Singapore** keeps growing further and is now a strong reference, both in APAC and globally. Singapore's changes to its arbitration law in the last few years have undoubtedly played a positive role in this increase in trust and cases seated there.



Top 3 most selected seats in Construction Arbitration in the last two years (inc. *ex aequo*)

- according to our database as of May 2023 -

- According to our data, more diversity in seats for construction arbitration has emerged in the last two years. **Beijing and Abu Dhabi** are now taking an increasingly important place among seats of arbitration

in construction disputes in their respective regions. As previously mentioned, arbitral institutions in China and the Middle East are also growing their caseload as infrastructure projects exponentially develop across these regions.

- According to our data, **São Paulo (Brazil)** is a rising seat for construction arbitration in **Latin America,** as well as **Bogota (Colombia)** and **Lima (Peru)**.

The Centre for Arbitration and Conciliation of the Chamber of Commerce of Bogotá (CAC-CCB) and the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) have both handled a number of construction cases in the last decade.

- In commercial arbitration, regional parties in LATAM tend to prefer a local seat of arbitration, which is not the case when at least one of the parties involved is foreign, even when the object of the dispute or matter is set in the region.

The development of Brazilian arbitral institutions and seats is largely due to the favorable Brazilian Arbitration Act (BAA) enacted 26 years ago. Since then, commercial arbitration has become the country's most commonly used method of alternative dispute resolution.

Unfortunately, this may all change if the Brazilian Congress approves Bill No. 3,923/21 — meant to amend the BAA. According to the Brazilian Arbitration Committee (CBAr), the main arbitration entity in Brazil, the changes proposed in the bill increase legal uncertainty and weaken the country's entire arbitration system. Its approval would represent a real step backward, as it promotes undue interference by the State in private proceedings.

- This demonstrates how crucial the choice of an arbitration seat can be. However, a recent **Swedish example** proves that arbitration can still remain unpredictable, even in a trusted and arbitration-friendly seat. It is extremely rare for arbitration awards to be set aside in Sweden. Yet, in Minmetals v. Chelyabinsk Metallurgical Plant, the Svea Court of Appeal set aside the award dated November 9, 2017. In its November 2022 judgment, the Court found that the arbitral tribunal has partially exceeded its mandate. The arbitral tribunal was composed of Boris Karabelnikov, appointed by the respondent, Boris Kojevnikov, appointed by the claimant, and Eva Kalnina, president of the tribunal. The award was challenged and set aside on the grounds that the arbitral tribunal relied on facts that had not been argued, failed to rule on an issue, and awarded unclaimed compensation.

Learn more about the latest developments in arbitration in 13 jurisdictions, with our **Arbitration 2022 Year In Review**.

Most Appointed Arbitrators

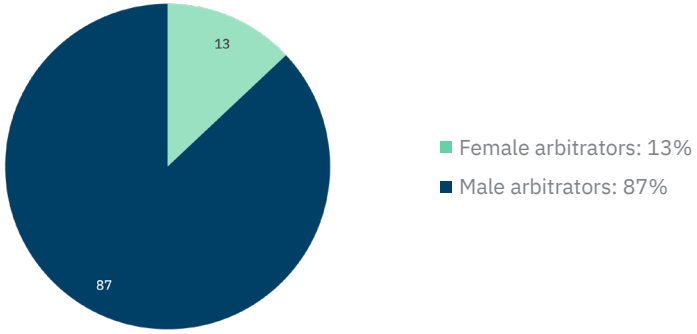
The selection of arbitrators is a crucial step in the arbitration process. Construction arbitration is a technical sector with capital-intensive and long-term projects, which requires arbitrators to have specific expertise in the field. However, finding the right arbitrator can be cumbersome, especially in such a specialized industry.

At the time of writing this Report, Jus Connect *contains* **over 9,000 arbitrator profiles**, *of which* **2,013** *have appeared in* **construction arbitration cases** *available on* Jus Mundi.

TOOLTIP

Efficiently select your arbitrators with **Jus Connect**, our free professional network tailored-made for the arbitration industry. What's more, verify in just a few clicks if they could possibly be conflicted with our **Conflict Checker**.

Key Takeaways



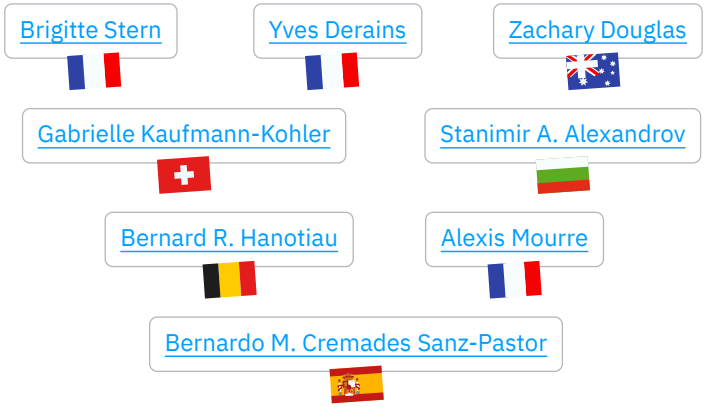
Representation of women as arbitrators in Construction Arbitration overall

- according to our database as of May 2023 -

- Gender equality and diversity in arbitration have been hot topics for a few years now. While many initiatives have been created to effect change in the legal profession and arbitral community, most arbitral institutions report a fairly unchanged number of female arbitrators appointed.

- For the most part, the lack of diversity in international arbitration is still a major concern. It is important that tribunals reflect the broad spectrum of stakeholders who may be affected by their decisions. This also applied to the counsel teams involved

When they are selected, the same few women tend to be appointed and the *cliché* of the "*male, pale, and stale*" arbitrators remains difficult to overcome.

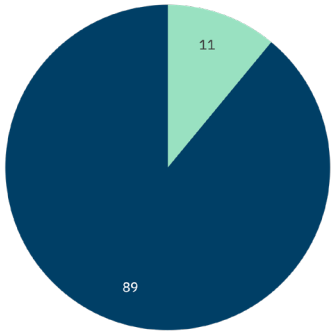


Top 5 most appointed arbitrators overall in Construction Arbitration (inc. *ex aequo*)

- according to our database as of May 2023 -

- The **top 5 most appointed arbitrators in construction arbitration** according to our database proves that the same names tend to come back: all of them have also appeared in other rankings of our Industry Insights Reports, whether it be in mining, electricity & renewables, or oil & gas arbitration.

Of course, their popularity is a testament to their expertise. But little diversity transpires so far in the data analyzed from the cases available on our database, in terms of the most selected arbitrators and the nationalities most represented in arbitrators.



Top 10 most appointed arbitrators represent 11% of all appointments of arbitrators in Construction Arbitration

- according to our database as of May 2023 -

- This is also accurate for female arbitrators for which the same handful of names tend to come back, whatever the industry.

- For instance, according to our data, Brigitte Stern is an extremely active arbitrator with a range of expertise:

- She is the **fifth most active arbitrator in construction arbitration**, according to our data.
- She was also in the top 5 most appointed arbitrators in our 2022 Oil & Gas Arbitration Report and 2022 Electricity & Renewables Arbitration Report.
- She arbitrated more mining disputes than any other economic sector, according to our data, and was the most appointed arbitrator in our 2023 Mining Arbitration Report.
- She is exclusively appointed in the construction sector for investor-State arbitrations, according to our data.
- The vast majority of her appointments came from States.

Find all these insights and more via her Jus Connect profile.

Lucy F. Reed

Brigitte Stern

Jean E. Kalicki

Gabrielle Kaufmann-Kohler

Aarta Alkarimi

Top 5 most appointed female arbitrators in Construction Arbitration

- according to our database as of May 2023 -

That said, a newcomer to our rankings joins the most appointed female arbitrators in construction arbitration: Aarta Alkarimi is Partner at Chrysalis based in Dubai, a British national who speaks English and Persian, and a construction expert.

Find all these insights and more via her Jus Connect profile.

TOOLTIP

Showcase your entire case history, making it easier for people to hire or appoint you by adding cases to your **Jus Connect** profile now!

SPOTLIGHT ON THE APAC REGION

- If the trends shown by two major arbitral institutions in APAC, namely HKIAC and SIAC, are any representation of the regional developments in terms of diversity in arbitration, strives have been made in the region to ensure better representation of female arbitrators.

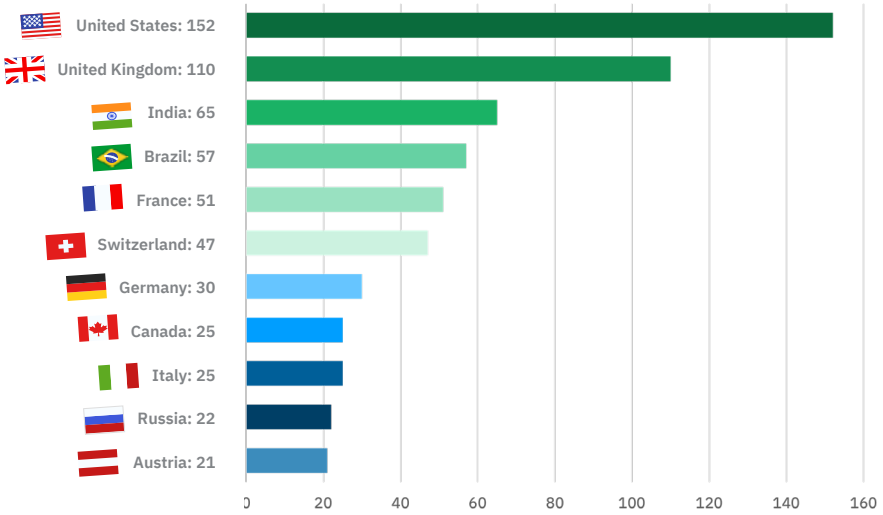
- **HKIAC** reports some improvements in the representation of women in arbitral tribunals. While in 2021, of the 142 appointments made by HKIAC, 31 (21.8%) were of female arbitrators; in 2022, of the 159 appointments made by HKIAC in 2022, 43 (27%) were of female arbitrators.

Parties also increasingly appoint female arbitrators for their HKIAC arbitrations. In 2021, of the 118 designations made by parties and confirmed by HKIAC, 15 (12.7%) were of female arbitrators. In 2022, of the 90 designations made by parties and confirmed by HKIAC in 2022, 17 (18.9%) were of female arbitrators.

The number of female arbitrators appointed by co-arbitrators, however, has decreased between 2021 and 2022: 9 out of 46 designations in 2021 (19.6%) to 4 out of 35 designations in 2022 (11.4%).

- In 2022, **SIAC** was close to achieving parity in arbitrator appointment. Of the 145 arbitrators appointed by SIAC, 67 (46.2%) were female (46.2%).

Diversity is also a matter of nationalities represented by arbitrators.



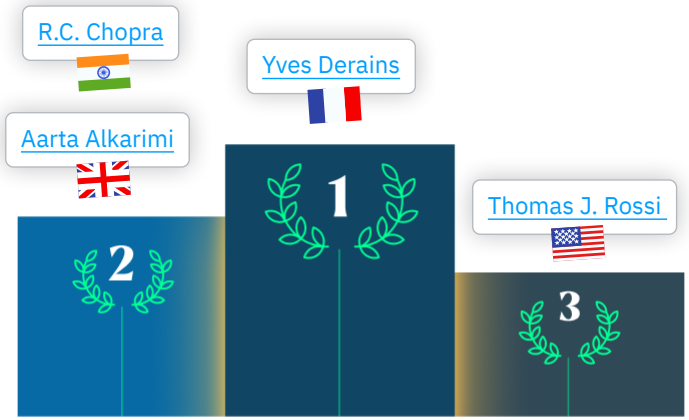
Top 10 nationalities most represented in arbitrators in Construction Arbitration (inc. ex aequo)

- according to our database as of May 2023 -

Key Takeaways

- ICSID reports in its all-time statistics, *i.e.,* data **from 1966 to 2022**, that the **most appointed arbitrators are American, British, or French.** Our top 5 most selected arbitrators in construction arbitration also solely showcase Europeans aside from one Australian. **In 2022**, it is fair to say that not much has changed as arbitrators are still mostly from **North America or Europe,** albeit now including some female arbitrators in the mix.

- However, the results are slightly different when focusing on commercial arbitration in the construction sector.



Top 3 most active arbitrators in commercial Construction Arbitration (inc. *ex aequo*)

- according to our database as of May 2023 -

- Due to the rise in commercial arbitrations of construction disputes in India and the 2019 amendments to the Arbitration & Conciliation Act 1996 - which were unclear as to whether foreign arbitrators were indeed allowed in Indian-seated arbitrations, an **Indian arbitrator** enters our **top 3 most selected arbitrators in commercial construction arbitration**.

- In fact, the **Indian nationality** is the **third most represented in arbitrators appointed in construction arbitration**, with 65 Indian arbitrators active in construction arbitration, according to our database.

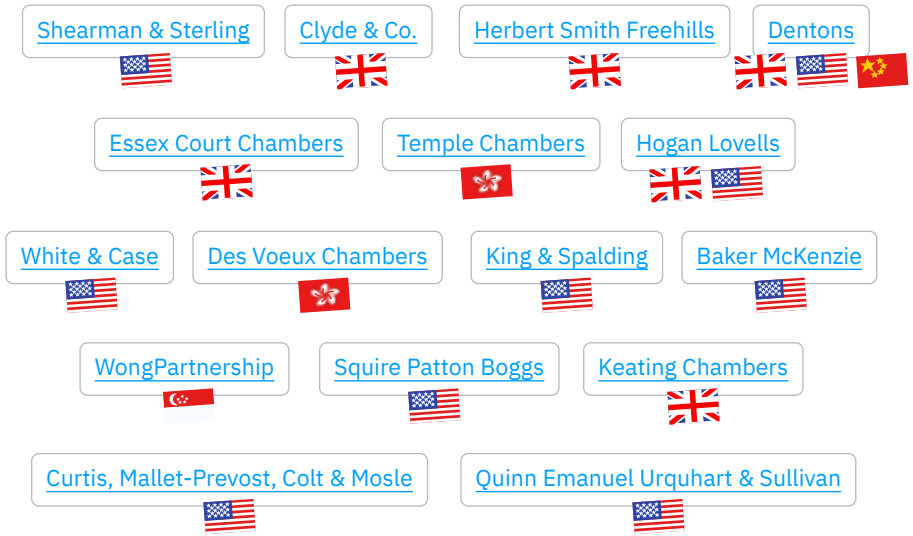
- **Brazilian arbitrators** are also highly selected. Similarly to India, Brazil has developed a very active domestic arbitration scene which may explain how these two nationalities overtake arbitrators of French nationality. Historically, French arbitrators are some of the most selected arbitrators, as is illustrated by our top 5 most appointed arbitrators in construction arbitration and the top 3 most active arbitrators in commercial construction arbitration.

Since its favorable Brazilian Arbitration Act (BAA) was enacted 26 years ago, commercial arbitration has become Brazil's most commonly used method of alternative dispute resolution.

Unfortunately, this may all change if the Brazilian Congress approves Bill No. 3,923/21 — meant to amend the BAA. According to the Brazilian Arbitration Committee (CBAr), the main arbitration entity in Brazil, the changes proposed in the bill increase legal uncertainty and weaken the country's entire arbitration system. Its approval would represent a real step backward, as it promotes undue interference by the State in private proceedings.

Most Active Arbitration Teams

As of May 2023, our data revealed **2,164 active arbitration teams in construction arbitration**, *including law firms, chambers, governmental legal teams, and expert firms.*

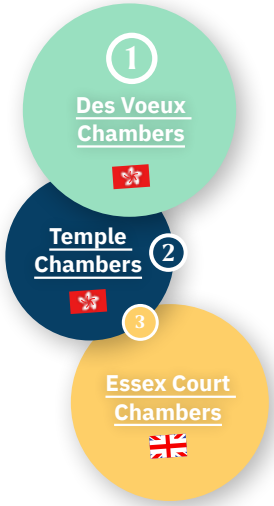


Top 10 most active arbitration practices in Construction Arbitration overall (inc. *ex aequo*)

- according to our database as of May 2023 -

Key Takeaways

- Among the **top 3 most hired arbitration teams overall** — *i.e.,* law firms, chambers, governmental legal teams, and expert firms **— 1** is a **law firm** and **2** are **chambers.**



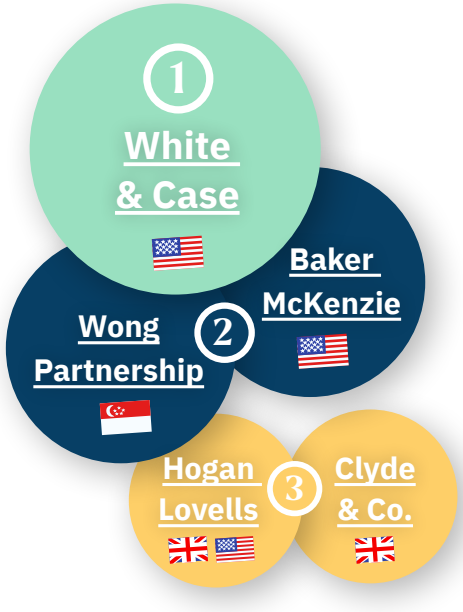
Top 3 most active chambers in Construction Arbitration

- according to our database as of May 2023 -

- **Chambers are very active in construction arbitration**, particularly in the APAC region. Of the top 3 chambers in construction arbitration, the **first 2 are headquartered in Hong Kong SAR**.

- Essex Court Chambers is the **most active chamber** as well as the **most active overall arbitration practice in mining arbitration,** *i.e.,* including law firms, chambers, governmental legal teams, and expert firms, according to our data. It is also a staple for **oil & gas and maritime arbitration**.

- Des Voeux Chambers and Temple Chambers also handle a variety of disputes in diverse sectors, but according to our data, most of their caseload is in the construction sector.



Top 3 most active commercial arbitration practices in Construction Arbitration (inc. *ex aequo*)

- according to our database as of May 2023 -

- White & Case is the **most active law firm in construction arbitration**, both commercial and investor-State. Although a multidisciplinary firm with expertise in a variety of economic sectors, the firm is mostly involved in construction, according to our data.

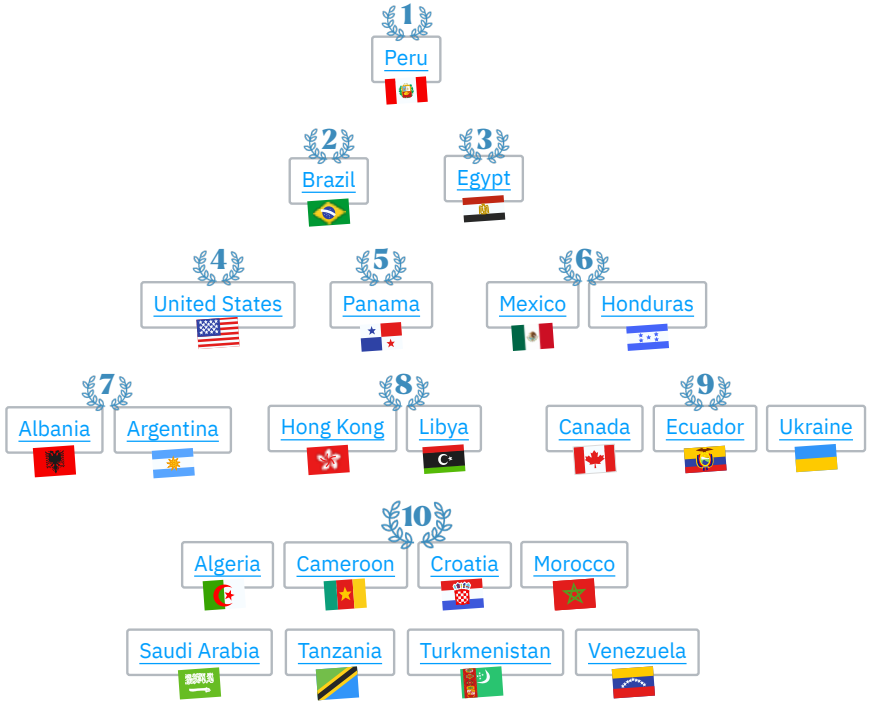
In 2022 alone, White & Case filed 6 construction arbitrations, according to our data:

- Rutas de Lima v. Municipalidad Metropolitana de Lima (III),
- Honduras Próspera v. Honduras,
- ICC Case - ID No. 2119,
- Claimant v. Respondent (ADCCAC Case No. 35/2022),
- Gama v. North Macedonia, and
- INPEX Operations v. Daewoo Shipbuilding & Marine Engineering.

- Most recently, Hogan Lovells filed an investor-State construction arbitration in May 2023 before ICSID, representing an American investor against Honduras.

TOOLTIP

For a full picture of the key players in arbitration, take a look at **Jus Connect Rankings**



Top 10 most active governmental arbitration teams in Construction Arbitration (inc. ex aequo)

- according to our database as of May 2023 -

- Many States are involved in construction arbitration. Out of our top 10 most active in representing themselves, 8 are Latin American States.

Infrastructure projects are booming in the region, leading to more disputes. These States have internal legal teams usually more involved in representing them in arbitration than other regions.

TOOLTIP

Access crucial information and analytics about States via **Jus Connect's State profiles**.

Select Regional Rankings of the Most Active Law Firms in Construction Arbitration

DISCLAIMER:

These regional rankings are based on the localization of the law firms' official headquarters. Please note that the headquarters of these firms have been automatically generated by Chat GPT, an AI language model, and may contain errors or omissions.

While efforts have been made to ensure the accuracy and comprehensiveness of the information, the data provided should be treated as a general reference.

AMERICA

BRAZIL

Top 3 most active law firms in Brazil in Construction Arbitration

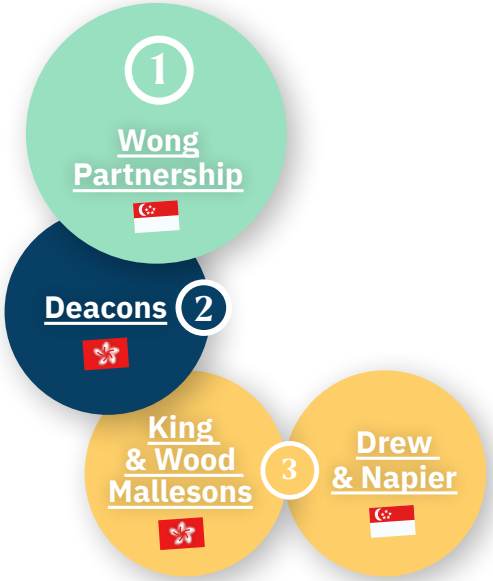
- according to our database as of May 2023 -

NORTH AMERICA

Top 3 most active law firms in North America in Construction Arbitration

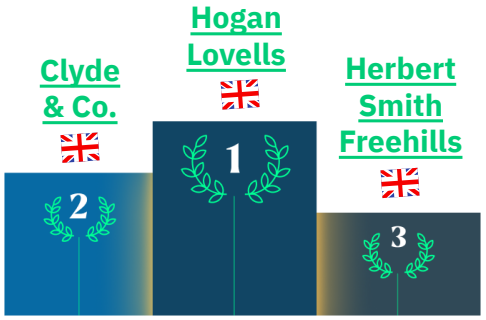
- according to our database as of May 2023 -

ASIA-PACIFIC



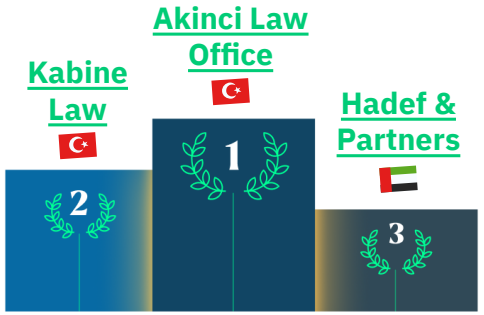
Top 3 most active law firms in APAC in Construction Arbitration-
according to our database as of May 2023 -

EUROPE



Top 3 most active law firms in Europe in Construction Arbitration
- according to our database as of May 2023 -

MIDDLE EAST & TURKEY

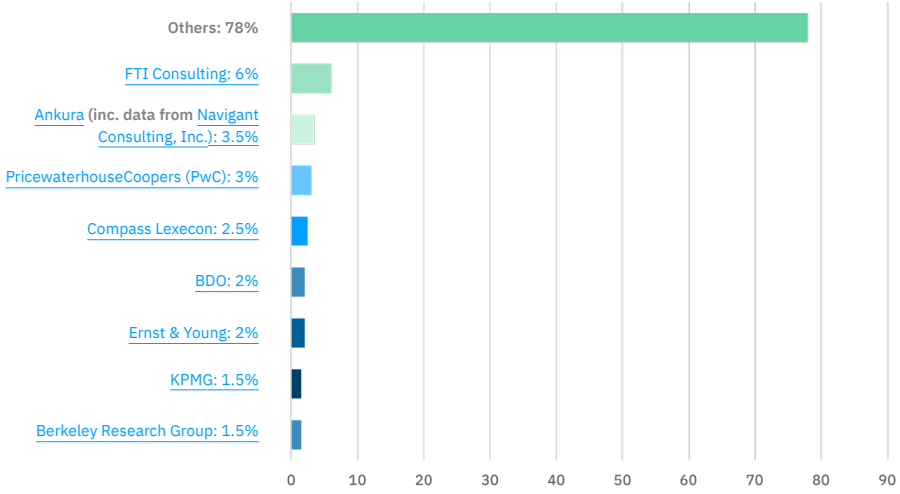


Top 3 most active law firms in the Middle East & Turkey in Construction Arbitration
- according to our database as of May 2023 -

Most Active Expert Firms

In construction arbitration, parties and tribunals frequently turn to experts for assistance in addressing complex issues and evaluating damages. Expert evidence is paramount in providing clarity, knowledge, and technical assessment of complicated issues.

Our data shows that **281 expert firms** were engaged in construction arbitrations.

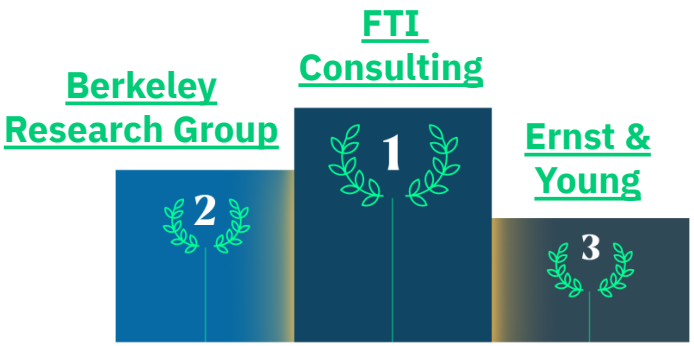


Proportion of expert firms' hires in Construction Arbitration

- according to our database as of May 2023 -

Key Takeaways

- The expert firms listed in this graph have all acted both in commercial and investor-State arbitrations of construction disputes. However, according to our data, only PricewaterhouseCoopers (PwC) and KPMG have acted in more investor-State than commercial arbitrations of construction disputes.



Top 3 most active experts firms in Construction Arbitration over the last 5 years

- according to our database as of May 2023 -

- **FTI Consulting** is **the most active expert firm in construction arbitration**, according to our all-time data, as well as **the most active in the last five years.** The firm therefore remains a staple when it comes to construction arbitration.

FTI Consulting is also a reference in other economic sectors. For instance, it was also ranked as the most active expert firm in mining arbitration, according to our data.

- Berkeley Research Group and Ernst & Young have grown their construction arbitration caseload in the last five years. Ernst & Young has acted as an expert only in commercial arbitrations of construction disputes in the last five years (as opposed to the last decade during which the firm did act as expert in investor-State arbitrations of construction disputes).

- Ankura is also a leading expert firm in construction arbitration. You can read their expert advice in *Hired Gun or Guide to Enlightenment?*, by David Dellar & Michael Stokes (Ankura).

TOOLTIP

For a full picture of the key players in arbitration, take a look at **Jus Connect Rankings**

Laying the Foundation: Global Insights on Construction Projects & Disputes

FIDIC-TIONARY

- Bypassing Pre-Arbitzral Dispute Resolution Mechanisms under FIDIC Contracts
  By Şule Uluç, Fahreddin Eren, & Zülal San - Hergüner

BLUEPRINTS FOR SUCCESS : EXPERT ADVICE

- Multi-Disciplinary Teams and the Co-ordinating Expert – Useful Developments in International Construction Disputes?
  By Dr. Franco Mastrandrea – HKA
- Hired Gun or Guide to Enlightenment?
  By David Dellar & Michael Stokes – Ankura

EFFECTIVE VISUAL ADVOCACY IN INTERNATIONAL ARBITRATION

- How can Counsel Leverage Graphic Design Principles to Increase the Effectiveness of their Visual Advocacy?
  By Becca Shieh – Dubin Consulting

FIDIC-TIONARY

BYPASSING PRE-ARBITRAL DISPUTE RESOLUTION MECHANISMS UNDER FIDIC CONTRACTS

In the realm of construction contracts, FIDIC (Fédération Internationale des Ingénieurs-Conseils) models are often hailed as the gold standard and attract an ever-growing interest. Turkey, where one of the most important business sectors is construction, also has its share of this gold standard. Today, FIDIC is the most preferred option, particularly in high volume construction and infrastructure projects in Turkey, as this standard model secures efficient and effective delivery of projects and is very credible around the world. While such contracts typically require the parties to undergo extensive pre-arbitral procedures before commencing arbitration, and the evidence from statistical data indicates that dispute boards function with a remarkable success rate, there may be circumstances where the parties seek to bypass such procedures. In this piece, we will briefly explain the dispute resolution mechanism under FIDIC Model Contracts, and we will also address why the parties would want to directly proceed with arbitration and whether they are able to do so.

Şule Uluç
Partner
Hergüner Bilgen Özeke

Fahreddin Eren
Associate
Hergüner Bilgen Özeke

Zülal San
Trainee Associate
Hergüner Bilgen Özeke

Dispute Resolution Mechanism Under FIDIC Model Contracts

The most prominent of FIDIC Model Contracts, The Red Book and The Yellow Book, set forth a four-stage process for resolving disputes. The first stage involves the parties applying to the Engineer that oversees the construction process and supervises the Contractor on behalf of the Employer. Initially, either party must refer the matter or dispute it may have with the other party to the Engineer. At this stage, the Engineer will try to facilitate a consensus between the parties, and if the process proves to be fruitless, the Engineer issues its determinations on the matter or claim. If neither party expresses dissatisfaction with these determinations within a specified timeframe, the Engineer's determination will become binding on both parties. If either party is dissatisfied with the Engineer's determinations, a "dispute" is deemed to have arisen under the contract.

The second stage involves the Dispute Adjudication/Avoidance Board ("DAAB"). It is worth noting that in the 1999 Yellow Book, the Dispute Adjudication Board ("DAB") was an *ad hoc* body that would be appointed only in case of a dispute. However, in the latest 2017 FIDIC Model

Contracts, both the Red Book and the Yellow Book require the appointment of the DAAB at the start of the construction and must remain throughout its duration. After the parties submit their dispute to the DAAB, it is the board's responsibility to make a decision on the matter. If no dissatisfaction with the decision is expressed within a certain timeframe, it becomes binding on both parties.

When a party expresses their discontent with a DAAB decision, they enter the third stage where they try to settle their dispute amicably. This phase is commonly referred to as the "cooling-off" period as it allows the parties to directly negotiate with each other instead of trying to convince a third party to rule in their favor based on legal arguments.

In the event that the parties are unable to reach an amicable resolution or initiate negotiations within the designated timeframe, arbitration shall be the final recourse for settling the dispute.

Why Would the Parties Want to By-Pass the Pre-Arbitral Dispute Resolution Mechanisms?

The parties may be inclined to bypass pre-arbitral procedures for various reasons. Firstly, in cases where the dispute has already reached a point where it cannot be resolved amicably, it may be evident that there is no chance for the parties to settle. This is particularly true in cases where construction has already been completed and the parties are in no rush to complete the project. Completion of the construction also means that the DAAB has dissolved and may lead to hesitation regarding the reappointment thereof. Moreover, parties may also be reluctant to apply the dispute board procedures because they are not well versed with the system and thus would prefer to directly resort to arbitration.

It is also imperative to underscore that the binding nature of the DAAB's decision or the Engineer's determinations pertains solely to their contractual effect. Therefore, infringement of a DAAB decision or an Engineer's determination would only mean an infringement of the contract and enforcement cannot be pursued through State authorities. The parties would have to obtain an arbitral award to determine the breach thereof and order the necessary remedy. Therefore, a proper and formal arbitration award is the *sine qua non* for initiating the process of State entities to execute a decision resolving the dispute.

Another reason may be that the dispute board process typically takes approximately six months to conclude. This duration implies that the DAAB process may cause significant delays and costs and might be ultimately detrimental to the interests of the parties involved, especially if the dispute board process fails to produce a satisfactory outcome or if it is obvious that the dispute may not be resolved through the DAAB process.

The urge to bypass pre-arbitral procedures may also stem from necessity. One such example is the risk of the statute of limitations elapsing. While Article 21.4.1 of the recent FIDIC Model Contracts explicitly allows an application to the DAAB to interrupt the statute of limitations, this may not be the case for disputes arising under 1999 contracts that lack such a clause. Therefore, the parties may find themselves in a situation where seeking relief from the dispute board is not a viable option and may opt to proceed directly to arbitration instead. An instance of this is how Turkish law treats an appeal to the dispute board, which does not serve as an interruption to the statute of limitations.

Can and Under Which Criteria May the Parties Bypass the Pre-Arbitral Dispute Resolution Mechanisms?

The nature of recourse to dispute boards as a mandatory or voluntary dispute resolution procedure has been a matter of considerable debate. This controversy arises from the fact that the 1999 Yellow Book regulates the DAB as *ad hoc*, as indicated earlier, along with the provisions of Article 20.8 of the Yellow Book of 1999 and Article 21.8 of the Red and Yellow Books of 2017. In brief, as per the mentioned articles, if a DAB's term expires or if the DAB is absent for any reason, disputes can be directly submitted to arbitration. However, an *ad hoc* DAB is naturally absent at the beginning of the dispute, which leads to arguments that an *ad hoc* DAB is not mandatory. However, the English [*See*, Peterborough *City Council v. Enterprise Managed Services Ltd, 3193, 01.01.2014, High Court Of Justice Queen's Bench Division Technology And Construction Court, EWHC 3193 (TCC)*] and Swiss courts [*See, First Civil Law Court of the Swiss Federal Tribunal, 16.03.2016, 4A_628/2015*] have held that an *ad hoc* DAB is also mandatory.

Nevertheless, in 2014, the Swiss Federal Court [*See, First Civil Law Court of the Swiss Federal Tribunal, 07.07.2014, 4A_124/2014*] ruled that arbitration may be resorted to without recourse to the DAB in certain circumstances and that such instances can arise when it is apparent from the circumstances that the parties intend to refer the dispute board decision to arbitration or when the dispute board cannot be established or operated for an extended duration. The court upheld that the creators of FIDIC Model Contracts intended to establish a permanent conciliation authority for prompt solutions and that the parties entering into *ad hoc* DAB contracts detracted from this aim as the DAB process, serving as a primary resort before the arbitration procedure, consumes time and generates decisions that are often challenged by parties. The court emphasized that pursuing claims before an arbitral tribunal without DAB proceedings may be more feasible under certain circumstances and should be examined on a case-by-case basis.

With reference to the above-mentioned ruling of the Swiss Federal Court, it can be argued that a court may accept the possibility of resorting directly to arbitration before applying to dispute boards based on a range of factors, such as the construction being completed a long time ago, an inability to appoint the board, the statute of limitations being about to elapse, and good faith.

First, the completion of construction may render the application of the dispute board redundant as the role of the board is to oversee the progress of work and assist in the swift resolution of disputes that arise during construction in order to ensure a smooth construction process.

Second, the parties may fail to appoint a dispute board, leading the parties directly to arbitration. This failure may occur for various reasons, such as lack of suitable candidates, disagreement over the appointment, etc. In such cases, bypassing the DAAB process may be a more efficient and effective means of resolving disputes.

Finally, good faith may be considered when bypassing the pre-arbitral procedures. If the party wishing to bypass the pre-arbitral procedures acts in good faith while doing so (that is, if it is clear that this request was not made for arbitrary reasons or in bad faith but rather made due to certain legal or factual necessities), then the arbitral tribunal may consider allowing the direct application to arbitration to achieve a fair and timely resolution to the dispute.

As a potential and significant risk of bypassing pre-arbitral mechanisms, the arbitral tribunal may find that it lacks jurisdiction to hear a premature arbitration. As a more feasible alternative solution, the tribunal may choose to suspend the arbitration proceedings until the parties exhaust the pre-arbitral mechanisms first.

In conclusion, although FIDIC model contracts typically require parties to adhere to pre-arbitral procedures, bypassing such procedures in certain circumstances may be a necessity. Nonetheless, it is paramount to meticulously examine the applicable law, contractual provisions, and the specific circumstances of the dispute before initiating arbitration.
If it is foreseeable that the dispute board would not be an ideal venue for resolution, it would be advisable to amend the dispute resolution article for special conditions to avoid superfluous delays and expenses during the dispute resolution process as well as to limit jurisdictional risk.

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BLUEPRINT FOR SUCCESS: EXPERT ADVICE

MULTI-DISCIPLINARY TEAMS AND THE CO-ORDINATING EXPERT – USEFUL DEVELOPMENTS IN INTERNATIONAL CONSTRUCTION DISPUTES?

As someone who has for many years been involved with construction disputes, both as expert witness and resolver, it is instructive to reflect on the many changes that have occurred over that period, mostly improvements.

Of particular note has been the increasing acceptance in the international arena of what is expected of the expert witness, the importance of their impartiality and independance, and of their duties to the tribunal recognised in guidelines such as the CIArb Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration (2007), the IBA Rules on the Taking of Evidence in International Arbitration (2020), and the rules of some of the professional bodies to which the expert may be affiliated, such as the RICS Practice Statement on Surveyors Acting as Expert Witnesses currently in its 4th Edition, amended February 2023.

There is still some way to go to achieve a level playing field for all involved, particularly in the international arena, with standards/improvements needed for peer reviews, witness conferencing, joint witness statements (*See*, for example, The Academy of Experts Guidance on Joint Statements (2021)), and, perhaps most starkly, witness coaching.

Dr. Franco Mastrandrea
Partner
HKA

What is clear is that experts, particularly when appointed early, can usefully advise whether there is a viable technical case (*e.g.,* on an engineering issue), and what it is worth (in respect of time or money) and thus help to avoid, reduce the extent of, or settle disputes.

An area of increasing focus is the use of a range of experts from the same organisation. In an early example drawn from my own experience, the owner appointed three separate discipline experts, all from my then employer, to address:

- technical engineering matters;
- delay; and
- quantum,

which were an issue between the owner and the contractor (the claimant in the case). Each discipline expert produced a report within their area of expertise.

In addition, I was appointed to the role of co-ordinating expert/expert team lead. My instructions, following early discussions with the owner and its legal team, were to manage the tasks of discipline experts.

I saw that task as a project management role - facilitating and integrating the overall expert process by creating and maintaining a consistent framework of expert tasks, procuring the sub-division and execution by each of the discipline experts of their individual tasks, and collaborating with the discipline experts in the selection of appropriate methodologies for each assignment. Importantly, this is a classic project management function. It does not/should not interfere with/undermine the independence and responsibilities of the discipline experts.

At the more granular level, I saw my particular tasks as extending to the coordination of the location, understanding, assimilation, analysis, and evaluation by each discipline expert of:

- the parties' various claims;
- the project data available from the parties' disclosure (or which ought in the opinion of the owner's experts including myself to exist as part of that disclosure);
- data available as part of the work product of the contractor-appointed experts;
- common areas of relevance and/or investigation by all of the discipline experts; and/or
- discrete areas of relevance and/or investigation for each of the discipline experts.

In addition, I saw it as part of my function to review progress and seek to manage any shortcomings in, or difficulties which may have arisen during, the discharge of work by each of the discipline experts.

Furthermore, I saw it as part of my project management function to undertake a review - at an informed coordination, as opposed to the discipline, expert level - for appropriateness, consistency, and by way of an objective sense check of the individual expert's approach and conclusions.

This required, in particular, an understanding of the claims advanced by the contractor, and of the reports produced by the individual technical, delay and quantum discipline experts appointed by the contractor.

It became clear from a consideration of the parties' contentions, my early investigations and those of the three discipline experts appointed by the owner that:

- the claims advanced by the contractor;
- the basis upon which the contractor had chosen to advance those claims;

- the basis upon which the contractor appeared to intend to pursue those claims; and
- the range and depth of investigation that appeared to have been undertaken by the contractor and each of its appointed experts,
- were extremely constrained. This was so albeit, paradoxically, that many of the claims in fact displayed characteristics of global, total-time, or total-cost claims.

These early investigations pointed to the likely relevance of particular areas of project performance which would justify more detailed analysis.

I considered, in consultation with the three discipline experts, that a balanced and more comprehensive appraisal of such areas of more focused investigation was likely to be achieved if each of the three experts was able to resort to a common analysis of as much of the project data as appeared reasonable and realistic. This resulted, for example, in the preparation of common chronologies of a number of work areas. This carried over, by way of extension, into other areas at the generic level of analysis, such as was to be seen by reference to a number of issues identified in the contractor's own documents (such as internal correspondence, correspondence with sub-contractors and internal progress reports) identified as contractor or contractor supply chain related issues that appeared to have delayed and/or disrupted the delivery of the project, including *inter alia* issues with interface management, lack of experience, poor staffing, equivalent issues with procurement; etc.

At this level of investigation and analysis the discrepancies to be seen between the reconstruction of such contemporaneous data and the allegations set out in the contractor's pleaded case was instructive, and sometimes stark. Significantly, neither the contractor nor its discipline experts offered any similar or equivalent reconstructions or analyses for verification/discussion.

Another common theme relevant to the discipline experts was the existence and application of particular contract terms. I considered it appropriate to encourage each of the discipline experts to consider the contract terms pertinent to their particular discipline. Given the matters in issue, it seemed to me clear, indeed inevitable, that part of the relevant discipline expert's task would be to express opinions not only on the nature and extent of such obligations but also an outline of how a responsible hypothetical contractor would or should undertake and discharge its manifold obligations on a project similar in nature and extent to that in issue.

Thus, in relation to:

- technical matters – the owner appointed engineering expert was asked to consider, *e.g.,* the contractor's design obligations including, in particular, the implications from a technical perspective of the nature, configuration ,and extent of such obligations.
- delay matters – the owner appointed delay expert was asked to consider, *e.g.,* the express scheduling obligations placed upon the contractor, the monitoring of progress to the critical path, the contractual mechanism for changes to the Scheduled Dates, the calculation by the contractor of the effect of a change on the Scheduled Dates (or the latest date that a decision on a change could have been made without affecting the Scheduled Dates) and the inclusion of the cumulative effect on the progress of the Work of all changes up to that time, the prescribed forms for a Change Inquiry, Change Proposals and Change Orders requiring an estimate of the effect of a change on the Scheduled Dates with appropriate back-up. Significantly, the contractor appointed delay expert, by contrast, very rarely set out or commented upon the nature and extent of the contractor's scheduling obligations and their appropriate discharge.

- quantum matters - the owner appointed quantum expert noted, *e.g.,* in respect of Change Order claims that they would regard it as appropriate, having regard to the particular contract terms in this case to enquire whether from a quantum perspective: the claimed item might appropriately be the subject of a valid Change Order; the cost claimed had in fact been incurred by reason of the complaints alleged, and whether any cost/sum claimed or incurred, based upon the available information, appeared to be reasonable. The contractor appointed expert had, by contrast, not considered such matters.

The approach provides an integrated set of expert discipline reports set against a common factual matrix. I have been appointed to this coordinating role on a number of other projects since, whether in a formal dispute process or as part of an early appraisal for the purposes of intended negotiation of an incipient dispute; a role which those commissioning it have found not only to add value to the traditional expert roles but, in some cases, pivotal.

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HIRED GUN OR GUIDE TO ENLIGHTENMENT?

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The provision of expert witness evidence can be frustrating to a tribunal where the parties take an adversarial view to cross examination that does nothing to advance the tribunal's understanding of the differences in opinion between experts. As a result of this, it is becoming increasingly common to see tribunals issuing procedural orders at the outset, requiring the early engagement of experts and the provision of phased joint statements before, and even during, the hearing stage. During the hearing stage, there is now greater reliance on listening to expert witness evidence from two or more experts concurrently, otherwise known as 'hot tubbing', now more and more frequently, the questioning of the experts is mostly led by the tribunal directly rather than the parties' counsel. These trends provide increased efficiency in the understanding of the expert evidence before and during the hearing, which is becoming progressively important as projects and project data become more complex, yet the average hearing durations are getting shorter.

It may seem strange therefore, that tribunals are increasingly giving expert witnesses more freedom and control in the process, but a considerable number of arbitration practitioners apparently consider that these same party-appointed experts are essentially "*hired guns*" or "*advocates in disguise,*" as recorded by 51% of the respondents in BCLP's Annual Arbitration Survey 2021.

Is there a contradiction here? Should experts that are perceived to be biased be given more freedom and control in the process?

Whilst there is a noticeable trend towards it, early engagement of experts is not the norm currently, as the perceived lack of control by the parties over the independent expert process often holds back instructing experts early. In the preliminary stages of an arbitration, evidence is still in the process of being collated and the parties' respective cases are often still being developed and understood. This being the case, parties often have a different strategic need at this stage, in the form of an expert advisor or claims consultant to help develop the claim and there is a sense that appointing an expert witness at this stage would be superfluous. There are, nonetheless, benefits of engaging experts early.

The timing of the instruction is of course important, and those instructing experts need to be mindful that if experts are instructed prior to all the evidence being available, for example, then there is the possibility that opinions may subsequently change. A good expert would identify these risks at the outset, as well as identify the information required to finalise any assessment.

An expert witness who is engaged early on, likely in an independent expert advisor capacity first, provides a direct benefit in assisting a party to understand their true position prior to pleading their case. Having this independent and objective view early in the process allows a party to make informed investment decisions in respect of how the claims should be advanced and often results in better particularised and supported claims. It also enables the experts and parties to identify the evidence required to support the claims made, resulting in a more efficient disclosure

process. These factors should result in material gains in terms of time and cost overall.

It is now becoming increasingly common that procedural orders require the experts to meet early in the process to seek agreement on such matters as the scope of their instructions, the documents that they intend to rely on, the methodology to be adopted and generally any parameters that provide consistency between the expert evidence. Of course, the experts may have legitimate and valid reasons to prefer one method of analysis over another, but if methodology and the relevant datasets can be agreed, any differences between the experts are likely to arise due to substantive differences in expert opinion, as opposed to the fact that the experts had different information available to them, for example. Consequently, the tribunal can have greater confidence and clarity on what the substantive differences of opinion are and focus their attention accordingly. Providing the experts with a forum to agree these foundational aspects of their analysis early in the process, before their opinions become too entrenched, is likely to increase the level of agreement and further improve efficiency.

During the hearing stage, tribunals often encourage the experts to continue to meet to seek agreement and narrow the issues between them. Tribunals are often receptive to additional joint statements at this late stage, providing the parties agree and valuable progress is being made in terms of further agreement between the experts. This approach is often coupled with the hot tubbing of the experts. Generally, though not always, the hot-tubbing process is led by the tribunal. Often the experts are required to provide a brief presentation summarising their opinion and explaining the reasons for any differences in opinion. The tribunal can then ask the experts questions on the material issues, as they see them. Hearing both experts in this way, at the same time, on the same issues, can be a very effective and efficient way for the tribunal to fully understand the reasons for any differences of opinion between the experts.

In conclusion, good experts who are suitably experienced and remain independent throughout can be efficient and effective in giving the tribunal the guidance it needs, whether the procedural orders permit early engagement or not. With light guidance from the tribunal, allowing experienced experts some control over the process, consistent of course with their instructions, can help drive an efficient process. Conversely however, less experienced experts who promote partisan views, play tactical games or who are unseasoned can frustrate a perfectly ordered process, impacting efficiency and increasing the complexity that a tribunal wishes to avoid. Thus, it is the conduct and experience of the experts, rather than the directed procedural process that has the most impact on the efficacy of the expert evidence. So, choose your experts wisely.

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EFFECTIVE VISUAL ADVOCACY IN INTERNATIONAL ARBITRATION

How can Counsel Leverage Graphic Design Principles to Increase the Effectiveness of their Visual Advocacy?

Becca Shieh
Director, Litigation Strategy
Dubin Research and Consulting

International arbitration lawyers are often tasked with explaining a complicated set of facts and legal arguments to an audience with varying languages, backgrounds, and levels of understanding. In construction arbitration, these challenges are even more pronounced due to the technical nature of the dispute and the complexity and density of the factual record. To overcome these challenges, lawyers need to make use of all tools that enable them to present information in a way that is accessible, easy-to-understand, and memorable. This is where effective demonstrative aids and trial graphics become invaluable assets.

In the United States, trial graphics are an essential part of a litigator's toolbox and are often employed to help simplify complicated topics for a lay jury. Despite this, demonstratives tend to be underutilized in international arbitration cases. This is perhaps due to the belief that lawyers—which often act as the tribunal members—are auditory learners and have a high level of sophistication that makes visual graphics unnecessary. However, by failing to employ such tools, an attorney misses out on a crucial opportunity for visual advocacy.

THE BENEFITS OF EFFECTIVE VISUALS

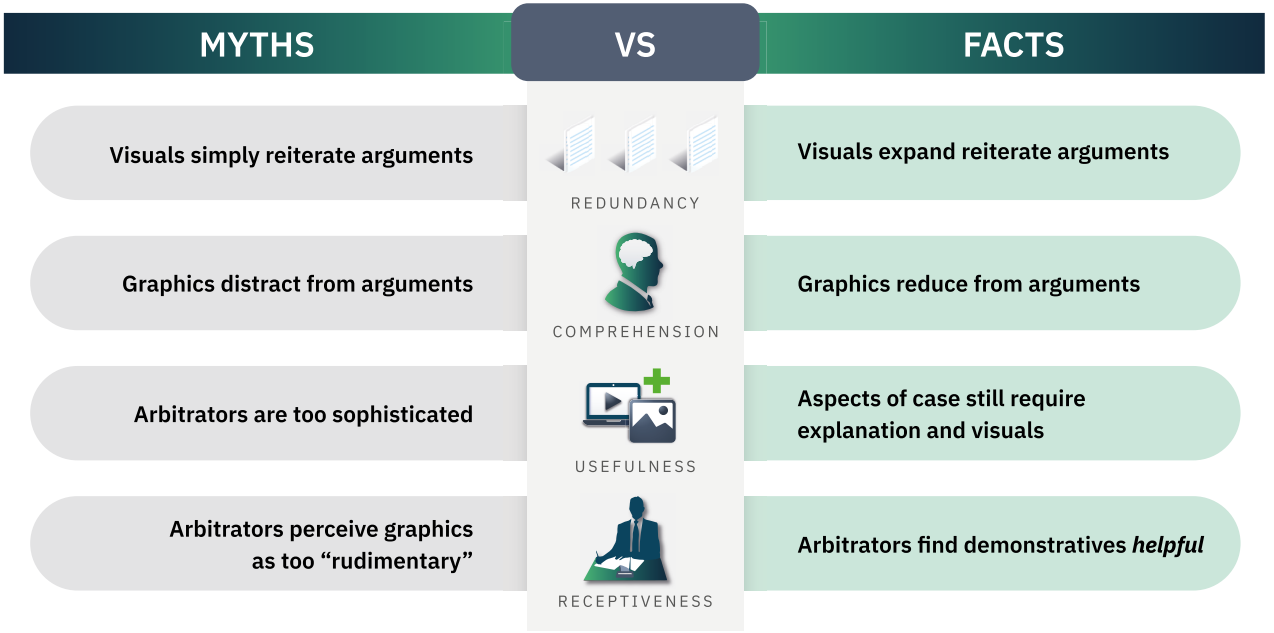
It is well-known that visual graphics can be used to improve attention, comprehension, retention, and recall of information (*See*, *e.g.*, Mayer, R. E., & Gallini, J. K. (1990). When is an illustration worth ten thousand words? Journal of Educational Psychology, 82(4), 715–726, https://doi.org/10.1037/0022-0663.82.4.715). However, what is often overlooked is the fact that visuals do not simply reiterate an argument, they *expand* upon it. In other words, effective visual graphics can provide an additional dimension to an argument that verbal explanations alone cannot offer. Consequently, demonstrative aids are not redundant, they are additive.

This is perhaps best illustrated with quantitative data. Most appreciate that it is less effective to verbally communicate statistics than to use data visualizations such as charts, which help viewers identify patterns and trends in the data. Such benefits can be derived from more abstract de-

monstratives as well. Still, lawyers are often concerned that sophisticated graphics will be perceived as "flashy," thereby distracting from the core arguments, or imply that the arbitrator requires the use of "rudimentary" educational tools to grasp the arguments.

However, the reason visual aids are effective is because they *reduce* cognitive load, not increase it. Instead of simply relying on an auditory stimulus, the information recipient is able to use both audio and visual processing systems when intaking new information (*See,* Sweller, John, Van Merrienboer, Jeroen J. G., Paas, Fred, "Cognitive Architecture and Instructional Design" Educational Psychology Review). Furthermore, although arbitrators are more sophisticated than a lay jury, they might not be as well-versed as the parties in the facts, the technical issues, or (should an engineer or architect be nominated as arbitrator) the law. As such, even when presenting to a judicial panel, there is likely still a knowledge differential that can be bridged by the use of effective visuals.

Consistent with this, arbitrators have embraced rather than rejected the use of visual aids. In a survey of American Arbitration Association Construction Arbitrators, when asked "*Do graphics and other forms of demonstrative evidence assist you in arriving at an appropriate award?*" 89% of the arbitrators answered "*yes*" (*See*, Thomson, Dean B. (1994) "Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators," Hofstra Law Review: Vol. 23: Iss. 1, Article 2). When asked their "opinions on advocacy techniques," arbitrators indicated that they preferred advocates to incorporate multimedia and visual graphics over "simple, direct, straightforward" presentations.



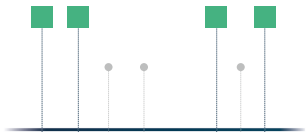
Visual Advocacy

Comparative charts like this one on the right can help reubttal points to be digested more quickly.

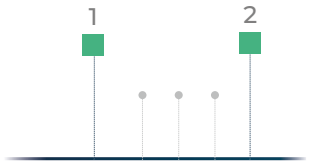
Opportunities for Visual Advocacy

For these reasons, counsel should look for opportunities to maximize their visual advocacy rather than shy away from it. Some examples of where graphics can be leveraged include when counsel wants to:

FREQUENCY



RELATIVE TIMING

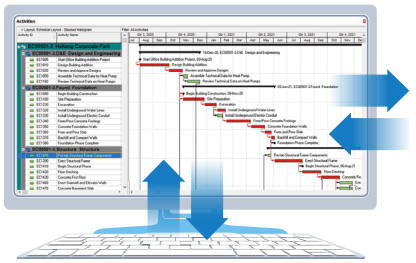


DELAYS

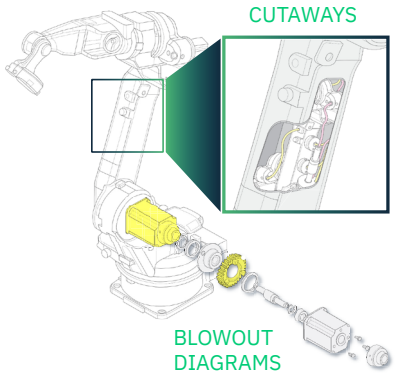
Establish Timing

Construction disputes can often have a complex and technical factual record referencing many more documents than in a typical dispute. Timing-based visual advocacy can help illustrate the frequency of a certain event, such as the number of times a party provided notice or rejected changed terms or work defects. It can also include illustrations of the relative timing of different events, or how key barriers increased the project timeline (both of which can establish causation).

RECREATE NATIVE NAVIGATION

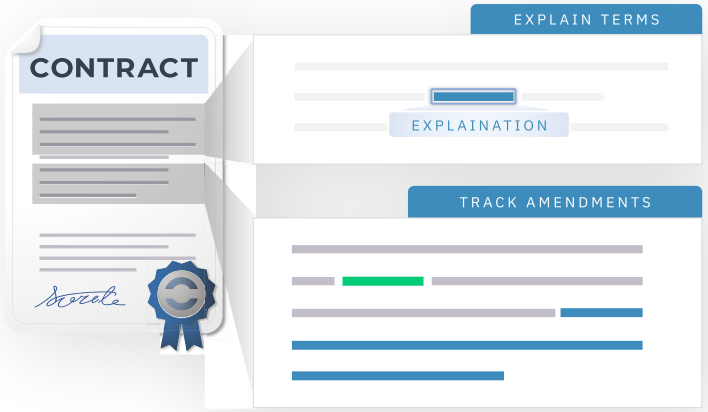


WALKTHROUGH CAD FILE



Recreate Native Files

Certain pieces of evidence—such as Excel files, websites, or software information (like from Primavera)—may be too large to display all at once on a typical screen. Demonstratives can recreate a more user-friendly "scrolling" experience to help the viewer navigate such pieces of evidence. Computer-aided design images can be brought to life through the use of blowout diagrams and cutaway demonstratives.



Explain Contractual Language

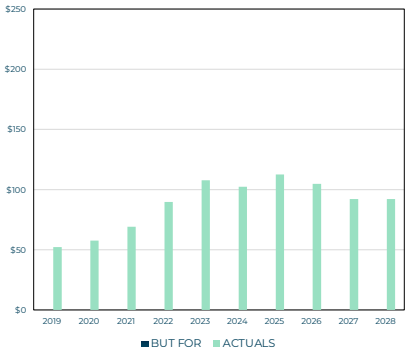
Construction disputes can often refer to specialized forms of contract unknown to those not involved in construction. Demonstratives can be used to pace the relevant language of the contract, highlight definitions of jargon, and incorporate relevant regional and national cultural nuances. They can also be used to animate amendments to show the progression of the contractual language over time.

Designing for Visual Persuasion

Once an advocate has identified an opportunity for visual advocacy, they should consider how to best leverage the principles of information design to maximize the efficacy of their graphic. Whether a demonstrative is well-designed will often determine whether the visualization obfuscates or enhances the arguments being presented.

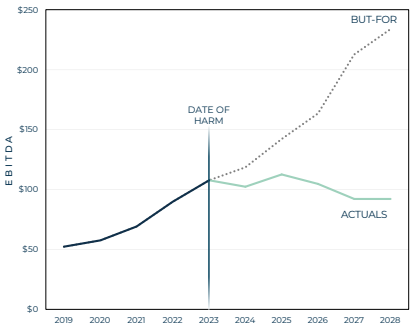
BEFORE

CLAIMANTS' PROFIT PROJECTIONS



AFTER

CLAIMANT'S PROFIT PROJECTIONS



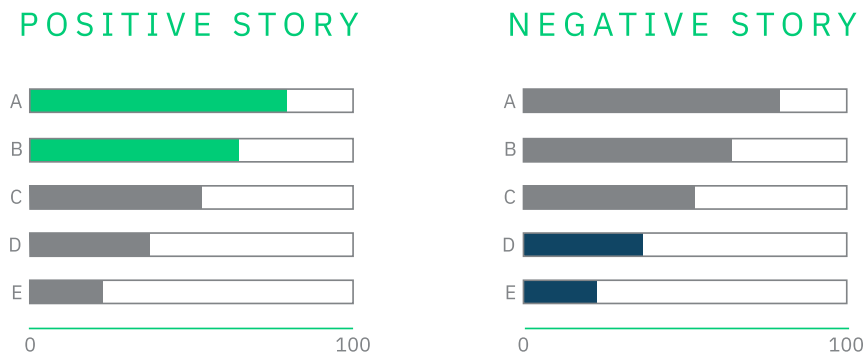
Note: *As illustrated above, using a line chart instead of a bar chart can more clearly depict the Claimants' argument that, but-for the Respondents' actions, profits would have increased exponentially consistent with historical performance.*

An exhaustive discussion of design principles is beyond the scope of this article. However, there are a few key points to keep in mind when designing for effective visual advocacy.

TIP #1:
IDENTIFY THE GOAL OF THE VISUALIZATION

Before beginning to design a visualization, advocates should first be able to concisely articulate the message they want to convey. This will inform the use of color, the placement of visual elements, and other design choices. To avoid information overload, one should try to limit each visualization to one point.

NARRATIVE AND GRAPHICS



Note: *For example, the green chart focuses the viewer on the top two most high-ranking items, whereas the blue chart focuses the viewer on the bottom two most low-ranking items.*

TIP #2:
USE GESTALT PRINCIPLES TO IMBUE MEANING

After determining the visual message, the advocate should then consider what visual patterns will best support that message. Here, Gestalt principles can help determine the most effective graphical approach. Gestalt psychology focuses on how we perceive and interpret visual information. Gestalt theory proposes that our brains naturally group and organize visual elements into cohesive wholes or patterns, rather than perceiving them as isolated parts.

There are several principles associated with Gestalt theory, which help explain what people see when they look at visualizations. These principles include:

Similarity, which refers to the principle that similar items are perceived as a group.

One can use similarity to suggest a connection between design elements that may not be in close proximity. Similarity can also be used to create contrast, drawing attention to key points (*e.g.*, having all elements color-coded blue, except for the focal point, which is red).

Proximity, which refers to the principle that objects that are close together are perceived as a group.

One can use proximity to suggest that two elements are related or use the lack of proximity to show that they are not.

Figure / Ground, which refers to the principle that objects are perceived as either being part of the figure (the focal point) or ground (the background).

This principle comes into play when you want to focus the viewer on a section of a document by showing a magnified screenshot of just that section while the rest of the document fades into the background.

TIP #3: HIGHLIGHT KEY POINTS WITH PRE-ATTENTIVE ATTRIBUTES

The chosen patterns can then be created by thoughtfully selecting the appropriate "pre-attentive attributes". Pre-attentive attributes—such as color, orientation, length, intensity, size, and shape—are features of visual stimuli that are processed unconsciously and rapidly by the brain. When used sparingly, pre-attentive attributes can: (1) help establish focal points; and (2) create a "visual hierarchy" of elements by emphasizing and de-emphasizing certain elements.

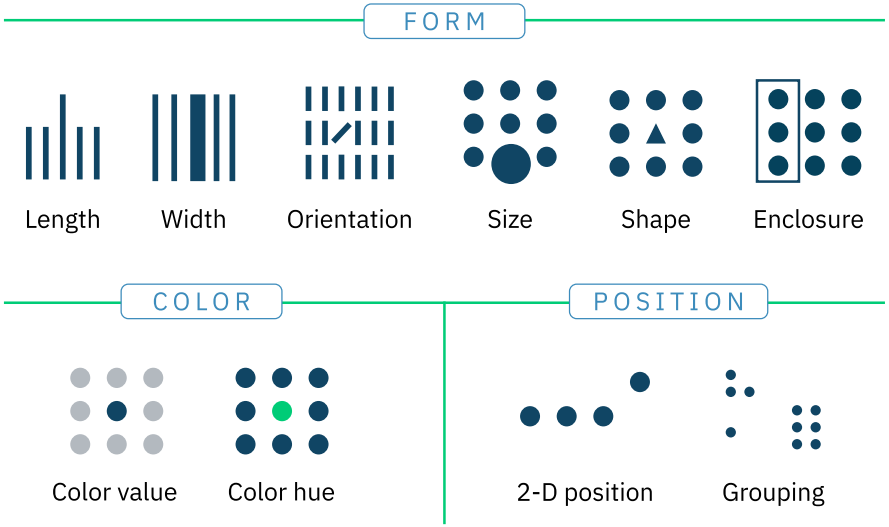
TIP #4: REDUCE VISUAL CLUTTER

Finally, once the first draft is complete, the advocate should audit the graphic for visual clutter. "Clutter" refers to visual elements that increase cognitive load but do not increase understanding. This does not simply mean having too many elements on the slide; it also encompasses situations when there is a lack of intentional design. For example, lack of visual order is a form of clutter, as is the non-strategic use of contrast (e.g., having a lot of different colors, sizes, or shapes that do not efficiently drive forward the message).

Conclusion

Demonstrative aids are powerful tools that help lawyers articulate their message and persuade arbitrators. With thoughtful design choices and strategic implementation, these tools can transcend mere bullets and become a form of visual advocacy that will help attorneys make their case more efficiently and persuasively than before. By incorporating more effective visual aids, advocates can better communicate complex ideas, enhance understanding, and ultimately achieve better outcomes for their clients.

EXAMPLES OF PREATTENTIVE ATTRIBUTES



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AFRICA

EXPLORING INTERNATIONAL ARBITRATION IN AFRICA'S CONSTRUCTION SECTOR

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Introduction

In recent years, Africa has become a hotspot for construction projects, with a current estimated pipeline of USD 521 billion worth of infrastructure projects under development (See, Umran Chowdhury, 2022 SOAS and AAA Surveys on Arbitration in Africa, Kluwer Arbitration Blog, 19 January 2023). The vast majority of projects are owned by governments, which have established national and regional infrastructure development plans, especially in East Africa. As African countries strive to promote economic growth and attract more investment, modernizing their arbitration laws has become a key priority.

This article focuses, first, on the legislative revolution of African countries' arbitration laws, with a particular focus on the arbitration regimes of Ethiopia, Nigeria, and Tanzania. Second, this article discusses insights from recent disputes arising out of major construction projects and involving African parties or African States.

Legislative Revolution: Transforming the Arbitration Framework of African States

ETHIOPIA

As the largest economy in East Africa and the headquarters of the African Union, Ethiopia has taken a proactive approach to modernize its arbitration laws. The recent enactment of the Arbitration and Conciliation Proclamation No. 1237/2021 (the "**Proclamation**") **is a significant step towards establishing a robust legal framework for arbitration in the country.**

The Proclamation aligns itself with the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, demonstrating the country's commitment to international best practices in arbitration. The Proclamation applies to both domestic and international arbitration seated in Ethiopia as well as national conciliation proceedings (*See, Section 3).*

An important innovation of the Proclamation concerns the establishment of arbitration centers. Prior to the issuance of the Proclamation, the existing arbitration centers were established by various laws as non-profit institutions. Unlike under the old regime, Section 18 of the Proclamation allows private organizations to establish arbitration centers. The introduction of this provision opens doors for the emergence of independent international arbitration centers in Ethiopia, bolstering its status as a hub for arbitration.

Further, Section 39 of the Proclamation emphasizes the importance of confidentiality, requiring that arbitral proceedings and awards shall remain confidential unless otherwise provided by law or agreement.

NIGERIA

Nigeria has taken a significant stride in transforming its arbitration and mediation framework through the Arbitration and Mediation Bill, which was passed in May 2022 (the "**Bill") and repealed the Arbitration and Conciliation Act 1988 (the "ACA"). The Bill has brought about substantial changes that enhance the efficiency and effectiveness of dispute resolution processes in the country. Some of the novel provisions of the Bill concern** third-party funding and interim measures.

For instance, unlike the ACA, Section 61 of the Bill makes elaborate provisions for third-party funding in arbitration, paving the way for increased access to funding for parties involved in arbitration proceedings. Furthermore, while under the ACA parties could make an application for interim measures only to the tribunal, Section 19 of the Bill extends this power to the Nigerian Courts.

TANZANIA

In an effort to modernize its arbitration framework, Tanzania enacted a new Arbitration Act, 2020 (the "**Act"), which came into effect in January 2021 and repealed the previous Arbitration Act, 1931. Under Section 5, the provisions of the Act are founded on the following principles: (i) the object of arbitration is to "***obtain the fair resolution of disputes by an impartial arbitral tribunal" and "promote consistency between domestic and international arbitration";***

(ii) the parties are "free to agree how their dispute are resolved, subject only to such safeguards as are necessary in the public interest"; and

(iii) in matters governed by the Act, the Courts' intervention shall be limited.

Moreover, the Act incorporates new provisions aligned with international standards regarding the constitution of tribunals, emphasizing the importance of their independence and impartiality. Under Section 28 of the Act, parties may apply to the Court to disqualify an arbitrator when justifiable doubts are in place of impartiality or competence. On the other hand, the Act also provides the arbitrator with protections, which could increase the likelihood of appointments in Tanzania. The Act further provides immunity of arbitrators from any liability associated with their actions unless it can be proven that said actions were done in bad faith or professional negligence.

A key departure from international standards under Tanzanian law, however, is that foreign arbitration in respect of natural wealth and resources is prohibited under the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (the "**Natural Wealth and Resources Act**"). Section 11 of the Natural Wealth and Resources Act provides that the adjudication of natural wealth and resources disputes are limited to bodies or other organs in Tanzania and in accordance with the laws of Tanzania. The implication is that the law permits the use of foreign arbitral bodies only if the seat of arbitration is in Tanzania and arbitral proceedings governed by the laws of Tanzania.

Insights from Recent Arbitrations in the Construction Sector Involving African Parties or States

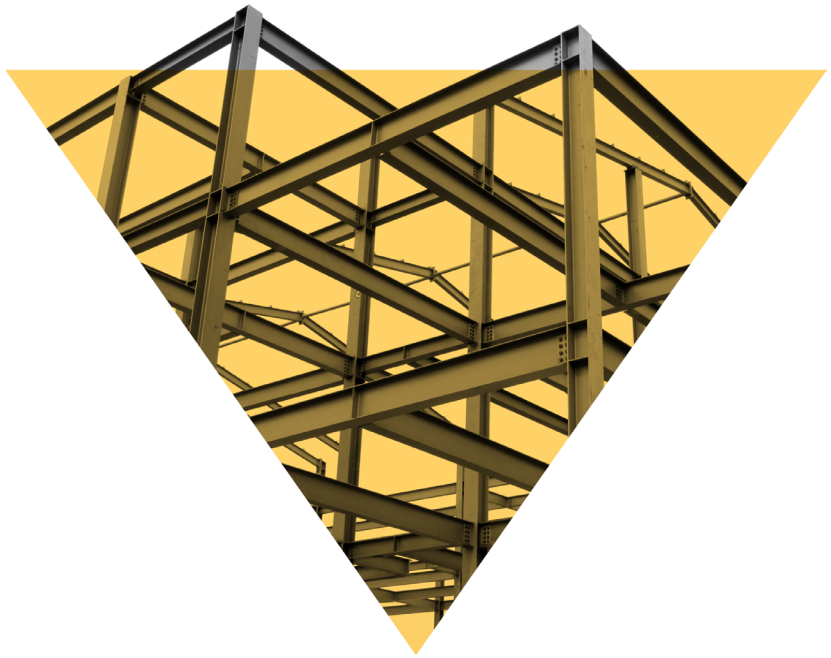
Major construction projects often lead to commercial arbitration disputes for reasons including the complexity of contracts, changes to the original plans and orders, delays, disagreement over payment amounts, and quality and performance issues. Regarding investor's claims against State actors, recent disputes within the construction sector involve not only the more typical claims but also allegations of corruption and harassment, as well as claims related to political instability. Recent disputes involving African parties or African States include the following.

In 2020, a dispute concerning a solar project valued at EUR 100 Million, Frazer Solar GmbH v. The Kingdom of Lesotho, *was resolved by an ad hoc Tribunal. The arbitration took place in Johannesburg, with the law of South Africa being applicable. Frazer Solar GmbH claimed that the Government of Lesotho violated the Supply Agreement by failing to ensure timely payment according to the agreed drawdown schedule. Consequently, Frazer Solar sought liquidated damages. The Tribunal sided with Frazer Solar's argument and ordered the Government of Lesotho to pay EUR 50 million as liquidated damages.*

Gabon has also recently faced several claims from investors in construction-related matters (*See, Gabon v. Santullo Sericom, and Webcor v. Gabon). In Santullo Sericom v. Gabon, which was decided in 2019 by an* ICC Tribunal, Gabon was ordered to pay damages on the basis that enforcement of the award would uphold contracts procured through corruption. In 2022, the Paris Court of Appeal dismissed the appeal filed by Gabon.

A recent example of an investor-State arbitration against an African State is the dispute of *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria, which was decided in 2021 in favor of the investor. This was the first ever win of a Chinese investor against an African country.*

In brief, in 2010, Zhongshan acquired rights to develop infrastructure including roads and power networks in a substantial area of land in the Ogun State in Nigeria and, to this end, Zhongshan set up a local Nigerian entity. In 2016, the Ogun State took a series of actions against some employees of the Nigerian entity including arrest warrants for senior managers and threats of prosecution and prison sentence. In August 2018, Zhongshan commenced an UNCITRAL investment treaty arbitration against Nigeria under the Bilateral Investment Treaty between the People's Republic of China and Nigeria (the "**China-Nigeria BIT"). The Tribunal issued its Final Award in March 2021, finding Nigeria in breach of its obligations for non-discrimination, fair and equitable treatment, and lawful expropriation under the China-Nigeria BIT and awarding Zhongshan compensation of around USD 70 million.



Conclusion Top of Form

The increasing prominence of construction projects in Africa has necessitated the modernization of arbitration laws in various African countries. Ethiopia, Nigeria, and Tanzania have exemplified this legislative revolution by enacting new arbitration laws that align with international best practices and promote a pro-arbitration approach. The dedication of African countries to modernize their arbitration laws reflects their commitment to establishing an attractive destination for investment and dispute resolution destination.

Recent arbitrations in the construction sector involving African parties or States have once again confirmed the complexities of major construction projects. Disputes often arise due to contract complexities, changes in plans, delays, payment disagreements, and quality or performance issues. Investor-State arbitrations have also emerged against African countries, with the additional factors of corruption allegations and political instability impacting investment projects.

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The authors would like to thank **Aamna Khaqan**, *Associate at Haidermota & Co, and* **Umar Shahzad Abbasi**, *Associate at Haidermota & Co, for their contribution to this article.*

BRAZIL
NAVIGATING ECONOMIC-FINANCIAL REBALANCING CLAIMS IN CONSTRUCTION CONTRACTS: A BRAZILIAN PERSPECTIVE

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According to the most recent ICC Dispute Resolution Statistics, Brazil ranks second in the world in terms of the volume of arbitration proceedings, with a significant portion of these cases originating from disputes arising from construction contracts. The 2022 Research "Arbitration in Numbers" confirmed that, in 2021, disputes involving construction contracts were among the most common types submitted to arbitration in Brazil, making up to 79% of the cases administered by the Chamber FGV of Mediation and Arbitration, and 35% of those administered by the ICC International Court of Arbitration.

The growing prominence of construction arbitration in Brazil stems primarily from the continuous expansion of the civil construction industry, encompassing projects in both the private and governmental sectors. The Economic Bulletin of the Brazilian Chamber of the Construction Industry highlights that the Brazilian civil construction sector grew by 6,9% in 2022, with even higher growth projected for 2023. As the industry continues to grow, the occurrence of disputes among stakeholders, including contractors, subcontractors, suppliers, and owners, also increases.

Traditionally, disputes connected to construction contracts have been commonly associated with claims relating to contractual liability for design defects, variations in the price of materials and equipment, loss of productivity, and changes in construction schedules. In recent years, however, there has also been a notable rise in claims for economic-financial rebalancing in construction contracts.

Civil construction agreements are generally characterized by their long-term nature, making them highly susceptible to various risks, including market and price fluctuations, environmental hazards, insufficient predicted work or materials, and other unforeseen events. The materialization of these risks often leads to the emergence of disproportionate liabilities to one of the parties. In this context, "contractual rebalancing" refers to restoring the economic-financial equation of the project as if the risk had never materialized.

Parties often try to identify and categorize potential project risks, incorporating remedies to offset unpredictable events and contractual provi-

sions to restore the balance in the event of such occurrences during the execution of the contract. However, it is common for the repercussions of such events to be inadequately addressed in the contract, causing an economic-financial imbalance and an uncalculated loss for one party. Discussions regarding economic-financial rebalancing have been growing in Brazil, largely, but not exclusively, due to the Covid-19 pandemic. This trend is particularly notable in the context of public-private partnerships and other long-term contracts involving public entities.

In this sort of contract, the Brazilian legal system mandates the maintenance of contractual balance, presenting different legal solutions depending on whether one of the parties involved is a public entity or not. The legal framework in Brazil imposes an obligation on the Public Administration to rectify any imbalances that may arise during the execution of a contract whenever any of the risks foreseen in the contract's risk matrix is made manifest.

The restoration of the economic-financial balance is considered a fundamental principle, especially in long-term and complex public-private partnerships established for infrastructure projects. In such contracts, arbitration has emerged as the preferred method for dispute resolution, with many agreements explicitly granting the arbitral tribunal jurisdiction to decide claims related to economic-financial rebalancing.

Arbitration has been presenting very positive results in settling complex disputes involving public entities, as arbitral tribunals are increasingly gaining confidence in handling matters concerning the public administration. In construction arbitrations involving public entities, it has become common practice for arbitral tribunals to appoint a technical expert to assist the tribunal in determining the technical aspects of the disputes, even when the parties have submitted robust technical assessments from their respective experts. However, in recent cases, tribunals have rendered awards recognizing the public entity's duty to rebalance the contractual equilibrium following unforeseen events based solely on the reports provided by the parties' technical experts, without designating its own expert.

Although the preservation of the economic-financial balance of the contract is a fundamental principle in agreements involving public entities, in contracts involving private parties exclusively, there is no legal provision imposing the parties a similar duty. Parties in private construction contracts impacted by the occurrence of unforeseen events generally invoke the *pacta sunt servanda* principle to support their claims for the economic-financial rebalance of the contract. The application of this principle, which embodies the binding nature of contracts, has been subject to reinterpretation and qualification in recent construction arbitration proceedings.

Many arbitral tribunals have rather adopted the *rebus sic stantibus* principle and other legal theories that enable the revision of a contract in the event of unforeseeable changes, particularly when one party is excessively burdened in fulfilling its contractual obligations. In this sense, the Brazilian Civil Code encompasses provisions such as Articles 478 and 317, which grant the debtor the right to terminate a contract when it becomes excessively onerous due to an extraordinary event and enables jurisdictional review to reestablish fair terms in an unbalanced agreement.

There is an optimistic perspective within the Brazilian arbitration community concerning contract rebalancing claims in construction arbitrations. While there is still more progress to be made in the field of construction arbitration in Brazil, significant advancements have already been achieved, especially in addressing claims related to economic-financial rebalancing in contracts involving public entities.

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BRAZIL
DISPUTE BOARDS PAVE THE WAY TO OPTIMIZE PUBLIC CONSTRUCTION PROJECTS IN BRAZIL

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Arbitration stands out as one of the tools available to enhance the legal certainty for investors in Brazil. Since Brazil never acceded to the Washington Convention nor to bilateral investment treaties or other instruments providing for binding arbitration, commercial arbitration foots the bill for this purpose. Even before a law explicitly regulating arbitration practices, the Brazilian legislature provided for arbitration in several statutes to increase the legal foreseeability of large infrastructure projects. Brazil, however, has been adopting tools similar to investment arbitration practices. Ever since the *Caso Lage* (a case judged in 1974 by the Superior Court of Justice), the Brazilian legal system has been establishing a lengthy path towards the employment of arbitration in cases involving the Brazilian State. Amongst the most important economic areas for alternative dispute resolution mechanisms in the public sector in Brazil are the commercialization of oil & gas (L9,478/1997), distribution of power (L10,848/2004), and the consolidation of Public-Private Partnerships- PPP (L11,079/2004).

Arbitration has also become commonplace in large construction and infrastructure projects in Brazil as the preferred method for solving disputes. Still, public and private players are increasingly attempting to resolve their disputes more efficiently by using other bespoke tools, referring to arbitration as a last-resort mechanism to save time and costs.

Considering the toolkit of alternative dispute resolution mechanisms for large construction disputes, Parties are leaning towards adopting Dispute Resolution Boards. There have been cases where Brazilian municipalities and federative States have adopted dispute boards in infrastructure projects. For instance, that was the case of Belo Horizonte (*See*, Law no. 11.241, June 19th, 2020 – Municipality of Belo Horizonte, Minas Gerais), the capital city of the State of Minas Gerais, and Rio Grande do Sul (*See*, Law no. 15.812, March 17th, 2o22 – State of Rio Grande do Sul), a federative State in the south of Brazil. Besides, the recent Law of Public Bids and Administrative Contracts (which passed through reform in 2021) also recognizes dispute boards as a valid conflict resolution mechanism. In contracts governed by Article 151 of the Law no. 14,133, April 1st, 2021 (*Lei de Licitações e Contratos Administrativos*), alternative means of preventing and resolving disputes may be used, notably conciliation, mediation, dispute resolution boards, and arbitration. The provisions of this article will be applied to controversies related to vacant property rights, such as issues related to the restoration of the economic and financial balance of the contract, the breach of contractual obligations by any of the parties, and the calculation of indemnities.

Dating back to the 1970s, the adoption of dispute boards came late to Brazil. One of the first reported cases in the country relates to the construction of one of the subway lines of São Paulo, which faced a deadlock in 2018 due to the contamination of the soil extracted while digging the subway lines.

Even though dispute boards have spread throughout Brazilian legislation, the practice is still limited to its application in matters related to infrastructure and civil construction, especially involving the public sector. This experience has shown that dispute boards would be conducive to better controlling costs and delays in large-scale infrastructure projects nationwide.

The issue of construction delays became widespread as an alarming number of infrastructure projects in Brazil struggled to meet completion dates as programmed. The statistics gathered by the Federal Court of Accounts (the *Tribunal de Contas da União*, "TCU", contributes to budgetary affairs of the public administration in the country whilst monitoring the expenditures of the Brazilian public bodies), estimate that more than 14,000 among 38,000 projects faced complications in their construction and that almost 20% of the projects initiated remained unfinished.

Considering that the House of Representatives instituted in April 2023 the External Commission on Interrupted and Unfinished Public Constructions (the *Comissão Externa Sobre Obras Públicas Paralisadas e Inacabadas no País*, "CEOPI", was created by the Chamber of Deputies by means of a Presidential Act with the goal of inspecting the ongoing public construction works and identifying the issues impeding its full completion) to usher in essential projects for the country's infrastructure. In the same context, the National Council of Justice (the *Conselho Nacional de Justiça*, "CNJ" is a public institution that promotes the development of the judiciary by means of innovative policies and guidance for new steps to be taken by the bodies that compose the judiciary branch) established a new structure: the Committee for the Resolution of Conflicts in Infrastructure (the *Comitê de Resolução de Disputas Judiciais de Infraestrutura*, "CRD-Infra", created by Ordinance No. 142 of the National Council of Justice on April 29th, 2022. Their main goal is to establish dispute resolution boards to solve the remaining issues of ongoing infrastructure projects (*See* full text). The main goal of CRD-Infra is to solve the severe and common issue of prolonged delays in public construction projects in Brazil.

The application of both tools first appeared in connection with the BR-163 highway. As one of Brazil's longest highways, BR-163 is a long-term project now expanding to facilitate the transport of goods across different regions. Its pathway connects the southern and northern regions of Brazil, so it became a complex case to be handled in other federation States. In the South, there is a dispute in Paraná, and in the Midwest, a more complicated dispute involving environmental issues impacting indigenous reservations near the construction sites.

In Paraná, there have been many controversies regarding the interruption of the expansion and the deterioration of the existing highway segments. According to local politicians, the delays are causing significant economic losses to Paraná and its neighboring State Santa Catarina as the current structure of the highway cannot absorb the traffic volume. Furthermore, the drivers' situation is so critical that some truck drivers transporting substantial amounts of grains to other parts of Brazil remain stuck in traffic jams for hours. It is also estimated that an additional R$ 40 million have been spent just for the construction site maintenance ever since the works were stopped.

The situation involving the State of Mato Grosso and Pará has similarities regarding the economic impacts of the lack of infrastructure on the highway. In addition, national environmental laws mandate the preservation of large forest areas, and the life of various indigenous tribes suffers interference from the works.

In this sense, there are many agents and players engaged in this dispute. Among them is the Ministry of Infrastructure, the National Indian Foundation ("FUNAI"), and the Brazilian Institute of Environment and Renewable Natural Resources ("Ibama"). This is one of the first challenges to be taken on by CRD-Infra: governmental agencies and private agents address the conflict from different perspectives, which encumbers the resolution of their qualms and, thus, the project's completion.

In July 2022, CDR-Infra instituted a board of members to start negotiations with all parties involved. The ongoing talks foster communication between all public agents involved and facilitate the development of legal solutions for those issues. Of course, that does not ensure the resolution of the controversy among parties nor guarantee that the project will not face stalemates. Still, establishing a communication forum for all the parties involved is a significant beginning to understanding all the issues behind this costly deadlock.

The BR-163 case illustrates the CRD-Infra's potential and that of other dispute boards in the public sector. At this point, there is no conclusion about the actual effectiveness of the Committee nor the innovation that the letter of the law will produce. However, as is shown in the BR-163 case and Brazilian legislation, it is safe to say that dispute boards are paving their way to solving conflicts quicker and more cost-effectively way than State lawsuits or even arbitration proceedings.

Furthermore, despite its application not broadly seen in the purely private sector – such as M&A and other contractual types of disputes, the dispute boards have the potential to pervade the country's private sector in the future.

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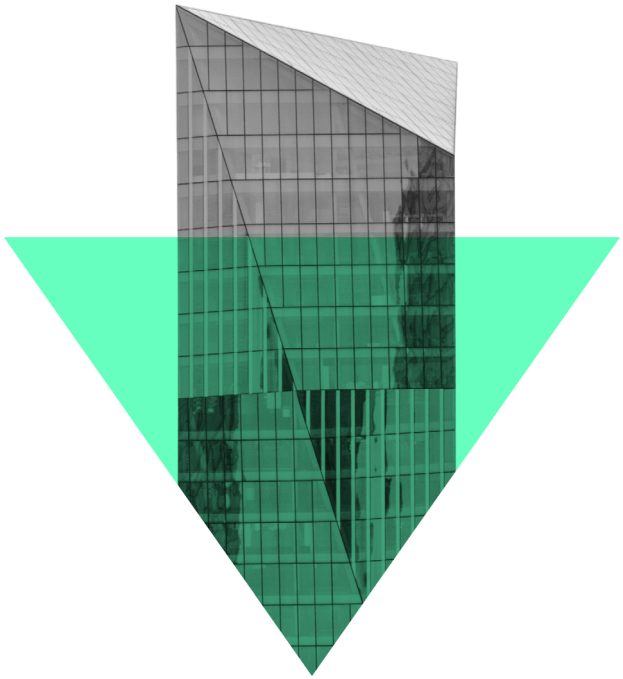
Guilherme Amaral, *Ph.D., is the current CEO and one of the founding partners of Souto Correa Advogados. He practices as a lawyer and an arbitrator in local and international arbitrations and strategic litigation.*

From 2018 to 2022, he served as a member of the commission established by the International Court of Arbitration of the International Chamber of Commerce for the Belt and Road project (Chinese investment program), and he has been devoting his time and expertise to assisting Chinese clients in Brazil.



Luis Alberto Salton Peretti *holds master's degrees in economic globalization law and comparative law. He helps Brazilian and international clients resolve disputes relating to corporate contracts, mergers and acquisitions, supply of equipment, construction projects and intellectual property through arbitration, mediation, litigation and other alternative dispute resolution mechanisms. He also focuses on dispute prevention, drafting contracts and designing efficient strategies to manage potential conflicts.*

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USA

STRUCTURAL SUPPORT: THE ARBITRATION INSTITUTION CONCRETE INSIGHTS - DOMESTIC AND INTERNATIONAL CONSTRUCTION AT AAA-ICDR

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The American Arbitration Association ("AAA") and its international division, the International Centre for Dispute Resolution ("ICDR"), are global leaders in the administration of construction arbitrations. Within the United States, the AAA administered 3713 domestic construction cases filed in 2022, with claims over 3.3 Billion USD and a median time of 8.8 months from filing to award. Internationally, the ICDR administered 55 international construction cases in 2022.

The ***AAA administers its construction cases pursuant to its*** *Construction Rules and Mediation Procedures* which were developed with input from the **National Construction Dispute Resolution Committee ("NCDRC").** The **NCDRC** is an advisory group founded in 1966 by the AAA in cooperation with the American Institute of Architects ("AIA") and other industry, trade, and professional associations.

For domestic cases, the AAA has a roster of Construction Industry Panels of Arbitrators and Mediators comprised of highly-qualified, diverse, and experienced construction attorneys and industry professionals. Additionally, the AAA has its Construction Mega Project Panel members who are top construction arbitrators specializing in construction and rated by a committee of attorneys and in-house counsel experienced in representing owners, contractors, design professionals, and insurers in disputes arising out of major construction and infrastructure projects.

Internationally, cases are likewise administered under the AAA's Construction Rules or the ICDR's International Arbitration Rules, which are designed specifically for international arbitration but also include provisions that may be applicable in a construction dispute.

Arbitrators may be appointed from the ICDR's international panel or the ICDR may consider arbitrators from the AAA's construction panel.

AAA–ICDR Dispute Avoidance and Resolution Board Procedures.

The AAA-ICDR (International Centre for Dispute Resolution) recently revised their Dispute Review Board Rules which had been in effect since 2001. The revision resulted in the Dispute Avoidance and Resolution Board Procedures ("DARB"), which took effect on November 1, 2022.

The AAA-ICDR (International Centre for Dispute Resolution) working with its NCDRC and international advisors provided input for the new DARB procedures.

The complexity and long-term nature of construction projects make it impossible at the outset to resolve every detail and foresee all external factors that may impact a dispute at the outset. As the provider of choice for dispute avoidance, conflict management and dispute resolution services, the AAA- ICDR offers their Dispute Avoidance and Resolution Board ("DARB") Procedures® in order to help parties avoid and resolve potential disputes at the project stage, focusing on real-time resolution, utilizing construction industry experts available throughout the project.

DARBs are independent panels of experienced professionals, appointed at the beginning of a domestic or international project to monitor the progress of the project and help parties avoid and resolve disputes in a timely manner. The primary role of a DARB is to identify and address potential disputes before they escalate into full-blown conflicts. The board members typically visit the construction site regularly, review project documents, observe construction projects and facilitate communications among the project participants. By proactively addressing issues and concerns as they arise, the DARB aims to foster collaboration, prevent disputes and promote the successful completion of the project.

Consistent with its focus on the importance of global expertise, The AAA-ICDR has also vetted and developed a roster of domestic and international dispute board professionals to be selected for these projects.

The DARB's purpose and features are set out in the DARB Procedures and in the requirements of a Three-Party Agreement among the Owner, Contractor and the Board members formalizing the Board and the rights and responsibilities of the Board and Parties. All Board members and the authorized representatives of the Owner and Contractor must execute the Three-Party Agreement within 14 days after the selection of the third member of the Board.

The members are selected from a list provided by the AAA-ICDR from its Roster of DARB Members. The Parties will consult in good faith to reach agreement on the members that will constitute the Board, but if the Parties are unable to agree on the members, the Board will consist of: (1) one member nominated by the Owner and approved by the Contractor, (2) one member nominated by the Contractor and approved by the Owner, and (3) a third member nominated by the first two members and approved by both the Owner and the Contractor. The third member will serve as Chair unless the Parties agree otherwise. If the Parties do not agree on the selection of DARB members, the AAA-ICDR will select the members without the submission of additional lists.

The Board meets regularly with representatives of the Parties at the jobsite or virtually to discuss the progress of the work, difficulties encountered, potential future claims or disputes and ways to avoid and resolve them in real-time. A site visit may be made to observe the progress of the work. In the event a Dispute arises, the Owner or Contractor may refer it to the Board for resolution through either the Interim Advisory Process or the Formal Process. The Interim Advisory Process is an expeditious proceeding intended to provide the Parties with immediate verbal or written guidance on an issue to help them resolve the issue promptly. The Board's Advisory Opinion is not binding on the Parties, and the Dispute may subsequently be presented through the Formal Process. In the Formal Process, each Party is given the opportunity to present its position in writing and then, if needed, verbally at a hearing. Promptly after completion of the proceedings, the Board provides the Parties with written Recommendations for the resolution of the Dispute.

Depending on the Contract requirements or other agreement of the Parties, the recommendations/determinations may be: (1) non-binding (Recommendations) or (2) binding (Determinations) until overturned in a subsequent dispute resolution proceeding.

If non-binding, the Recommendations may be designated as admissible or not admissible in a subsequent dispute resolution proceeding. If there is no designation, the default position will be that the Recommendation is admissible, but not binding, in a later proceeding. AAA-ICDR will assist in the selection of Board members, prepare and provide notices of meetings, transmit meeting minutes and Board recommendations, collect and disburse Board member fees and expenses, and provide other administrative services as required.

If Recommendations are not accepted by a Party, the Dispute will be resolved by arbitration administered by the AAA under its Construction Industry Arbitration Rules, or administered by the ICDR in accordance with its International Arbitration Rules if the dispute is determined to be international in scope.

Aisha Nadar, an AAA-ICDR DARB professional, states,

"*The main advantage of using DARB Procedure is the avoidance and resolution of disputes in a fast and inexpensive manner. DARBs can serve as 'insurance' against drawn out litigation or arbitration, so to speak, but to my mind, the main advantage of DARBs is the possibility of preventing issues from escalating into disputes. Dispute Boards are underutilized, but that may change because today's cost-sensitive environment demands that the parties focus on project success and effectively avoid disputes and resolve unavoidable disputes efficiently*".

The AAA-ICDR DARB Procedures can be found here.

American Arbitration Association® | International Centre for Dispute Resolution®

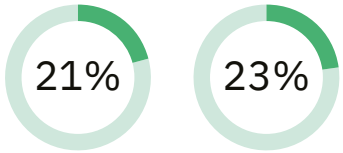
2022 Construction Dispute Resolution Infographic

3,713 Construction Cases Filed in 2022

THE CONSTRUCTION PANEL IS COMPOSED OF **1,385**

accomplished arbitrators and mediators including construction attorneys, engineers, architects and other construction industry professionals as well as former federal and state judges.

COMMITMENT TO DIVERSITY



DIVERSE ROSTER

DIVERSE APPOINTMENTS

2022 Total Claims

$3,366,997,250

Median Claim:	Average Claim:	Largest Claim:
$103,873	$983,065	$105,000,000

2022 Total Counterclaims

$870,959,449

Median Counterclaim:	Average Counterclaim:	Largest Counterclaim:
$100,000	$897,896	$36,052,085

FILING TO AWARD

For the parties that proceed to award - time resolution is speedy, especially when compared to U.S. District Court

QUICKEST TIME TO AWARD

MEDIAN TIME TO AWARD

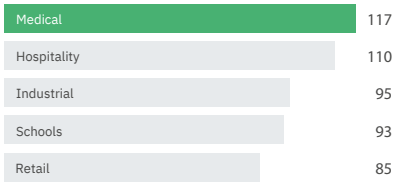
MEDIAN TIME TO TRIAL IN U.S. DISTRICT COURT

MOST CASES SETTLE

53%

CASES SETTLE PRIOR TO AN AWARD

TOP COMMERCIAL CONSTRUCTION CASE TYPES



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AAA428

ABOUT THE AUTHORS

Luis M. Martinez *is Vice President of the International Centre for Dispute Resolution, (ICDR) the international division of the American Arbitration Association, (AAA) and is an Honorary President of the Inter-American Commercial Arbitration Commission, (IACAC). Luis M. Martinez, as the Vice President of the ICDR located in New York, serves as an integral part of the ICDR's international strategy team and is responsible for international arbitration and mediation business development for the East Coast of the United States (from Maine to Florida), Central and South America, the Caribbean, EU and UK. Mr. Martinez is also responsible for case administration of international cases out of the AAA-ICDR's Miami office.*

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Michael A. Marra, *is Vice President for the Construction Division and has served with the American Arbitration Association (AAA) for more than twenty-two years.*

Mr. Marra is currently responsible for expanding the use of AAA construction ADR services in the Mid-Atlantic and New England States. In that role, he also interacts with the AAA's clients who file construction and real estate cases and the neutrals who serve as arbitrators and mediators. Mr. Marra also has national responsibility for developing the AAA's construction caseload and works closely with construction industry associations through the AAA's National Construction Dispute Resolution Committee (NCDRC). In this capacity, he assists the corporate, legal and public sector communities in educating them on the various construction industry dispute avoidance and resolution techniques and in designing dispute resolution systems to meet their specific needs.

Aisha Nadar *is active in international construction and dispute resolution. For thirty-five years she has handled all phases of project implementation of large-scale cross-border infrastructure and defence programs. She advises clients on strategic procurement planning, contract drafting, contract management and dispute resolution. She acts as arbitrator, mediator and dispute board member. She is listed on the Panel of Conciliators at the International Center for Settlement of Investment Disputes ("ICSID") and is Vice Chair of the Commission on Arbitration and ADR at the International Chamber of Commerce ("ICC"). She served as a member of the FIDIC Board, responsible for the Contracts Committee (2016-2020) and has carried out assignments related to procurement reform for organizations such as the World Bank, US Agency for International Development and US Department of Defense. Aisha holds a BS in Electrical Engineering (University of Nebraska-Lincoln), an MBA (University of Texas-Austin), an LL.M. in International Commercial Dispute Resolution (Queen Mary, University of London) and the CIArb Diploma in International Commercial Arbitration (Keble College, Oxford).*

USA

STRUCTURING AND LAYING THE FOUNDATION FOR AN EFFECTIVE COMPLEX CONSTRUCTION ARBITRATION

Wendy Venoit
Member
Cozen O'Connor

Ralf Rodriguez
Member
Cozen O'Connor

Josephine Bahn
Associate
Cozen O'Connor

In the United States, construction project participants often specify the American Arbitration Association ("AAA") as the forum for claim resolution and will utilize the AAA Construction Industry Arbitration Rules to resolve disputes. Even a seemingly small project could have a dozen different types of contractors participating in the completion of the work. If one subcontractor fails to perform it will likely impact other trades, causing a ripple effect of delays, inefficiency, construction defects, and cost increases. Arbitration, however, is a matter of contract.

To effectively utilize arbitration as a dispute resolution process for complex projects, it is necessary to first establish the contractual foundation to ensure that all necessary parties may be joined when a dispute arises. The failure to properly join necessary parties in a complex arbitration will lessen the benefits derived from engaging in arbitration. This article addresses how to properly establish the right to join necessary parties in a complex construction related arbitration, sequence and stage hearings, and provide best practices for the successful joinder of necessary parties.

Joinder Requirements and Related Considerations Under the AAA Construction Industry Arbitration Rules

Under AAA Construction Rule R-7, parties are required to raise any consolidation or joinder requests during the early stages of the arbitration – the latter of (1) before the appointment of a merits arbitrator or (2) within ninety days of satisfaction of all administrative filing requirements. Thereafter, a single arbitrator from a pool of arbitrators is appointed by the AAA to resolve a consolidation or joinder request. This single arbitrator is initially selected to determine the joinder issue but cannot

serve as the arbitrator for the merits component of the arbitration hearing – unless all parties consent to the selection of this arbitrator as the merits arbitrator.

A party seeking joinder of another party or parties must provide an affirmative written request to the AAA which identifies the parties to be joined and the reasons for the joinder. This joinder request is filed after an initial demand for arbitration has been filed with the AAA. For the purposes of proper service, the requesting party is obligated to send a copy of the written joinder request to all parties named in the pending arbitration – plus those individual parties the requester is attempting to join in the arbitration. The AAA Construction Industry Arbitration Rules require that if one of the proposed parties for joinder is not already a party to a pending AAA arbitration, the requesting party must submit a demand for arbitration as to that party (*See,* AAA Construction Industry Arbitration Rule R-7(c)). In contrast, the ICDR International Arbitration Rules of the AAA allow a new party to join if the tribunal deems it appropriate and the additional party consents (*See,* ICDR Article 8(1)).

Once the joinder request is received, the AAA will send a notice to all parties subject to the arbitration – which may be a significant undertaking in the event there are multiple, or extensive claims in the arbitration involving numerous design professionals, owners, contractors or subcontractors. The non-requesting parties have ten days to provide a written response (*See,* AAA Construction Industry Arbitration Rule R-7(b)).

The AAA Construction Industry Arbitration Rules provide flexibility on what happens next, including allowing the tribunal to stay the proceedings in order to make a full decision on joinder. The arbitrator or panel, for more complex cases, can address joinder at the initial administrative conference or convene one separately to contemplate the joinder issue (*See,* AAA Construction Industry Arbitration Rule R-11). For complex construction matters, panels will often choose the latter to provide time for facts to develop and for the parties to at least begin settlement discussions for certain claims.

Practical Components for Construction Contract Provisions to Lessen Joinder Disputes

A first step in eliminating joinder concerns for future arbitration proceedings is to mandate and ensure the inclusion of joinder arbitration provisions in all contracts and related subcontracts. This applies to all contracts for a project, including the prime owner-contractor agreement and the owner-architect agreement. The parties to a construction contract should carefully consider the various tiers of subcontractors and/or suppliers and which should be included in a potential dispute so that these parties are included in the dispute provisions of the proposed contracts or subcontracts. A general contractor should include and require joinder provisions in agreements for downstream subcontractors and in related purchase orders to ensure the right to join lower-tier subcontractors and suppliers in regards to a future arbitration.

For example, to ensure the right to join a subcontractor in a future arbitration proceeding, a general contractor may include a clause in its subcontract form stating:

> "*If requested by Contractor, Subcontractor agrees to and shall submit any dispute under this Subcontract to arbitration under the AAA Construction Industry Arbitration Rules, or pursuant to any arbitration proceeding and rules governing the prime contract between the Contractor and Owner. Subcontractor hereby agrees to participate and cooperate with Contractor in connection with any arbitration proceeding between Contractor and Owner, including joining such arbitration proceeding if requested to do so by Contractor*."

Any lower tier subcontractor agreements should also include a provision whereby the sub-subcontractor agrees to abide by and be bound by the arbitration provisions specified in the subcontract agreement between

the subcontractor and contractor and the prime contract between the owner and the contractor.

In addition to the foregoing, and given the recognized right to complete discovery in traditional litigation in the United States, parties employing arbitration to resolve construction disputes should also specify in their agreements what rights they have to conduct and complete discovery as part of the arbitration, if any, and to require the exchange of documents or the appearance of witnesses at a final arbitration hearing. These are just a few considerations parties should keep in mind when agreeing to utilize arbitration to resolve their disputes associated with a complex construction project.

ABOUT THE AUTHORS

Wendy Venoit *is a Member with Cozen O'Connor in Boston, MA. Her practice focuses on the litigation and arbitration of domestic and international construction disputes (including mediation and arbitration before the AAA, JAMS, LCIA, ICDR, and ICC), construction contract drafting and negotiation, and counseling clients during project execution. She sits regularly as an arbitrator and is a member of the AAA Construction, ICDR, and AAA Mega Project's panels.*

Ralf Rodriguez *is a Member with Cozen O'Connor in Miami, Florida. His practice focuses on representing general contractors, construction managers, sureties, and other construction professionals in connection with domestic and international litigation and arbitration. He is an experienced trial attorney who has handled numerous construction disputes before the AAA, JAMS, and the ICC.*

Josephine (Jo) Bahn *is an Associate with Cozen O'Connor in Washington, D.C. She focuses her practice on commercial litigation and construction law. Jo counsels real estate developers, project owners, contractors, and design professionals in all phases of the construction process. Her practice includes public and private projects as well as bid protests throughout the United States. She also regularly handles claims related to mechanics' liens on projects.*

USA
ARBITRATING OFFSHORE WIND PROJECT DISPUTES IN CALIFORNIA

Nathan O'Malley
Partner
Musick Peeler

Giorgio Sassine
Associate
Musick Peeler

Through government initiatives and legislation, California's offshore wind project market is expanding exponentially. The 100 Percent Clean Energy Act requires California to be carbon neutral by 2045. As part of the effort to move the State to total reliance on renewable energy, California (through collaboration with the Federal government) has initiated steps towards bringing two large offshore wind projects into development: the Humboldt Wind Energy Area and the Morro Bay Wind Energy Area. The projects will have the combined potential to generate up to 4.6 gigawatts of renewable energy.

To address the business, policy, and legal issues raised by the future of offshore wind energy in California, Musick Peeler & Garrett LLP hosted a Law & Policy Roundtable in April 2023, in collaboration with the University of Southern California's Schwarzenegger Institute for State and Global Policy, the USC Gould School of Law, and the Energy Industries Council. This Report expands on the topics addressed during the Roundtable and provides an overview of some of the most important laws and cases of direct relevance to parties who arbitrate renewable energy disputes in California.

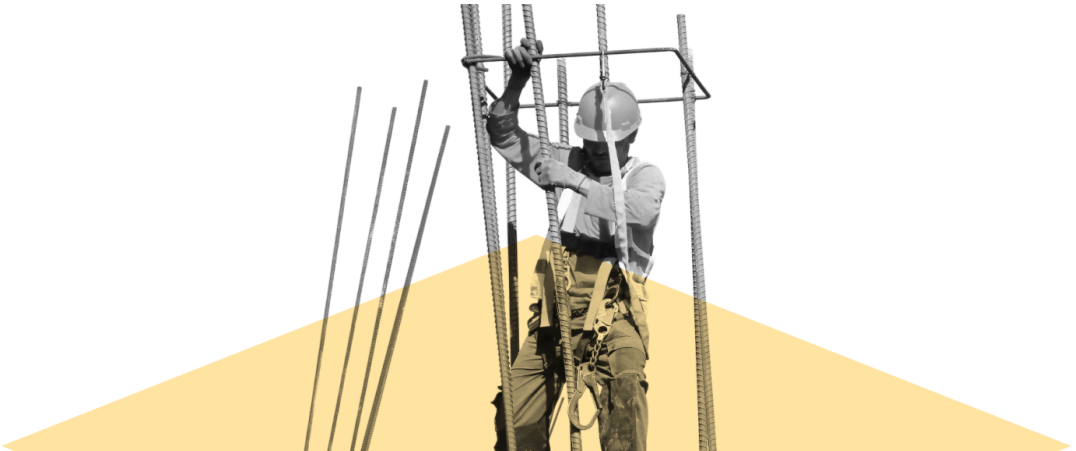
Foreign Attorneys Can Participate in International Arbitrations Seated in California

In 2018, California's legislature passed legislation expressly permitting non-California lawyers to appear in international arbitrations in California without any registration or local counsel requirements. Prior to then, the California Supreme Court considered in *Birbrower, Montalbano, Condon & Frank v. Superior Court* whether California's unauthorized practice of law statute precluded non-California licensed attorneys from participating in arbitrations seated in California. The Supreme Court concluded the

unauthorized practice of law statute applied to arbitration. In response to *Birbrower*, California's legislature adopted a *pro hac vice* approach for out-of-state attorneys, but the law did not address foreign attorneys. Through much effort from California's international arbitration community, this issue was resolved and foreign attorneys can now participate in arbitrations seated in the State.

The Federal Arbitration Act Typically Applies, But Parties May Agree to Use the California Arbitration Act

Nearly all international arbitrations in California are governed by the Federal Arbitration Act (the "FAA"). However, California has also enacted its own international arbitration law, i.e., the California International Arbitration and Conciliation Act (the "CAA"). California was the first state in the United States to adopt its own international arbitration law and based it on the UNCITRAL Model Law. Legislation is currently pending to amend the CAA in order to update it to be in line with the 2006 amendments to the Model Law and addresses various issues including the form of the arbitration agreement and interim measures. Federal courts have held that parties who want to opt out of the FAA must specify their choice for the CAA in the agreement to arbitrate.



Arbitrations with California–based Contractors Involving Public and Private Work Projects in the State Must be Seated in California

California law requires any dispute resolution clause in a contract between a contractor and a subcontractor with its principal offices in California for the construction of public or private works in the State to designate a California seat. A failure to do so renders the provision void and unenforceable.

In particular, California Civil Procedure Code § 410.42 voids any provision:

> "*which purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside [California]*"

and is

> *"between the contractor and a subcontractor with principal offices in [California], for the construction of a public or private work of improvement in this state*".

This also includes any provision "*which purports to preclude a party from commencing such a proceeding or obtaining a judgment or other resolution in [California] or the courts of [California]*".

California Civil Procedure Code § 410.42 has also been applied by California state courts to hold a contract provision requiring mediation in another State to be void.

Competence – Competence in California

The principal of competence-competence does not automatically apply for those arbitrations falling under the FAA. Where issues arise as to the arbitral jurisdiction, the parties must "clearly and unmistakably" delegate to the arbitrator by virtue of the agreement to arbitrate, the power to determine their own jurisdiction, or otherwise U.S. federal courts will decide such matters.

Most of the popular arbitration rules will include specific provisions delegating to the arbitrator the power to consider and rule on their own jurisdictional competence. Many state and federal courts have found that the incorporation of such rules into an agreement to arbitrate is sufficient to meet the clear and unmistakable test, thus, ousting federal courts of their presumptive jurisdiction in this area in favor of arbitrators. In the Ninth Circuit case of *Portland GE v. Liberty Mut. Ins. Co*., which was successfully argued by Musick Peeler, the top federal appellate court for California ruled that the provisions of the ICC Rules of Arbitration effectively delegate to arbitrators the ability to rule on jurisdictional challenges.

Therefore, when the FAA applies, parties to an arbitration agreement seated in California may expect that in most cases where modern and well used rules, such as those of the ICC or AAA-ICDR, apply, the competence-competence rule will be upheld.

Conditions Precedent in Escalating Dispute Resolution Clause Must Be Followed

Escalating dispute resolution clauses are often used in construction and renewable energy project agreements. An escalation clause typically requires the parties to engage in a series of steps, such as negotiations and mediation before submitting the dispute to final adjudication. Often times, the steps before submitting the dispute to final adjudication are conditions precedent, meaning that the parties cannot submit to litigation or arbitration unless and until they complete the antecedent phases.

For arbitrations seated in the United States, the U.S. Supreme Court held in *BG Group PLC v. Republic of Argentina* that "*courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration*". Thus, whether certain conditions precedent have been followed will be for arbitrators to decided, and this principal holds for arbitrations seated in California under the FAA.

The above notwithstanding, where the parties have agreed to require certain pre-arbitration steps, the courts may require such actions to be taken before compelling arbitration. For example, in *Synopsys, Inc. v. Siemens Indus. Software*, Siemens moved to stay the action under the FAA, arguing that the parties agreed to resolve any dispute under their licensing agreement pursuant to arbitration. However, the Northern District of California found that "*the conditions precedent for arbitration set out in the licensing agreement have not yet been met and there is currently no ripe issue referable to arbitration*".

The holding and reasoning in *Synopsys* has been followed in other cases, including in *Mosotwfi v. I2 Telecom Int'l, Inc*., *Chess v. CF Arcis IX LLC*, and *Lopez v. Fountain View Subacute & Nursing Ctr., LLC*. According to this line of authority, the FAA does not even apply until the arbitration provision has been appropriately activated.

Therefore, parties whose arbitration is governed by an escalation clause should be mindful of compliance with those pre-arbitration steps prior to initiating proceedings.

Arbitrators Do Not Have the Power to Issue Third-Party Subpoenas for Depositions or Documents

Section 7 of the FAA provides: "*[A]rbitrators (...) may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case (...)*"

Following the text of section 7 of the FAA, the Ninth Circuit held in *CVS Health Corp. v. Vividus LLC* that an arbitrator does not have the power to authorize non-party subpoenas for documents prior to an arbitration hearing. Courts in the Ninth Circuit have followed *CVS Health Corp.* and extended it to non-party subpoenas for depositions. For example, in *Gellman v. Hunsinger*, the court stated that "*[n]owhere does the FAA grant an arbitrator the authority to order non parties to appear at depositions*".

Similarly, the court in *McTammany v. Found. Capital Partners L.P* reasoned that "*an arbitrator's authority over non-parties, particularly non-parties to the arbitration proceeding who are also non-parties to the arbitration agreement, is limited because the arbitrator's power ultimately stems from a contractual agreement to arbitrate. Non-parties, by definition, have not agreed to abide by the arbitrator's decisions*."

The result is no different under the CAA. In *Aixtron, Inc. v. Veeco Instruments Inc.*, the California Court of Appeal held that "*under either statutory scheme*," an arbitrator does "*not have the authority to issue a discovery subpoena*" to a non-party.

The Vacatur Provisions Applicable When Challenging an Arbitral Award

In addition to the foregoing pre-arbitration and arbitration related issues, in California it is important to understand what options a party has to challenge an international arbitration award rendered in the State.

Parties challenging an arbitral award rendered in the Ninth Circuit will generally have to frame their challenge according to the FAA's provisions on vacatur. The FAA's Chapter 1, section 10 provides that a party may seek to vacate an award (1) where it was procured by corruption, fraud, or undue means; (2) where there was partiality or corruption in the arbitrators; (3) where there was arbitrator misconduct or refusal to hear evidence pertinent and material to the controversy or other prejudicial behavior; or (4) where the arbitrators exceeded their powers.

The Ninth Circuit therefore looks to the FAA's vacatur provisions to supply the controlling standard when an arbitral award is challenged for the purposes of setting it aside, consistent with the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits.

For parties who agree to utilize the California International Arbitration and Conciliation Act, which defaults to the CAA's grounds for vacatur, California Code of Civil Procedure § 1286.2 provides an expanded set of options to vacate an arbitral award. These include (1) where the award was procured by corruption, fraud or other undue means; (2) there was corruption in the arbitration; (3) the rights of a party were prejudiced by arbitrator misconduct; (4) the arbitrators exceeded their powers; (5) the rights of a party were prejudiced by a refusal to postpone a hearing or hear evidence; (6) an arbitrator failed to disclose grounds for disqualification; and (7) an arbitrator was subject to disqualification, but failed to disqualify themselves.

California Arbitration Act Allows for Appeal of Awards

The grounds for challenging an arbitration award under the FAA are "extremely narrow". Ninth Circuit case law holds that the FAA permits a final award to be challenged on procedural grounds, but "*neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitration award.*"

To further tighten the scope of possible post-award challenges, the U.S. Supreme Court ruled in *Hall Street Associates v Mattel* that the limited grounds of vacatur in the FAA "*provide the exclusive regimes*" for review of an arbitral award and parties cannot expand upon them. Thus, even if an arbitration agreement purported to grant a federal court a wider level of review, so as to permit an appeal on the merits of a decision, it would be void under the FAA. However, the Supreme Court did explain that *"[t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law (...)"*.

As the above quote from *Hall Street* indicates, state arbitration law may permit an appeal of the merits of an arbitration decision where the FAA does not, and that is certainly true of the CAA. Even though the CAA's statutory language speaks to only limited grounds for reviewing an arbitral award, California's state courts have held that parties may contractually expand the scope of review so that the merits of an arbitration award may be appealed. This, in essence, sets up California's Superior Courts as an appellate body with the power to vacate an arbitral award if it is erroneous – but only if the parties have agreed to this in advance. The California Supreme Court has emphasized that "*parties seeking to allow judicial review of the merits (...) would be well advised to provide for that review explicitly and unambiguously*" in their arbitration agreement.

Thus, parties looking to seat an arbitration in California and provide for a right of appeal to a court, have a route to doing so under the CAA. Such a choice must be made in advance, and any arbitral agreement needs to expressly exclude the FAA in favor of the CAA, if the former would otherwise apply. Moreover, express language setting up the expanded level of appeal needs to be included in any clause.

Conclusion

As the foregoing overview of some of the most important laws and cases indicate, foreign entities who come to California to perform work related to the State's offshore wind projects may be assured that arbitration is favored in this jurisdiction. That being said, careful consideration should be had for choosing the best legal framework, the FAA or state law, for the arbitration. These and other considerations must be taken into account during the drafting of the agreement to arbitrate.

ABOUT THE AUTHORS

Nathan O'Malley *is a partner in the Los Angeles office of* Musick Peeler *where he leads the International Arbitration and Litigation Practice Group. Nathan's practice is largely focused on disputes in the renewable and clean energy sector where he represents clients involved in the engineering, construction, operation and sale of various energy producing assets, such as solar thermal power facilities and natural gas-fired electricity plants. In recent years, he has developed a particular expertise in the field of onshore and offshore wind farms and has served as an arbitrator in disputes involving wind energy.*

Giorgio Sassine *is an associate with the* Firm's *Los Angeles office and is a member of the International Arbitration and Litigation and Construction Practice Groups. Mr. Sassine has extensive experience on domestic and international high-value, complex commercial, construction, and energy disputes. Mr. Sassine has represented clients in the United States, Europe, the Middle East, and North Africa.*

USA

INTEGRATING INDEPENDENT FORENSIC ANALYSES IN INTERNATIONAL CONSTRUCTION ARBITRATIONS

John Ciccarelli
Director
JS HELD

This article discusses the various independent analyses that experts perform and how these analyses should be integrated when involved in a construction dispute that has progressed to international arbitration. While experts are not advocates and do not provide legal advice, early involvement of independent experts can help form case strategies and identify the need for other specific expert analyses and opinions to be integrated into, to develop the strongest possible case. The goal of the article is to provide perspective into various forensic analyses to better understand the influence that each analysis could have on the various analyses typically performed in a claim and on which experts often rely.

Dispute resolution experts are typically engaged in construction arbitration proceedings to provide expert forensic analysis and opinions on schedule delay, disruption, and damages quantification. These forensic analyses typically lead to assessments of entitlement, causation, and responsibility and thus come in direct contact with a variety of other subject matters that may require additional expert forensic analyses to be performed and incorporated, or relied upon. These related subject matters can include, for example, estimating, standard of care (for project management, construction management, engineering, etc.), quality, safety, and forensic architecture and engineering.

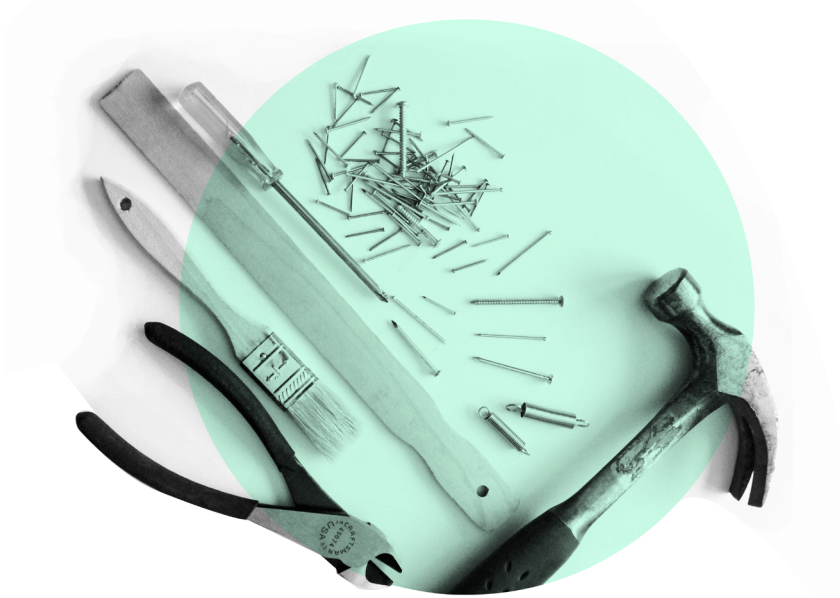
Most contracts define a process for initiating and resolving disputes and typically allow for a combination of both a self-decided and/or adjudication process to resolve a dispute. The self-decided group of dispute resolution processes are typically resolved at the project level in which the parties have a say in the decision and includes negotiation, mediation, or a Dispute Review Board ("DRB").

The adjudication group of dispute resolution processes are those in which someone else decides the fate of the matter, are more formal, and include arbitration and litigation. It is not uncommon for a contract to require the parties involved in a dispute to attempt to resolve the dispute using one or more self-decided methods of dispute resolution before proceeding to an adjudicated method. As such, regardless of the dispute resolution process method, early involvement of independent claims experts is important as the effort and methodologies to perform the forensic analysis for the claim should be consistent throughout the life of the claim and can be used in the various venues. In addition, the observa-

tions can focus on discovery efforts, document production, the need for fact witnesses, and the need to integrate other subject matter experts to assist the triers of fact in the arbitration.

Disputes and claims can be caused by numerous reasons, but regardless, it is generally the claimant's responsibility to prove a claim. Independent expert analyses can be an important component to help analyze a claim, to either help prepare the submission or to respond to the claim.

There are two perspectives of a disputed issue to consider: legal and technical. From the legal perspective, counsel should be consulted to frame the context of the contract, applicable laws and regulations, notice provisions, and the dispute resolution process. Counsel typically then seeks subject matter expert technical forensic analyses of relevant issues. The technical perspective of a dispute considers the contract scope and the required technical forensic analyses associated with a claim submission (i.e., delay analyses, loss of productivity, quantum, failure, and standard of care). Forensic claims experts should understand the legal context under which the disputed issue exists, while the legal practitioners should understand the technical context and results of independent analyses which can help frame their case management.



There exists a variety of industry recommended practices, guidelines, and publications that are used by independent experts as technical resources that provide principles for the sound application of forensic analysis methodologies to promote competent analyses and consistent information as a basis to evaluate and compare varying methodologies and forensic work product (See, examples of industry professional associations that publish technical material include: AACE International (Recommended Practices) and the Society of Construction Law (Protocol). Their publications address a variety of dispute and claim-related topics such as forensic schedule analysis, loss of productivity, delay and disruption). A recent publication also addresses various elements that should be considered by independent experts when preparing forensic analyses associated with a claim (See, AACE International Recommended Practice ("RP") No. 120R-21, Demonstrating Entitlement for Contract Change Orders or Claims – As Applied in Engineering, Procurement, and Construction). Some of the key elements identified to demonstrate entitlement include: occurrence of the casual event (did the alleged event actually happen?); adherence to contract notice requirements (did the parties adhere to the contract?); and contractual entitlement to make a claim.

Another key element is to demonstrate causation and responsibility. This element should be the most technically focused effort that often requires specialized skills and knowledge from one or more independent experts to develop various cause and effect analyses to establish the causal linkage (nexus) between facts and events and the impacts in dispute. These analyses can include forensic schedule delay, loss of productivity, damages quantification, and other technical demonstrative analyses. Each of these analyses requires a specific set of subject matter skills and knowledge to perform, and, while these can be performed independently,

oftentimes the cause and effect determined through the various analyses are related to the same issue(s).

- **Forensic Schedule Delay** – disputes often include an element of delay for which an independent forensic schedule delay analysis expert might be needed. A claim would be asserted for impacts that resulted in additional time that could increase the project duration, usually resulting in additional costs to both parties. Independent experts frequently reference two technical resources: the AACE International Recommended Practice No. 29R-03, Forensic Schedule Analysis, and the Society of Construction Law Delay and Disruption Protocol. These documents address the delay element of a claim and provide guidelines to the industry for the application of critical path method scheduling in forensic schedule analysis to measure delay (including disruption and acceleration) and identify effected activities to focus on for establishing causation.
- **Loss of Productivity** – another element of disputes for which independent forensic experts are often used is for an assertion for impacts resulting from loss of productivity ("LoP"). Claims for LoP can be a major source of disagreement and dispute, and the effect on cost and schedule difficult to identify and quantify. Often, LoP occurs as the result of a disruptive event or series of events and is tied to both schedule delay and quantum. There is a long list of technical resources that address various LoP factors and from which independent experts often reference. The various technical resources provide guidelines to the industry regarding the application of analyses related to capturing the effect of LoP on cost and schedule address key factors including the common causes, various analysis methods (including project specific analyses (i.e., Measured Mile, Earned Value Analysis, Direct Observation), specific industry studies (i.e., acceleration, overtime, cumulative impact, and weather), and general studies (i.e., MCAA, Construction Industry Institute, Leonard Study), and Cost-based methods), and how to employ those methods.
- **Specific Technical Causal Analyses** – There are numerous specific demonstrative analyses that can be performed by the appropriate technical experts to establish causation of events to delay, disruption, and damages and thus need to be integrated with the core dispute. Depending on the type of data available in the project file, and the specifics of the matter, the following are example topics can be analyzed to support a claim: change orders, shop drawings, Request for Information ("RFI"), engineering and design, design standard of care, management standard of care, bid and estimate, quality, rework, and other scientific studies (i.e., geotechnical). These analyses should be fully integrated with and used to demonstrate the causal nexus to the impact events in dispute.
- **Quantification of Damages** – the culminating element in a claim for which independent experts are often used is the quantification of damages. The types of costs to be considered for analysis as damages can include: remaining unpaid contract balance and change orders; direct project costs; time-related indirect project costs for general conditions; owner management costs, Home Office Overhead; interest, insurance, bonds, and markup for profit. The choice of a damage quantification methodology can be influenced by the available project records and data. Triers of fact have generally established that discrete approaches that prepare specific estimates are more accurate and effective than the more general cost-based methods.
- **Documentation** - the last, but definitely not least, underlying element to any independent claim analysis is factual documentation. Supporting documentation is vital to each of the aforementioned elements and to developing a comprehensive and unimpeachable independent expert report for arbitrations.

This article discussed the various forensic analyses that experts are engaged to prepare and provide independent expert opinions upon during construction arbitration proceedings. It should be understood that these analyses often influence and rely upon one another and should be integrated to confirm entitlement and demonstrate causation and responsibility through forensic schedule, loss or productivity, and other technical analyses; and quantify damages. Early involvement of independent experts can help form case strategies and identify the need for other specific expert analyses and opinions to be integrated into to develop the strongest possible case throughout the life of the dispute from starting with self-decided/negotiated methods through adjudication in international arbitration.

ABOUT THE AUTHORS

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AUSTRALIA
MULTIPARTY ARBITRATION OF CONSTRUCTION DISPUTES IN AUSTRALIA – CAN NON-SIGNATORIES BE COMPELLED TO ARBITRATE?

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Where disputes arise on major construction projects, they inevitably impact a complex set of contractual relationships between principals, contractors, various subcontractors and third parties, leading to related claims and disputes under multiple contracts. When arbitration is chosen by some or even all of the parties, a multiplicity of transactions and associated disputes can cause inefficiency and risk inconsistent decisions or delays in the resolution of the related disputes. In order to avoid inconsistency, proceedings in one part of the contractual chain may be stayed until others are concluded.

Multi-party arbitration, by parties either commencing arbitration against multiple parties, or by joinder of parties or consolidation of arbitrations, offers greater efficiency through processes such as discovery, streamlined resource allocation and logical issue sequencing. But it typically turns on party consent – expressed either in the arbitration agreement, or indirectly by choice of arbitral rules.

The conventional requirement of party consent has been brought into question in Australia by recent jurisprudence that has significantly broadened the circumstances in which third parties may be brought into an arbitration between parties named in an arbitration agreement. Until further clarification is provided, this development has potentially far-reaching consequences for the resolution of disputes that arise in the construction industry.

The Conventional Rules on Multi-Party and Multi-Contract Arbitration in Australia

In Australia, arbitration is governed by the *International Arbitration Act 1974* (Cth) ("**IAA**") and uniform State and Territory Commercial Arbitration Acts ("**CAAs**"), for international and domestic arbitrations, respectively. Both incorporate the UNCITRAL Model Law with minimal amendments.

The IAA and the uniform CAAs contain provisions that empower arbitral tribunals in Australian-seated arbitrations to order the consolidation of proceedings commenced pursuant to one or more arbitration agreements in certain circumstances. Consolidation may be ordered where: (a) a common question of law or fact arises in all those proceedings; (b) the rights

to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or (c) for some other reason specified in the application, it is desirable that an order of consolidation be made. While, theoretically, these criteria may be easily met in disputes arising under related transactions on a construction project, achieving consolidation will require tribunals appointed in each of the arbitrations (where they are different) to deliberate jointly and agree that the arbitrations should be consolidated. Absent agreement, the arbitrations shall proceed separately without consolidation.

Australia's leading international dispute resolution institution, the Australian Centre for International Commercial Arbitration ("**ACICA**"), has issued rules that equally provide for an extended scope for consolidation if certain requirements are met, mirroring international best practice. The 2021 ACICA Arbitration Rules ("**ACICA Rules**") allow consolidation where (a) all parties have consented to consolidation; (b) all the claims in the arbitrations are made under the same arbitration agreement; or (c) the claims in the arbitrations are made under more than one arbitration agreement, but there is a common question of law or fact in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and ACICA finds the arbitration agreements to be compatible.

In addition, the ACICA Rules also provide for the joinder of parties to arbitral proceedings, provided that (a) the additional party being joined is, on the face of the matter, a party to the same arbitration agreement between the existing parties; or (b) all parties, including the additional party, have consented to the joinder.

These provisions are designed to facilitate multi-party arbitrations to resolve disputes involving several related transactions that commonly occur on construction projects, but their application is fundamentally, and unsurprisingly, a function of party consent.

Expanding the Ambit of Parties that May be Brought into an Arbitration

Recent jurisprudence of Australia's highest court, the High Court of Australia, has significantly expanded the potential scope in Australia for achieving multi-party arbitration, by allowing parties that have not concluded a compatible arbitration agreement (or consented to consolidation) to be brought into an arbitration as third parties.

The IAA and the uniform CAAs provide that a stay may be granted of proceedings that are brought in a court by a party to an arbitration agreement against another party to the arbitration agreement, and the court may refer the parties to arbitration. The term 'party' is then defined in both acts as including '*a person claiming through or under a party*' to the arbitration agreement. By virtue of this statutory provision, non-signatory third parties can be referred to arbitration (along with any signatories to the arbitration agreement) if they are '*claiming through or under*' a party to the arbitration agreement.

In *Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors* [2019] HCA 13 ("***Rinehart***"), the High Court of Australia considered the interpretation of '*claiming through or under*' in the Commercial Arbitration Act 2010 (NSW) (**CAA (NSW)**). The case originated in a dispute between a trustee and beneficiaries about interests in mining tenements, which the trustee had assigned to certain third-party companies. The beneficiaries commenced proceedings against the trustee and the third-party companies, some of whom were and some of whom were not originally parties to the deeds containing agreements to arbitrate. The trustee and the third-party companies applied for a stay and for claims against them to be referred to arbitration under the CAA (NSW), on the basis that they were '*person(s) claiming through or under a party to the arbitration agreement*'.

The majority held that as assignees of mining tenements from parties to the relevant deed, the third-party companies could be considered per-

sons claiming '*through or under*' a party to that deed. This was based on the fact that an essential element of the defense of the third-party companies was exercisable by the party to the arbitration agreement, and to exclude them from the scope of the arbitration agreement could, undesirably, result in duplicated proceedings. The majority emphasised the subject matter of the dispute, noting that, as the defenses of the third-party companies and the respondent were similar, if the respondent were found to be blameless, the third-party companies would be equally blameless.

In this way, the High Court in *Rinehart* dramatically broadened the interpretation of parties '*claiming through or under*' which under previous jurisprudence required that third parties '*claiming through or under*' have a claim or defense that is derived from a party to the arbitration agreement. This narrower – and more conventional – scope of parties '*claiming through or under*' would include only examples where third parties are successors in title, such as assignees of rights under a contract. Pursuant to *Rinehart*, however, there is no longer a need for a third party to derive its cause of action or defense from the party to the arbitration agreement – rather, it suffices that there is an overlapping element in the claim or defense. Dissenting from the majority, one justice cautioned that this expansive approach to the definition of 'party' would undermine concepts of privity of contract and party autonomy.

The High Court's judgment in *Rinehart* has potentially far-reaching implications for the construction industry. This is illustrated by a judgment of the Queensland Supreme Court in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd [2019] QSC 173* ("***Bulkbuild***") which applied *Rinehart* in a construction context.

Bulkbuild concerned a dispute under a contract for the design and construction of serviced apartments. Despite the arbitration clause contained in the design and construct contract, the contractor initiated court proceedings against the principal (with whom it had concluded an arbitration agreement) and superintendents (with whom no arbitration agreement had been concluded). The argument advanced by the contractor was that the resolution of claims before two different fora would risk producing inconsistent decisions, which made the arbitration clause in the design and construct contract '*incapable of being performed*'. The principal and superintendents applied for a stay of proceedings on the basis that the contract contained an arbitration agreement and arguing that, as parties whose claims are made '*through or under*' the principal, the arbitration would also apply to the superintendents.

The court relied on the reasoning in *Rinehart* to find that the plaintiff's claims against each of the defendants was '*essentially the same case*' as they were closely related, dependent on findings about the same factual matters, and the success of the plaintiff's claims against the superintendents was ancillary to its success against the principal. As a result of this overlap, the court considered that the superintendents were likely to rely on the rights of the principal under the design and construct contract, which meant that they were likely parties '*claiming through or under*' the principal – and therefore bound by the arbitration agreement in the design and construct contract.

Implications for Parties Arbitrating in Australia

The expansive approach taken by the Australian courts in *Rinehart* and *Bulkbuild* to interpreting the '*through or under*' provision in Australia's *lex arbitri* has the potential to expand significantly the scope of parties that may be brought into an arbitration – including, in principle, where no consent to arbitration has been given.

These observations are subject to a caveat. There is limited case law applying the *Rinehart* interpretation and, indeed, the High Court majority itself noted in *Rinehart* that it did not receive submissions about wider complex issues of arbitral consent and privity of contract, and on third-party claims more generally. The court's findings may therefore be difficult to apply outside of the specific circumstances of the case.

That notwithstanding, the majority's judgment raises the obvious question as to whether it will enable parties in Australian-seated arbitrations to be coerced into arbitration when they have not consented to it, as it may be taken to do on at least one reading.

Leading academic, Professor Richard Garnett, has urged caution when applying the High Court's *Rinehart* test to non-signatory third parties. In his view, the *Rinehart* test may be applied to a category of cases where a non-signatory defendant applies for a stay and by doing so consents to being referred to arbitration – which does not offend the fundamental requirement of party consent. However, the same rationale does not apply, according to Professor Garnett, when a non-signatory claimant wishing to pursue a claim in court is faced with a stay application by a defendant arguing that, perhaps unbeknownst to the claimant, the claimant is a party '*claiming through or under'* a signatory to an arbitration agreement. In that scenario, the granting of the stay would mean that the non-signatory claimant's claim in court would be defeated by an arbitration agreement it is not party to and in circumstances where that non-signatory has never consented to having its claim settled by arbitration.

The latter hypothetical scenario is distinguishable from the circumstances of *Rinehart* and *Bulkbuild*, where all defendants were seeking a stay in favour of arbitration – expressly or impliedly consenting to having the matter resolved by arbitration.

Whether or not it is desirable from the perspective of party consent, at least theoretically, the High Court's expansive interpretation of '*claiming through or under*' leaves open the possibility of arbitration to be directed with or without party consent. Until further clarification and perhaps narrowing of the interpretation is provided by a superior court, the uncertainty as to the boundaries of current jurisprudence will persist, making this a hot-button topic in Australia as the courts grapple to balance party autonomy and efficiency for fragmented disputes on major construction projects.

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CHINA & HONG KONG SAR
STRUCTURAL SUPPORT: THE ARBITRATION INSTITUTION CONCRETE INSIGHTS CONSTRUCTION ARBITRATION IN SHIAC AND THE OUTLOOK

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Shanghai International Arbitration Center ("SHIAC") started with the specialty in foreign-related arbitration in China. Unlike the majority of Chinese arbitration commissions that mostly deal with local transactions including infrastructure, real estate and construction disputes, construction arbitration was historically not in the top three of the caseloads in SHIAC. With this being said, as the Chinese construction industry goes overseas for international projects, the caseload for construction arbitration is on the rise in recent years, especially between 2019 and 2022. The change reflects the institution's inherent and well-founded strength in dealing with foreign-related disputes including construction arbitration.

Between 2019 and 2021, the Covid pandemic caused disruption to the normal pace of real estate development and the continuity of businesses. Resultantly, the range of claims spread from compensation against contractor's delay, mutual compensation on concurrent delay to owner's payment claims on overdue rents and tenant's request for rent deduction pertaining to governmental measures, etc. In this three-year period, the construction arbitration in SHIAC saw a mild growth, with the annual case number for construction arbitration at around 8% of the total caseload. The phenomenon reflects the market players' resilience against economic hardship and the success of the government schemes in maintaining the operation of the businesses. The situation changed in 2022, with a number of giant real estate players suffering from broken financial chains, which lifted the number of construction arbitration up to 27% (703 out of 2,576) of SHIAC's yearly caseload in 2022.

The rising of construction arbitration in SHIAC resonates with the expansion of the Chinese capital on contracting overseas project, *e.g.*. under the One Belt, One Road Initiative, with Asia and Africa being the most popular destination for Chinese contractors. Nevertheless, in recent years, with the impact of the Covid pandemic and the restructuring of the global supply chain, the disturbance to the global market has also been seen in the construction business. The situation with the Chinese contractors for international projects has been two-fold:

(a) The accumulation of Chinese contractors' successful management of international projects has led to a growing number of EPC (Engineering, Procurement and Construction) contracts, usually by adopting the FIDIC suits with necessary variations, where the Chinese contrac-

tors independently engineer, procure and construct (EPC/Turn-key) the targe project;

(b) The complexity of EPC disputes, particularly in cross-border setting, yields more challenges than usual when it comes to design and operate the multiple aspects of the arbitral proceeding.

On one hand, the tendency for Chinese contractors to submit the EPC contract concluded with their foreign owners to the jurisdiction of SHIAC is more alive than before. For one example, in one SHIAC proceeding for construction arbitration, a Chinese contractor successfully bid for and EPC contract for a construction project located in Dubai and submitted the claim forms to SHIAC for nonpayment after the contractor's completion of the works. For another example, in the South-Eastern Asia, a group of Chinese suppliers were engaged by the foreign owner in the same petroleum project. The supplies were delivered on site without delay, but the progress of the project was disrupted by the Covid pandemic. The Chinese suppliers initiated a dozen of arbitration in SHIAC against the foreign owner for overdue payments. Most of the arbitration ended up by amicable settlement with the mediation services from the arbitral tribunal.

Apart from the payment claims, there is also a growing number of claims or allegations on construction delay. This trend is mostly attributable to the Covid pandemic for the past years, but in the proceedings, construction delay is more used as a defense than as a cause for monetary compensation. Two reasons have been observed for this phenomenon:

(a) Construction delay is complicated and requires the assistance of experts during the analysis, thus the maturity of the construction marks plays an important role in the popularity of claims on delay;

(b) Due to the external factors like the Covid pandemic, delays are almost inevitable, thus no party may be held absolutely not liable for the costs of delay.

In this situation, the defense or allegation of defense can still serve as a bargaining chip in the mediation procedure. Regarding the design of settlement procedure, it should be mentioned that Article 41 of the SHIAC Arbitration Rules allows the combination of Arbitration-Mediation-Arbitration, thus providing the flexibility needed for case scenarios like concurrent delay.

On the other hand, the international nature of overseas contracting disputes requires the procedures to be more flexible than in traditional cases. Some typical challenges in international construction arbitration include the stringent demand for suitable arbitrators with industry/technique background, the growing trend for using language other than Chinese, and/or determining the applicable law to be non-Chinese law in the proceeding, etc. In order to tackle these procedural issues, SHIAC gives its best efforts to maintain the proceeding as flexible as possible and answer to the procedural needs of the disputants. One particular emphasis should be made to the evidentiary rules for construction arbitration, as this type of case often shows to be extensive with facts. In SHIAC proceeding, the disputants in construction arbitration may determine whether to adopt the IBA Rules for Taking Evidence in International Arbitration when related evidentiary question like "*the fixation of the quantity of works short of contractor's records*" arises; or, the arbitrators in SHIAC proceeding for international construction arbitration may appoint independent third-party experts to provide expert opinions on issues like quantity, quality or delay pertaining to Article 39.1 of the SHIAC Arbitration Rules, etc.

In addition to the flexibility of arbitral procedures, SHIAC also pays attention to the use of alternative dispute resolution (ADR) mechanism in order to more swiftly and fairly resolve construction disputes. For one example, SHIAC encourages the parties to use mediation to resolve their disputes. For that purpose, SHIAC maintains a panel of mediators, in which nearly 30% of the panelist mediators possess specialty in construction dispute settlement. For another example, SHIAC has participated and contributed to the themed program organized by the Permanent Forum of Chinese

Construction Law (PFCCL) to jointly introduce and build the consensus for SOP (Security for Payment) mechanism among the Chinese domestic entities.

The year of 2023 marks the 35th anniversary of SHIAC since its establishment in 1988. Thus far, SHIAC has managed over 17,000 arbitration cases, in which parties from 85 countries and regions have participated. The success of SHIAC in commercial arbitration including construction arbitration involving projects in and out of China, should pay tribute to our elite panels of arbitrators and mediators. In the current panel of arbitrators, over 300 arbitrators are specialized in construction arbitration, including 100 international arbitrators.

In the next ten years, SHIAC will continue to build our image and enhance our capacity for Chinese and international construction arbitration. We look forward to frequent dialogue with the international construction arbitration community to bridge the gap between Chinese practices and international practices. All in all, SHIAC pledges to provide the disputants from China and abroad with just, impartial, professional and efficient arbitration services.

ABOUT THE AUTHORS

Ms. Wang Weijun, *Secretary-General of Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center ("SHIAC")) and Secretary-General of Shanghai Arbitration Association is also the vice-Chair of the Permanent Forum of China Construction Law (PFCCL). She possesses unparalleled experience in Chinese and foreign-related commercial arbitration through her successful career built over 1,150 arbitration cases during the past decades and currently sits on the panels of arbitrators maintained by a number of arbitration institutions. She is an active promotor for the development and innovation of arbitration mechanism. Her dedication to the institutionalization of commercial arbitration has resulted in the establishment of China (Shanghai) Pilot Free Trade Zone Court of Arbitration, China-Africa Joint Arbitration Center Shanghai Center, the promulgation of Free Trade Zone (FTZ) Arbitration Rules, and the launch of Shanghai International Aviation Court of Arbitration, etc. She is the member of Shanghai Law Society Arbitration Law Research Association, Aviation Law Research Association and serves as a part-time graduate tutor in Fudan University, East China University of Political Science and Law, etc.*

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CHINA & HONG KONG SAR

THE SPECIALTY OF THE CHINESE WAY OF ORGANIZING A CONSTRUCTION ARBITRATION PROCEEDING

This article explores three features in Chinese construction arbitration. The first is about the conduct of the hearing. Unlike the evidentiary hearing conducted at the final stage in international arbitration, there are often multiple hearings in Chinese construction arbitration. The second is about a unique type of the tribunal's power, the right of clarification. The third is about the appraisal mechanism in construction arbitration. These three features point to the fact that the arbitration practice is striving in China and there is still room for it to further develop. On one hand, the arbitration community has grasped more international characteristics into their working practice. On the other hand, these practices are at the same time tailored to meet up with the domestic needs.

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The Hearing

International arbitration features an evidentiary hearing. The counsels usually spend extensive time and effort on cross-examining the witnesses. Except for bifurcated proceedings, one hearing would be held for the Tribunal to examine all issues.

It is acknowledged that every tribunal has its own way of organising proceedings. Meanwhile, in China, for most construction disputes at least two rounds of hearings will be held. The first one is more for educational purposes. The tribunal takes this opportunity to provide guidance on how they wish the parties to prepare and present their cases.

Usually, the first hearing is held after the exchange of the Notice of Arbitration and the Answer to Notice of Arbitration. At that stage, the parties have not yet fully elaborated their positions on law and facts. Only a general understanding of the dispute was communicated to the opposing party and the tribunal. Therefore, a hearing held at this stage is not supposed to be very productive in reaching the final decision. Its function lies more with advancing the case. It is an occasion to make the parties agree on what they are actually disputing and how the case will proceed.

Some may argue that holding multiple hearings is not cost-efficient in view of the organisation of the whole arbitration proceeding. On its face it may seem so, but it is not the reality. The average duration of a Chinese construction arbitration is shorter than an international arbitration. This may result from the higher efficiency achieved by face-to-face communication. At the same time, the Chinese arbitration community is still thriving to optimise the process. A growing trend is the increment in utilising techniques common in international arbitration, such as procedural orders. This may explain why having multiple hearings is the mainstream for Chinese construction arbitration.

The author is of the position that this aligns with the current situation in China. The arbitration practice is not fully developed in China. While there are sophisticated counsels, the average expertise is still undergoing a growing period. What adds more difficulty to the situation is that construction arbitrations are always of high complexity. It is a challenge for both the counsels and the tribunals to figure out the best way to coordinate between the experts and the legal submissions. Therefore, it is necessary to hold the first hearing in an educational manner. This is a true reflection of the present needs in the Chinese arbitration community. Such a way can also help nurture more skilled counsels in the future in this field.

The Right of Clarification

The "right of clarification" (in German: *Aufklarungsrecht*) is a product of the inquisitorial method of hearing. It refers to a judge's right to ask, suggest to or require the parties to clarify or supplement their ambiguous, insufficient or improper claims, submissions or evidence. In international arbitration, which is strongly influenced by the adversarial system, arbitral tribunals are usually cautious and reluctant to exercise the right of clarification. In comparison, for arbitrations seated in China, due to the influence of the inquisitorial system on Chinese courts, it appears common for arbitral tribunals to provide clarification to the parties at hearings. This is even more commonly seen in construction arbitrations. The construction industry is a heavily regulated industry in China. Therefore, there are many cases in practice where the underlying contract should be deemed as invalid because it violated mandatory rules of law. This is a typical scenario where the tribunal exercises its right of clarification.

Except for situations within the scope of the judicial interpretations, the decision of whether to exercise the right of clarification is largely at the discretion of the judge or arbitrator. Clarification by an arbitral tribunal might concern both procedural and substantive issues including legal and factual components. In exercising the right of clarification, the arbitral tribunal should observe two main principles.

First, the purpose for the arbitral tribunal in exercising the right of clarification is to balance the rights of the parties to present evidence and engage in argument with each other. In exercising this authority, the arbitral tribunal should keep in mind principles of impartiality and due process and avoid showing favouritism toward a party or making a decision in place of a party.

Second, when deciding whether to exercise the right of clarification, if there are no directly applicable laws or regulations, the arbitral tribunal can refer to basic legal principles. For example, in a dispute over a subcontract, the general contractor and the subcontractor have agreed that the project payment shall be made only when the general contractor has passed the final completion acceptance test and the subcontractor has already passed the completion acceptance test for the subcontracted project but is unable to prove whether the conditions for payment of the overall project have been satisfied, nor can it calculate the interest on late payment due to lack of information. As the subcontractor is not a party to the general contract, it cannot be reasonably expected to provide evidence about the completion date of the general project. Based on the principle of privity of contracts, the tribunal should allocate the burden of proof to the general contractor to prove that the general project has not passed the overall completion acceptance test.

The Appraisal Mechanism

Unlike in international arbitration where the parties tend to engage their own experts and ask them to issue individual reports, in China, the usual model is that the arbitration institution will engage an appraiser (sometimes appraisers) at the parties' request to issue an appraisal opinion on the disputed issues. Overall, the appraisers can opine on a wide range of issues from the delay analysis to the quality control of the project. According to the expertise in need, the appraiser is selected from the list of appraisers provided by the arbitration institutions. Under the circumstances that the arbitration institution does not possess such a list, the parties and the tribunal will refer to the list of appraisers provided by the court of the seat of arbitration or the court of the place where the underlying project is located.

After reviewing all the materials, the appraiser will issue a first draft of its opinion. The Tribunal will then invite comments from the parties. The appraiser will then make amendments accordingly to finalise the Appraisal Opinion.

It can be clearly seen that this is in stark contrast from the frequently adopted adversarial style in international arbitration. In a way, the appraiser works like the tribunal-appointed experts, *e.g.*, as provided in Article 29 of the UNCITRAL Arbitration Rules.

It is clear in international arbitration that the expert's role and duty is to assist the tribunal. It should be noted that it is the same case in Chinese construction arbitrations– the appraiser cannot override the tribunal's adjudicative power. Sometimes the tribunal needs to be very cautious about where the line should be drawn when relying on appraisal opinions.

Conclusion

These above three features point to the fact that the arbitration practice is striving in China and there is still room for it to further develop. These Chinese specialties answer to the need of arbitration in China, at the current stage, and are of potential to further transform the Chinese experience, to be shared with the international community.

ABOUT THE AUTHOR

Wei Sun *is a dual qualified dispute resolution lawyer (China Mainland and the State of New York) and partner at Zhong Lun Law Firm. Over the years, he has built up a broad practice including arbitration, litigation and civil enforcement on construction, energy, finance, and corporate equity disputes. Sun Wei also possesses extensive experience in international arbitration and litigation, having assisted clients in commercial disputes covering various jurisdictions. He is also frequently appointed as an arbitrator in domestic and international matters. Aside from legal practice, Sun Wei is a prolific writer and academic, a member of various international dispute resolution organisations and a Representative of China to UNCITRAL Working Group II.*

CHINA & HONG KONG SAR

NAVIGATING SOLVENCY ISSUES IN THE SUPPLY CHAIN: A HONG KONG PERSPECTIVE

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Introduction

Recent years have seen big challenges for the construction industry globally. In the United Kingdom, the Insolvency Service reported in April 2023 that more UK companies in the construction industry succumbed to insolvency than in any other (19%), rising to 4,165 in the 12 months ending March 2023 (nearly 1,000 more than the previous year).

Figures from May this year tell a similar story for Australia: of the 7,991 companies that entered external administration from June 2022 to April 2023, over a quarter were in construction (2,143), more than twice the next highest industry.

The statistics for Hong Kong reveal an outlier: contrary to some predictions, there was not, in fact, an appreciable rise in winding-up orders in 2022 (just 303 across all industries, four more than 2021). While these numbers highlight the resilience of the region as a whole, the construction industry here is not immune to the same economic headwinds seen elsewhere: inflation, labour and material shortages, supply chain troubles and volatile material and energy costs. As such, now is no time to let the guard down on solvency issues. The nature of major construction projects (technically complex with a multitude of stakeholders) and the current economic climate call for continued vigilance.

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In this article we:

- *outline common issues to consider when negotiating and drafting your contract;*
- *identify options (and common pitfalls) when responding to solvency concerns in the supply chain; and*
- *highlight recent developments in Hong Kong in the solvency disputes space.*

Pre-contract and Drafting Issues

Well before a project kicks off, the first line of defence against insolvency risk should always be thorough due diligence. That being said, even the most rigorous due diligence cannot exclude the possibility that solvency issues only come to light after the project has started. For this reason, negotiating and drafting the contract well is essential.

The contract should clearly spell the meaning and the consequences of "*insolvency*". Will insolvency be grounds for termination of the contract? If so, will termination result by default, or will it be at the option of the solvent counterparty?

It is important to define "*insolvency*". One party may wish to define it by reference to precise events, *e.g.*, insolvency upon appointment of a receiver. Left undefined, its meaning will be determined in line with authorities, which generally say a company is insolvent if it is unable to pay debts as they become due. This will be a question of objective fact usually requiring a forensic insolvency expert to give evidence, if the matter is ever in dispute.

A challenge arises where signs of insolvency emerge in piecemeal fashion (as they often do). Early red flags might include staffing or turnover issues, repeated failures to achieve project milestones; failure to pay sub-contractors or even staff; performance issues or deficient workmanship; and requests for changes to the agreed payment mechanism or other arrangements to improve cash flow, to name a few.

In these situations, the ship may look to be sinking even as the source and extent of the leak are unknown. To protect your position, a key contractual safeguard is a clause setting out precisely what information must be made available on request and when it must be provided. For example, an employer may insist that the contract entitles it to certain financial information and accounts to provide a clearer picture of the true cash flow position, or details as to liabilities or the realisability of assets. Another option, which is often included in contracts, is security by way of performance bonds or retention, to provide some recourse if your counterparty becomes insolvent.

Insolvency in your Supply Chain – What are the Options (and Pitfalls)?

Termination on a construction project will normally be the last resort, because there is often an overriding desire to keep the project moving and the time and cost involved with securing a replacement contractor is unattractive. For employers faced with a potentially insolvent main contractor, one option may be to make direct payments to sub-contractors, to secure continued progress. Care should be taken here because there are distinct and hidden risks:

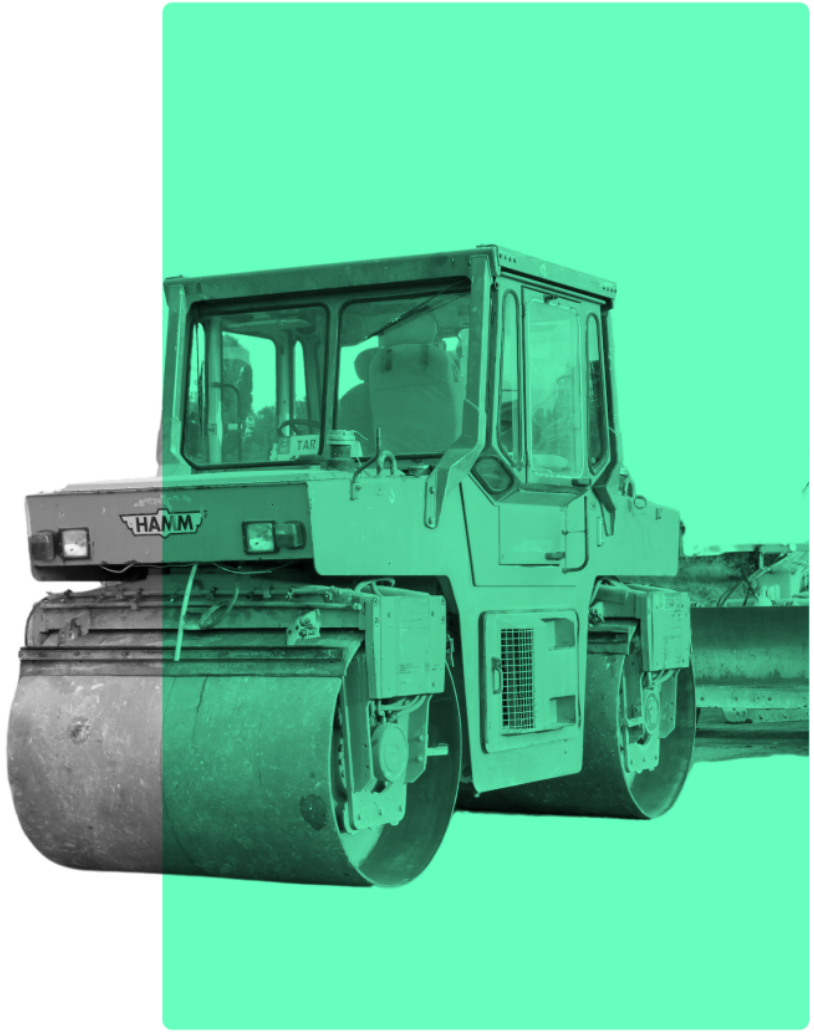
- First, making direct payments may not alleviate a contractor's financial strife if the problem is more fundamental. An employer should monitor the situation closely and reconsider future payments if there is no improvement.

- Second, direct payments risk being treated as unfair preferences which, in Hong Kong, are voidable under Cap. 32 Companies (Winding Up and Miscellaneous Provisions) Ordinance, s. 266. In most instances, the issue in dispute is likely to be whether the employer was "influenced... by a desire to" prefer the sub-contractors, as required by s. 266(4). Provided the subjective desire of the employer is to maintain the project or respond to commercial or moral pressure from sub-contractors, direct payments are unlikely to be voidable. A prudent (but unpopular) option may be to require any sub-contractors to indemnify the employer in the event those payments were ever clawed back by liquidators.
- Third, before making any direct payments, it is essential to ensure that they are contractually operating as intended: *i.e.*, that direct payments to sub-contractors defray any obligation to pay the employer by an equal amount. Again, one solution is to require the sub-contractors to provide an indemnity against any liability the employer may have to the contractor.

Depending on the outlook, other options might include advance payments or early release of retention money. However, one would expect these to be accompanied by appropriate security from the main contractor.

Termination may be preferred, especially if other options have been exhausted. If so, first check there is a right to terminate, either for insolvency, performance issues, or both. An invalid termination may lead to a counterclaim for repudiation. The terminating party should then be ready to immediately exercise its post-termination rights, *e.g.*, taking possession of the site along with all equipment and temporary works (if entitled to do so).

It may be necessary for the employer to engage not just a replacement contractor but further sub-contractors, depending on what works remain to be completed. Detailed record keeping should be kept of all completion costs, plus any defects or unfilled "*scope gaps*" in the work.



Hong Kong as a Forum for Insolvency Related Disputes

Insolvency issues can flare into legal disputes in many ways. We highlight two key developments for insolvency disputes in Hong Kong below.

INTERPLAY BETWEEN THE HONG KONG COURTS' WINDING-UP JURISDICTION AND ARBITRATION

In Hong Kong, insolvency proceedings often begin with a statutory demand. If the debtor fails to pay the statutory demand within 21 days, the crauthor can petition to have the debtor company wound up. However, the debtor may resist a statutory demand if the debt in question is subject to a dispute.

In Re Southwest Pacific Bauxite Ltd [2018] 2 HKLRD 449 ("Lasmos"), the Hong Kong Court of First Instance ("CFI") had held that where three criteria are satisfied, a crauthor's winding-up petition should be dismissed (save in "exceptional" circumstances):

- the company disputes the debt;
- the contract under which the debt arises contains an arbitration clause covering the dispute; and
- the company take the steps required under the arbitration clause to commence the contractually mandated dispute resolution process.

The decision has been the subject of heated debate. A recent decision of the Court of Final ("CFA") appeal, Re Guy Kwok-Hung Lam [2023] HKCFA 9, delivered on 4 May 2023, refers to but does not resolve the Lasmos controversy. The CFA upheld a decision of the Court of Appeal that, where a dispute over a petition debt was subject to an exclusive jurisdiction clause ("EJC") in favour of a foreign court, the court in Hong Kong should decline to exercise jurisdiction in insolvency proceedings, save for "strong reasons" to the contrary.

While the parallel for insolvency proceedings where an arbitration agreement is at play is obvious, the CFA noted that, unlike EJC clauses (where the issue of whether to decline jurisdiction in favour of the agree forum is not "burdened by statutory constraint"), there was by statute a non-discretionary imperative to refer any disputes subject of an arbitration agreement to arbitration. This points toward a potentially compelling policy argument in favour of the Lasmos approach insofar as arbitration agreements are concerned. However, the CFA said it was :

> "not necessary for present purposes to explore the interaction of the non-discretionary provision applicable to arbitration clauses with the statutory jurisdiction of the CFI in bankruptcy and in company insolvency".

PILOT RECOGNITION AND COOPERATION SCHEME

Insolvency proceedings in Hong Kong often involve a cross border element. The recent pilot mutual recognition and cooperation scheme for insolvency proceedings between Mainland China and Hong Kong, signed on 14 May 2021 (the "Pilot Scheme"), is a welcome development in this regard, for liquidators and investors alike.

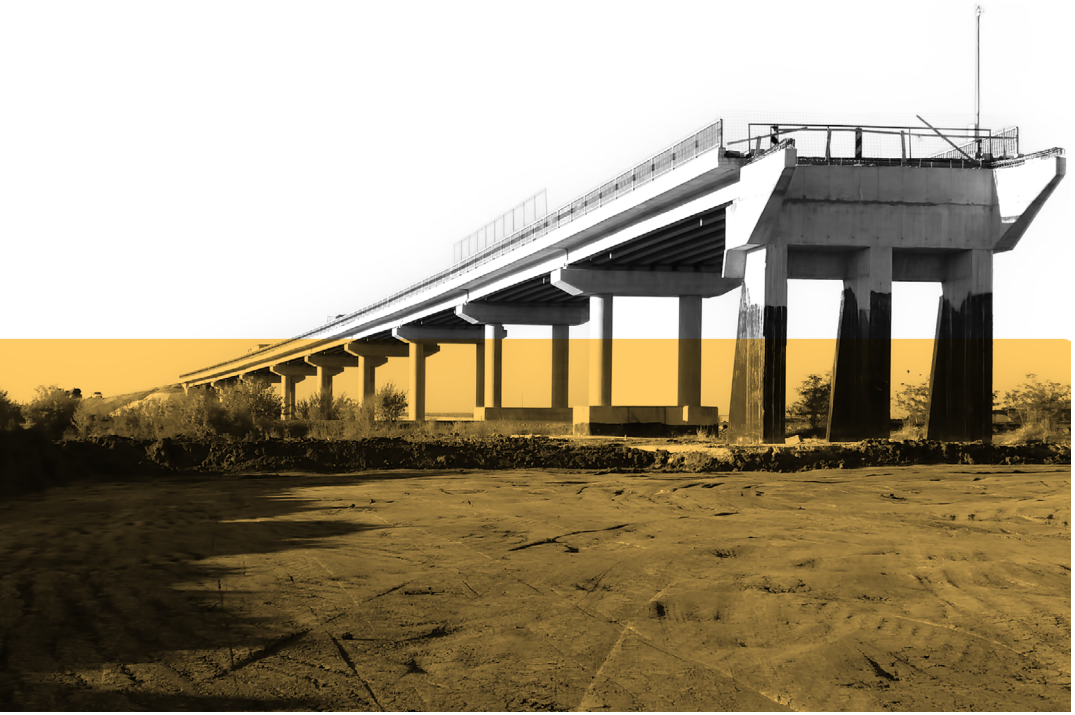
Under the Pilot Scheme, liquidators form Hong Kong may seek recognition of insolvency proceedings in designated areas of the Mainland, and vice versa. The first application under the scheme was made on 20 July 2021, and decided in Re Samson paper Co Ltd [2021] HKCFI 2151. There, the CFI determined that it was:

> "desirable that the Liquidators' appointment [be] recognised and assistance provided in Shenzhen (...) in order that the Liquidators can collect in the assets within the jurisdiction of the Shenzhen Court."

The assets concerned included wholly owned subsidiaries in Shenzhen, and receivables totalling HK$422 million.

In practice, the Hong Kong Court writes a letter to the relevant Mainland Court, and upon recognition by the Mainland Court, the liquidators then exercise the same functions and powers they would otherwise have in Hong Kong. The Pilot Scheme has seen significant uptake since it was implemented and marks a major enhancement to cross border insolvency administration between Hong Kong and the Mainland.

**References to "Hong Kong" shall be construed as references to "Hong Kong Special Administrative Region of the People's Republic of China".*



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INDIA

RECENT AMENDMENTS IN INDIAN ARBITRATION AND CONCILIATION ACT: THE WINDS HAVE BEGUN TO BLOW FOR THE RESOLUTION OF COMPLEX CONSTRUCTION DISPUTES

Prateek Jain
Partner
Masin

Introduction:

In recent years, to cater to its broader goals of fostering economic growth, improving the business environment, strengthening its position in the global market, attracting foreign investment, and easing the burden on courts for settling commercial disputes, India has made significant strides in positioning itself as a prominent destination for domestic and international arbitration. The construction industry is one of the most active and complex sectors for arbitration in India and is, therefore, the biggest beneficiary of these winds of change.

The Act and the Recent Amendments:

The Arbitration and Conciliation Act ("1996 Act"), which came into force on January 25, 1996 and is based on the UN model law adopted by the United Nations Commission on International Trade Law ("UNCITRAL"), was enacted to provide a legislative framework for the conduct of international commercial arbitration, domestic arbitration, and enforcement of foreign arbitral awards.

Despite the enactment of the Act, arbitration in India faced several challenges, such as delays in resolving disputes, the lack of clarity in the Act with respect to certain provisions, the interference of courts in the arbitration process, and the increased costs.

Therefore, in an attempt to make arbitration the preferred mode of settlement of commercial disputes, create greater confidence in parties to choose India as a seat for arbitration, and make India a hub of international commercial arbitration, this 1996 Act was amended three times in the last decade, on October 23, 2015, August 9, 2019 and March 10, 2021.

Key Amendments in the Act Promoting Arbitration as a Means to Resolve Complex Construction Disputes in India:

The key factors that make arbitration an attractive and preferred option for the resolution of complex construction disputes over litigation are the advantages in terms of confidentiality, expertise, flexibility, neutrality, enforceability, cost and time efficiency, and the potential to preserve business relationships.

Accordingly, the changes associated with the above-listed areas are the key amendments that drive this wind of change and shift of preference in India from litigation and other alternative dispute resolution ("ADR") methods to arbitration. The major amendments are as follows:

ENHANCEMENT IN THE AUTHORITY OF THE ARBITRAL TRIBUNAL AND ENFORCEMENT OF MANDATORY REFERRALS BY JUDICIAL AUTHORITIES

Key amendments in this area include:

- The 2015 Amendment to Section 8 and Section 9 mandates all judicial authority to refer the parties to arbitration in respect of an action brought before it, which is subject to an arbitration agreement, and that the arbitral proceedings shall have to commence within 90 days once the Court passes an interim measure of protection under the section.
- The 2015 and 2019 Amendments to Section 17 empower the arbitral tribunal to have (under Section 17 of the Act) the same powers that are available to a court (under Section 9), and that the interim order passed by an arbitral tribunal during arbitral proceedings would be enforceable as if it is an order of a court.
- The 2015 Amendment to Section 2(2) envisages that subject to the agreement to the contrary, Section 9 (interim measures), Section 27 (taking of evidence), Section 37(1)(a), and 37(3) (Appealable orders), shall also apply to international commercial arbitrations, even if the seat of arbitration is outside India.
- These amendments empower the Arbitral Tribunal and ensure that parties resort to arbitration to get their disputes settled if the matter is subject to an arbitration agreement.

RESTRICTIONS ON AUTOMATIC STAY OF THE ARBITRAL AWARD UPON THE FILING OF A CHALLENGE IN THE COURTS

Key amendments in this area include:

- The 2015 and 2019 Amendments to Section 36 and Section 87 stipulate that the arbitral award, for proceedings post-2015 Amendment, would not be stayed automatically by merely filing an application under Section 34 for setting aside the award.
- The 2021 Amendment, through the introduction of a condition under section 36(3), ensures that when a party challenges an arbitral award and alleges that it was induced or affected by fraud or corruption, the court, upon being prima facie satisfied, shall stay the award unconditionally until the challenge is disposed of.

These amendments impose strict restrictions to the unconditional stay and/ or setting aside of the awards merely by filing an application under Section 34. It also makes the arbitration system robust and less prone to corruption and impartial judgments.

FREEDOM TO CHOOSE ARBITRATORS

The 2021 Amendment Act, through the substitution of Section 43J and deletion of the Eighth Schedule, provides the freedom to appoint a foreign national arbitrator. This plays a crucial role in the selection of an arbitrator having the right set of knowledge and expertise to be able to handle complex and large technical disputes in the construction industry efficiently and effectively.

DECLARATION OF IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS

The 2019 Amendment sets that the declaration and disclosures on the part of the arbitrator about his independence and impartiality shall be more onerous and in the specified formats (Sixth and Seventh Schedule of the Act). This amendment promotes foreign parties to opt for arbitration in India as it restricts Indian Government bodies to appoint their employees or consultants as arbitrators.

CONFIDENTIALITY OF ARBITRATION AND PROTECTION OF THE ARBITRATORS FROM LEGAL PROCEEDINGS

Key amendments in this area include:

- The 2019 Amendment, through the introduction of Section 42A, provides for maintaining the confidentiality of arbitration proceedings by the arbitrators, arbitral institutions, and the parties to arbitration, except where its disclosure is necessary for implementation and enforcement of the award.
- The 2019 Amendment, through the introduction of Section 42B, protects the arbitrators from any legal proceedings against acts done in good faith or as intended to be done under this act.
- These amendments ensure the confidentiality of arbitration proceedings and protection of the Arbitrators from legal proceedings against acts done in good faith.

ESTABLISHMENT OF THE ARBITRATION COUNCIL OF INDIA ("ACI") AND GRADING OF ARBITRAL INSTITUTIONS AND ARBITRATORS

- The 2019 Amendment, through the introduction of Section 43, establishes the Arbitral Council of India ("ACI") with the primary agenda, including 'Grading of arbitral institutions and arbitrators', 'Formulation of policies and training relating to Arbitrations', 'Maintaining an electronic depository of the awards made in India', and 'Promotion of ADR'.

This amendment led to an increase in institutional arbitration in India and recognition of the importance of state-of-the-art infrastructure, and investment within India toward establishing world-class arbitration centres. The construction industry is the biggest beneficiary of this amendment, as their disputes are known to have complexity and details with crucial demand for infrastructure for arbitration proceedings, which is now available through institutions such as the Mumbai Centre for International Arbitration ("MCIA") and the Delhi International Arbitration Centre ("DIAC") among others.

SCOPE OF PLEADINGS AND BASIS OF THE DECISION

Key amendments in this area include:

- The 2015 and 2019 Amendments to Section 23, entitle the Respondent to submit a counterclaim or plead a set-off in the proceedings within the scope of the arbitration agreement. It also enforces timelines for submission of a statement of claim and defence, within six months of arbitrators being appointed.
- The 2015 Amendment to Section 25 empowers the tribunal to treat the Respondent's failure to submit his statement of defence as forfeiture of his right to file a statement of defence, but without treating such failure as an admission of the allegations made by the Claimant.
- The 2015 Amendment to Section 28 seeks to relieve the arbitrators from strictly adhering to the terms of the contract while deciding the case. Though the terms of the contract are still not to be ignored, this brings in an element of discretion in favor of the arbitrators while writing an award.
- The 2015 Amendment to Section 31 stipulates that the whole or part of the cost of arbitration shall be paid by the party who initiated the arbitration proceeding, only if the arbitration agreement is made after the dispute in question had arisen.
- The 2015 Amendment to Section 31 also provides for the levy of future interest, in the absence of any decision of the arbitrator on the awarded amount, at 2% higher than the rate of interest prevalent on the date of the award.
- These amendments ensure the protection of the Respondent's right to counterclaim, imposes strict timelines for submission of the Parties' pleadings of arbitration proceedings, relieve the arbitrators from going beyond the terms of the contracts while deciding the case, and enhance the degree of freedom in certain decision and award by the tribunal.

TIME-BOUND AND COST-SAVING PROCEEDINGS OF ARBITRATION

Key amendments in this area include:

- The 2015 and 2019 Amendments, through the introduction of Section 29A and 29B, imposed that the arbitral award shall be made within 12 months from the appointment of arbitrators, with a period extension of a maximum of 6 months with the consent of the parties, unless the Court extends it for sufficient cause or on such other terms it may deem fit.
- The 2015 Amendment to Section 24 stipulates that the hearing for the presentation of evidence or oral arguments be held on a day-to-day basis and mandates the tribunal not to grant any adjournments unless sufficient causes are shown.
- The 2015 Amendment to Section 11 makes it incumbent upon the Supreme Court, or the High Court, or a person designated by them, to dispute the application for appointment of arbitrators within 60 days from the date of service of notice. It also empowers the High Courts to fix limits on the fee payable to the arbitrator as per the rates in Fourth Schedule.
- The 2019 Amendment through the introduction of Section 11(3A) stipulates that in cases where parties cannot reach an agreement, the court, instead of stepping in to appoint the arbitrator(s) by themselves, which takes considerable time, may designate graded arbitral institutions to perform that task.

These amendments make arbitration proceedings time-bound and cost-saving, which is particularly helpful for construction arbitrations, where the appointment of arbitrators and proceedings can often be a lengthy and complex process due to factors such as the technical nature of the disputes requiring specialized knowledge and expertise, requirement of interim relief, and consolidation of arbitrations due to involvement of multiple contracts, subcontractors, and parties.

Overall, the recent changes have made the arbitration process more efficient and effective, which is crucial for dispute resolution in the construction industry where time is often of the essence and late settlement of disputes can have significant financial implications.

Furthermore, India's judiciary has also played a crucial role in promoting arbitration and ensuring the smooth functioning of the Amended Act. The consistent judgments from the judiciary have clarified legal ambiguities, reduced judicial interference, and established a strong precedent for the enforcement of domestic and foreign arbitral awards. Such judgments and the judiciary's pro-arbitration stance have contributed to the acceptance of arbitration as a preferred method of resolving construction disputes in India.

Conclusion

The recent amendments to the Indian Arbitration and Conciliation Act have brought significant changes that have made the arbitration process more time-efficient, cost-effective, enforceable, and confidential. The amendments have successfully tackled various challenges previously faced by construction and other industries. Although there is still ample room for further improvement, I firmly believe that the winds of change have begun blowing in the right direction for the resolution of complex construction disputes in India.

India's journey to becoming an international arbitration hub is ongoing, and the efforts made thus far have already started to bear fruit. These recent amendments and the consequential reforms, infrastructure development, and the promotion of a pro-arbitration environment are allowing India to continue its journey towards becoming a preferred arbitration destination and making its mark in the international arbitration landscape - starting with the Asia Pacific region - since India's strategic geographic location makes it an attractive choice for resolving cross-border disputes.

ABOUT THE AUTHOR

Prateek Jain, *a Partner at Masin, is a seasoned expert witness with over 12 years of experience specializing in dispute resolution and claim consultation within the engineering and construction industry. With specific expertise in conducting Delay, Quantum, and Technical Analysis, he has worked across various Engineering, Procurement, and Construction (EPC) sectors such as Manufacturing Plants (Chemical, Medical, & Metallurgical), Power Plants (Thermal, Nuclear, & Hydro), Roads and Highways, Buildings and Infrastructure Projects (Residential & Commercial), and Pipeline (Petrochemical, Water, & Sewerage). Prateek's extensive project portfolio encompasses regions spanning the Middle East, South Asia, Central Asia, Southeast Asia, and Africa.*

INDIA

"TIME OF THE ESSENCE": TERMS OF CONTRACT & CONDUCT OF PARTIES

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The Indian construction market was valued at $701.7 billion in 2022 and is expected to grow at an annual rate of more than 6% from 2024 to 2027, as per the Global Data Report published on March 29, 2023, on "India Construction Market Size, Trend Analysis by Sector (Commercial, Industrial, Infrastructure, Energy and Utilities, Institutional and Residential) and Forecast, 2023-2027".

While the growth has been exponential, the same has not been without its share of disputes, including on account of delays in the completion of construction projects in India in the public as well as the private sector. The 448th Flash Report on Central Sector Projects dated March, 2023 by the Infrastructure and Project Monitoring Division of the Ministry of Statistics and Programme Implementation of the Government of India states that out of the 1449 government projects, 12 are ahead of schedule, 283 are on schedule, 821 are delayed, 354 projects reported cost overrun, and 247 projects reported both time and cost overrun with respect to their implementation schedules. Such delays are caused due to various factors, including budget inaccuracies, labour challenges, sub-contractor commitment failure, and the impact of the COVID-19 pandemic.

In order to streamline the dispute resolution process, the Indian Department of Expenditure, Ministry of Finance has introduced the "Vivad Se Vishwas" scheme ("Scheme"). The Ministry has invited comments on Part II of the Scheme, which aims to settle certain identified contractual disputes where claims involving the Central Government and its specified governmental undertakings ("Procuring Entities") were submitted by the contractor to the court or for arbitration/conciliation on or before September 30, 2022 and the tribunal/ conciliation committee has already been notified by the Procuring Entity.

In this context, the importance and interpretation by Courts and Arbitral Tribunals ("Tribunals") of clauses, stipulating that time shall be of the essence in construction contracts ("TOE clause(s)"), assume great significance.

Indian Position on TOE clauses

Section 55 of the Indian Contract Act, 1872 provides that where time is of the essence of the contract, then a failure to comply with the stipulated timeline renders the contract voidable at the option of the promisee. The onus to prove that time is of the essence of the contract is on the party claiming it. TOE clauses assume great significance in long-term construction contracts especially as delays in such contracts are not only common but often unavoidable.

The principle that Tribunals and Courts must adhere to the terms of a contract and not travel beyond, is well established in India. However, the application of this rule becomes far more complex and nuanced in case of TOE clauses.

Particularly, in cases relating to construction contracts, the Tribunals and Courts in India have held that TOE clauses in a contract by themselves are not sufficient to prove that time is of the essence of a construction contract and that the true intention of the parties would need to be gathered from a collective reading of the contract as a whole, the conduct of the parties, and the surrounding circumstances. Thus, in essence, there is an assumption against time being of the essence of construction contracts unless the agreement as a whole speaks to the contrary [*See*, **Mcdermott *International Inc vs. Burn Standard Co. Ltd.*** ((2006) 11 SCC 181); and ***State of Gujarat vs. Kothari & Associates*** ((2016) 14 SCC 761)].

Where construction contracts have clauses which militate against TOE clauses, such contracts cannot be considered as contracts where time is of the essence. [*See,* ***Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs vs. State of Maharashtra*** (AIR 1979 SC 720) read with Welspun Specialty Solution Limited ***vs.*** Oil and Natural Gas Corporation Ltd**.** (2021 SCC OnLine SC 1053)]. Whether a particular clause would have the effect of diluting a TOE clause would depend entirely on the facts and circumstances of each case. For example, clauses relating to levy of liquidated damages for delay or clauses providing for the manner in which the contractor is to complete the delayed work or clauses providing for extension of time and mechanism for the same, have been read to dilute a TOE clause.

Further, even the conduct of the parties has been held to be enough to establish that time is not of the essence of a construction contract despite a specific TOE clause in the construction contract. This has been observed in matters, where the timelines in the construction contract have been waived by interparty correspondence or where there is failure to levy compensation for delay in performance [*See*, ***Deconar Services v. National Thermal Power, Judgment of the Delhi High Court, 16 Dec 2009*** (jusmundi.com)].

Of course, this is not to say that courts in India have, as a practice, disregarded TOE clauses in construction contracts. Where the intention of the parties to give effect to a TOE clause is evident from the relevant facts and circumstances, the tribunals and courts have recognised the same. Where work under the contract was connected with other time-bound projects or where the terms of the contract provided for a specific timeline and the consequence of termination for non-completion of work within the stipulated time [*See,* ***Citadel Fine Pharmaceuticals and Ors. vs. Ramaniyam Real Estates P. Ltd. and Ors.*** (AIR 2011 SC 3351)], the courts have enforced TOE clauses.

Further, in contracts where time is not of the essence, the non-defaulting party may make time of the essence by issuing a notice expressly stipulating that time is being made of the essence [*See*, **Hind *Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs vs. State of Maharashtra*** (AIR 1979 SC 720)] and may require performance within a specified reasonable period. What constitutes a reasonable period, would depend on the facts and circumstances of the each case and the nature of obligations to be performed under the contract.

Conclusion

The exponential growth in the infrastructure industry in India and the governmental push on capital spending on infrastructure will invariably lead to high-value disputes. It is important that there is utmost clarity not only in the dispute resolution process but also the legal principles on the basis of which such disputes are resolved. TOE clauses remain a major bone of contention in construction contract disputes in India.

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Indranil has extensive experience of about 20 years in a wide range of disputes relating to commercial contracts, shareholder disputes, corporate insolvency, construction contracts, media rights contracts, etc. His dispute resolution experience is diversified across numerous sectors including construction , manufacturing, securities and financial regulation, health, local government, planning and environment and public sector projects.

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EUROPE

STRUCTURAL SUPPORT: THE ARBITRAL INSTITUTION CONCRETE INSIGHTS - CONSTRUCTION ARBITRATION AT ICC

Disputes arising in the construction & engineering sector generate the largest number of ICC cases. This trend has been confirmed in 2022 with construction & engineering disputes representing 24% of the newly registered cases (compared to 26.2% in 2021). In terms of geographical representation, most construction cases come from North & West Europe, followed closely by Central & West Asia. For instance, in 2021, 65% of the cases came from North & West Europe (40%) and Central & West Asia (25%). The remaining cases came from: Latin America and the Caribbean (12%); South & East Asia and Central & Eastern Europe (with 8% each); North America (5%); North Africa and Sub-Saharan Africa (with 1% each). In 2020, the numbers were as follows: 60% of the cases came from North & West Europe (36%) and Central & West Asia (24%); Latin America and the Caribbean and Central & Eastern Europe (with 10% each), Sub-Saharan Africa (8%), North America (6%), South & East Asia (5%) and North Africa (1%).

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Disputes in this sector often involve projects which are complex, long-term, high-value and, not surprisingly, the amounts in these disputes are considerable. The annual total amount in dispute in construction & engineering cases in the past five years is on average 9,6 billion USD, with cases ranging from 14 460 USD at the lower end, to 3 billion USD at the high end.

Types of projects vary greatly and include roads, railways, bridges, seaport and airport terminals, production and manufacturing plants, (nuclear, hydroelectric, thermoelectric or other) power plants, wind farms, residential real estate, hotels, commercial properties, and other.

Provisions on joinder of additional parties (Article 7 of the ICC Arbitration Rules); claims between multiple parties (Article 8); multiple contracts (Article 9) and consolidation (Article 10) are often invoked in construction and engineering arbitrations. Many cases also include jurisdictional / admissibility objections based on an alleged failure to complete pre-arbitral steps in the presence of a multi-tier arbitration agreement, or time-bar.

Some of the common substantive issues present in such cases include allegations of wrongful contract termination; delay, extensions of time, prolongation costs, application of penalties; calling of bank guarantees and securities.

EA and EPP

Disputes arising in the construction & engineering sectors also represent a substantial portion of cases under the emergency arbitrator ("EA") provisions introduced in 2012 and the Expedited Procedure Proceedings ("EPP") introduced in 2017.

To date, a total of 212 emergency arbitrator applications have been filed and 26% out of these arose from construction projects. Such applications usually involve requests for orders relating to calling of bank guarantees, bonds and letters of credit. The vast majority of the applications in construction cases (64%) have been dismissed for failing to fulfil the conditions for emergency relief or due to lack of urgency/proving a risk of imminent irreparable or serious harm, often relying on the existence of an independent, abstract contractual right to request the execution of the bank guarantee. In some cases, the relief was dismissed because it required a determination of the merits of the case. In few cases, the emergency arbitrator found that he/she did not have jurisdiction.

In the remaining cases, the measures requested were partially granted in 24% of the cases, and fully granted in 3% of the cases, usually on the basis that they were necessary to preserve the *status quo*, or, in other words, avoid further aggravation of the dispute. Finally, 9% of the applications were withdrawn and/or terminated and no order was issued.

In addition, approximately 17% of the cases under EPP arise from the construction sector. The vast majority of these cases involve two parties and a single or few simple issues to be decided such as payment of outstanding sums, entitlement of payment of additional costs incurred or penalties, non-delivery of services or materials, delivery of defective goods. Such cases are normally submitted to a sole arbitrator either according to the arbitration agreement, subsequent agreement of the parties or pursuant to Article 2(1) Appendix VI of the ICC Rules. In terms of procedure, there has been no document production phase and no written post-hearing briefs in the vast majority of cases in which a final award was issued; a hearing was held in more than half of the cases and in a small portion of cases experts were also involved.

Covid-19 and Subsequent Disruptions

The construction sector was one of the sectors which was most heavily impacted by the Covid19 pandemic. The cases registered during the pandemic saw an increase of claims relating to force majeure/hardship, (additional) delays and disruptions caused by government restrictions imposing lockdowns, supply chain disruptions and labour forces as well as increased pricing of materials. Most arbitral tribunals did not find the Covid19 pandemic to constitute a force majeure event for lack of concrete and material impact on the performance of the contract, or that it had only a limited impact and therefore only partially excused the non-performance of contractual obligations.

Russia's invasion of Ukraine in February 2022 and the unprecedented wave of sanctions following the invasion have further disrupted the performance of existing contracts in various sectors including construction. The trend to see more claims relating to force majeure/hardship/change of circumstances coupled with claims relating to Covid19 pandemic will most certainly continue.

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FRANCE

THE CONCEPT OF "TIME" IN CONSTRUCTION: WHERE DID IT ALL GO WRONG?

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Construction contracts generally provide for a completion date. It has been rightly pointed out that the concept of "*time*", and more precisely "*time for completion*", is one of the most important legal and managerial aspects in a construction project and, as a result, ranks among the top priorities of all construction project participants (*See*, Lukas Klee, International Construction Contract Law, 2015 John Wiley & Sons, Ltd, p. 128). That being said, one of the most common characteristics of construction projects is that the works often take longer to complete than initially anticipated. Simply stated, construction projects are frequently "*delayed*". According to the second edition of the Society of Construction Law ("SCL") Delay and Disruption Protocol,

"*in referring to 'delay', the Protocol is concerned with time – work activities taking longer than planned. In large part, the focus is on delay to the completion of the works – in other words, critical delay. Hence, 'delay' is concerned with an analysis of time*".

One of the core elements of the construction industry is that every project is, in effect, a prototype which is simultaneously exposed to various factors both within and outside the parties' control. As a result, delays and disruptions can occur for various reasons including changes in the scope of the works, geotechnical discoveries, labor shortages, missing or incorrect data, force majeure, etc. In other words, while we can all agree on the definition of the term "*delay*" (according to one of the definitions of the Cambridge dictionary, the meaning of the verb "delay" is: "*to make something happen at a later time than originally planned or expected*"), for the purposes of a construction project, each party's perspective can be significantly different when it comes to identifying the specific issues that led to such *delay(s)*.

In order to clarify these issues, the party-appointed or tribunal-appointed expert will, by conducting a *delay analysis*, "reconstruct" the project's history in an attempt to clearly identify and understand the origin(s) and cause(s) of the delay(s). By doing so, the expert, armed with the project's factual background, will support the tribunal's decision-making process (*i.e.,* allocation of responsibilities and the related financial consequences) by shedding light on what it is that led the works not to be completed by the anticipated *time for completion*.

Provided that the contract does not provide for a specific method, experts can apply different delay analysis methods (as-planned vs as-built, time slice, time impact analysis etc.), depending largely on the project's available documentation, as well as the cost of application of a respective method.

The approach "à la française"

It's safe to say that, as opposed to the United States (the Association for the Advancement of Cost Engineering ("AACE") International Recommended Practice 29R-03 Forensic Schedule Analysis or the American Society of Civil Engineers ("ASCE") 67-17 Schedule Delay Analysis) or the United Kingdom (the 2017 SCL Delay and Disruption Protocol), where technical guidelines have long been in place, and are highly influential all around the world, in France, delay analysis is a relatively new science.

Moreover, as opposed to the United Kingdom, where there exists a specialist court (the Technology and Construction Court) "*with specialist judges who deal with all types of construction, engineering and technology disputes*", there are no French courts that are specialized in construction (*See*, Frederic Gillion, Eran Chvika, Toshima Issur and Dominique Nkoyok, "Construction and projects in France: Overview", Thomson Reuters, Practical Law).

Additionally, while in terms of French civil proceedings, the use of court-appointed expert witnesses ("*experts judiciaires*") is widely established in construction disputes, these experts, who are used to assessing technical issues, often lack the necessary training and experience in delay analysis. Largely based on their understanding of the project, the French *experts judiciaires* will provide their opinion on the project's delays, not by applying a specific methodology, but by using their "common sense". That being said, in the past years, there has been a clear shift in that practice, with some welcomed training courses being organized, and the role of delay experts, while not clearly defined, slowly gaining ground.

Today, the role of delay experts in France is twofold: on the one hand they shall enforce the application of internationally known methods, while ensuring that these methods become standard practice. When conducting a delay analysis, the expert is thus required to consider the familiarity of the parties with the various methods.

Even though the selection of the appropriate method naturally lies at the heart of every reliable analysis, the delay expert must take particular care in the presentation of his analysis so that it can be understood (and accepted) by the parties. In other words, the delay analysis, will not necessarily be limited to the strict application of any given methodology but will be backed up by the relevant factual background, in an attempt to identify the cause(s) of the delay(s) and closely review the timeline of the construction project. In this context, the use of the expert's common sense could prove particularly useful.

To the extent that it is possible and practical to do so, delay experts should thus be provided with sufficient documentation in order to have a clear understanding of the construction project (*i.e.,* the base works), the programmes, the delay events and their duration.

In the authors' experience, delay analyses are well received by the French construction world, as they provide the parties with a clear and impartial overview of any given project. Considering the complexity of today's construction projects, we are confident that in France, these methods are here to stay!

ABOUT THE AUTHORS

Sandrine Coste, *one of the founding partners of Lynkea, is a delay and quantum expert, with over 19 years of experience in the construction project industry. Sandrine assists both contractors and employers, and intervenes in various sectors including industry, construction, infrastructure, public and railway works.*

After graduating from the ESTP, Sandrine began her professional career in the project planning department of Artelia. She then decided to join Vinci Construction Grands Projets where she worked as engineer and planner. Through these experiences, Sandrine has developed a comprehensive knowledge of issues relating to costs, project planning and management of large-scale construction projects.

Sandrine works in French and English, and is actively involved with LEAN Legal and Contract Services, the International Chapter Committee of the AFDCI, as well as with the Equal Representation of Expert Witnesses association in France.

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Betina works in French, English and Greek, and participates in training courses on the use of FIDIC contracts.

UNITED KINGDOM

A REVIEW OF THE LAW COMMISSION'S SECOND CONSULTATION ON THE ARBITRATION ACT 1996: IS THE CONSTRUCTION ARBITRATION LANDSCAPE CHANGING?

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*The introduction of the Arbitration Act 1996 (the "**1996 Act**") established an effective and favourable framework for arbitration in England and Wales. When the 1996 Act came into force, it bolstered the existing and long-standing tradition of the courts of England and Wales supporting arbitration agreements and enforcing arbitral awards.*

Not resting on any laurels, at the end of 2021, the Law Commission announced it would conduct a review of the 1996 Act. The aim of this review is to ensure that the UK – and London in particular – remains a leading destination for arbitrations.

The Law Commission conducted a first review and consultation throughout 2022 and published its proposals in September of that year. This was followed by a second consultation published in March 2023. The second consultation focused on the following key points:

- The proper law of an arbitration agreement.
- Challenges to awards under section 67 of the 1996 Act on the basis that the tribunal lacked jurisdiction.
- Discrimination in the context of arbitration.

Reforms to the 1996 Act in these areas may have implications for the construction arbitration landscape, particularly in light of the global wave of energy and infrastructure projects conducted by States transitioning from fossil-based systems of energy production and consumption to renewable energy sources.

Proper Law of the Arbitration Agreement

The current law in England and Wales for determining the proper law of an arbitration agreement was established in the Supreme Court judgment in Enka v Chubb [2020] UKSC 38. The dispute involved the construction of a power plant under a contract that included an agreement for disputes to be referred to the International Court of Arbitration of the ICC, with a

London seat. However, the contract did not specify a governing law, either in relation to the contract as a whole, or to the arbitration agreement.

In short, the *Enka* decision resolved the following:

- In the event that the parties agreed, expressly or impliedly, what law applies to the arbitration agreement itself, this choice will govern the arbitration agreement, unless it is contrary to public policy.
- In the absence of such choice, and if the arbitration agreement forms part of a matrix contract, and if there is a choice of law applicable, express or implied, for the matrix contract, then said law will be applicable.
- However, the chosen law may be displaced in some circumstances (for example, where the law of the seat itself provides that the arbitration agreement is governed by the law of the seat, or where there is a serious risk that the chosen law might render the arbitration agreement invalid).
- In the absence of any choice of law anywhere, the arbitration agreement will be governed by the law with which it has the closest and most real connection. This will be the law of the seat of the arbitration (although, again, that chosen law could be displaced if there is a serious risk that the chosen law might render the arbitration agreement invalid).

The *Enka* decision established a complex framework for determining the proper law of the arbitration agreement and arbitrability, but it leaves room for argument – the Supreme Court itself was divided on the approach with a small majority winning out.

Where construction projects are concerned, these are often documented in a matrix of contracts, involving multiple, overlapping parties. Very much depending on the project, this suite may include concession agreements, license agreements, joint venture agreements, financing agreements and various agreements with sub-contractors and other interested parties.

Arbitration provides a route to consistency across multiple contracts which can be achieved through consolidation. However, any disparity in an arbitration agreement across multi-contract projects can give rise to satellite litigation, with typically delayed and inconsistent decisions.

The costs and time burden of dealing with multiple disputes may also be significant. Thus, it is crucial to identify these issues at the contract negotiation phase. For example, creating certainty by mirroring arbitration agreements in contracts down the supply chain means that liability can be passed on seamlessly to the party ultimately responsible, without overly complicating disputes when they arise.

In addition, such certainty is also often a requirement to ensure project documents are “bankable” and funding may be obtained through project financing arrangements. The more complex and expensive a project is, the more certainty is required by potential lenders.

Yet, when large construction and financing contracts are being negotiated, whilst the seat of arbitration may be considered, the law of the arbitration agreement may not be a top priority. As evidenced by the underlying contractual documentation in *Enka*, it may be overlooked completely. Typically, the arbitration agreement is negotiated at the eleventh hour, is considered to be a minor aspect of the deal and is not reviewed by any international arbitration specialist. Additionally, many practitioners assume that the law of the seat is applicable to the law of the arbitration agreement.

Recognising the benefit of clarity, the Law Commission has proposed that a new rule be introduced into the 1996 Act stating that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.

This proposed rule removes much of the opportunity for argument and satellite litigation. It would also, in turn, assist with the certainty required when it comes to obtaining project financing and enforceability of arbitral awards.

The knock-on effect of a default rule in favour of the law of the seat would see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here. Further clarity on the applicability of the law of the seat to arbitrability may ensure the often more generous English law rules on arbitrability and scope to be applied more widely.

Challenges to Awards under Section 67 of the 1996 Act

- The Law Commission's specific concern in relation to section 67 of the 1996 Act is to avoid situations where parties attempt to revisit, before the courts, a decision made by a tribunal when the tribunal has been asked to determine whether it lacks jurisdiction. Often these attempts amount to a rehearing rather than an appeal. Within this context, the Law Commission's proposal is that:
- The court should not entertain any new grounds of objection, or any new evidence, unless those grounds or evidence could not have been reasonably advanced before the tribunal;
- Evidence should not be reheard, save exceptionally in the interests of justice; and
- The court should allow the challenge only where the decision of the tribunal on its jurisdiction was wrong.

The above is intended to be encapsulated in rules of court, rather than in legislation. However, irrespective of how it is effected, the proposal supports the traditional principle of kompetenz-kompetenz. In essence, it ensures that where a tribunal rules on its own jurisdiction before a court does, there is reason for some deference to be shown to that ruling and to the process which led to it. The contrary argument is that if a party did not agree to arbitration, the tribunal should never be ruling in the first place.

The effect of the proposed reform may not be felt as widely as the one addressing the proper law of the arbitration agreement – it will only come into play where a party seeks to challenge the jurisdiction of a tribunal. However, the impact is likely to be significant when it does. Limiting the scope for subsequent challenge may deter satellite litigation altogether which, in turn, creates more certainty in terms of time and cost.

Where construction projects are concerned, the risk of satellite litigation is real and can spread quickly. Greater certainty would reduce risk, which may be the difference between a viable project and a costly one.

Discrimination

Impartiality is essential to arbitration's offering. One way parties to an arbitration agreement seek to achieve this impartiality is by specifying that the tribunal must be made up of arbitrators of a different nationality to those of the arbitral parties. Accordingly, the Law Commission proposes that it should be deemed justifiable (albeit not essential) to require an arbitrator to have a nationality different from that of the parties.

There is already precedent as to the desirability of an arbitrator having a neutral nationality in a number of institutional arbitration rules used in construction agreements, for example Article 13.5 of the ICC Arbitration Rules. However, perhaps uniquely when it comes to the energy transition, the project documentation often involves state entities. Whilst independence from the State can be achieved, given the high stakes involved, unconscious bias cannot be ignored and the Law Commission's proposal addresses this important factor.

Conclusion

The Law Commission's proposals are only at the consultation stage and are subject to further changes, and it may be some time before any legislative amendments are brought in. However, the proposed reforms, as they stand, should give cause for construction specialists to continue to look favourably towards England and Wales as a core destination for resolving any disputes by virtue of arbitration.

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UNITED KINGDOM

JUMPING THROUGH (ENFORCEABLE) HOOPS: THE IMPORTANCE OF CERTAINTY IN MULTI-TIER DISPUTE RESOLUTION CLAUSES

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Introduction

Contracts in the construction industry often include multi-tiered dispute resolution clauses. These are clauses which set out in an escalating sequence the stages of dispute avoidance and/or alternative dispute resolution ("ADR") processes that parties would need to go through or follow before referring a dispute to litigation or arbitration. For example, the preceding stages of the Engineer consulting before making a fair determination of a claim and the use of dispute boards set out in the FIDIC suite of contracts before arbitration may be commenced.

When contemplating the use of bespoke dispute resolution provisions or modified versions of standard form clauses, it is important to ensure that the clause, and the process prescribed by the clause, is sufficiently certain to be enforceable. This article considers the use of multi-tiered dispute resolution clauses and their enforceability against the backdrop of the recent case of Kajima Construction Europe (UK) Ltd and another v Children's Ark Partnership Ltd [2023] EWCA Civ 292.

Multi-tiered Dispute Resolution Clauses

A clear advantage of multi-tiered dispute resolution clauses is that they impose upon the parties contractual opportunities to cool off and reassess how they might reach a compromise. Such clauses are particularly useful in preventing small disputes from snowballing, saving the parties time and costs, as well as helping them to preserve their commercial relationship.

The trouble arises where one or both of the parties fails to adhere to each of the steps laid out in the clause, and where there is a lack of clarity as to the steps needed to be taken or the mandatory or permissive nature of these steps. There are three common questions: whether the preceding steps are mandatory or optional, the effect of non-compliance and whether or not the clause is enforceable. This article will focus on the third question.

Failing at the Hurdle of Certainty

Historically, the English courts have treated agreements to negotiate or to resolve a claim by friendly discussions with suspicion. An agreement to the effect that parties shall "*strive to settle [disputes] amicably*" or that parties must first be "*unable [to] reach amicable settlement*" before referring a dispute to arbitration was held not to be a legally enforceable obligation (*See*, *Itex Shipping v China Ocean Shipping [1989] 2 Lloyds Rep 522* and *Paul Smith v H&S International Holding* [1991] 2 Lloyds Rep 127). The House of Lords in *Walford v Miles* [1992] 2 AC 128 confirmed that a bare agreement to negotiate was too uncertain to be enforceable and likened such a clause to an agreement to agree.

The introduction of pre-action protocols with Lord Woolf's reforms to the Civil Procedure Rules in 1999 ("CPR"), heralded increasing intervention by the Courts in forcing parties to consider mediation and go through a cooling off process in which they must set out their positions clearly and meet before running off to court (*See*, CPR 1.4).

Against this backdrop, courts have expressly recognized the public interest benefit of giving effect to multi-tiered dispute resolution clauses: first, as a reflection of the commercial arrangement struck by the parties when they entered into the contract, and second, because such clauses provide well-timed opportunities for the parties to resolve a dispute in a cheaper, quicker and less antagonistic way.

In *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), the Court found that a provision requiring parties to participate in an ADR procedure recommended by the Centre for Effective Dispute Resolution ("CEDR") before commencing litigation was an enforceable obligation. Colman J said the clause was certain enough to be enforceable because it did not merely prescribe a good faith attempt to negotiate a settlement; it also identified a particular procedure the parties needed to follow.

Nevertheless, in keeping with the fundamental rules of contract interpretation, clarity and certainty remain key. Where Courts have found that provisions have simply been too uncertain to create an unenforceable obligation, they have not hesitated to make such a finding:

- The Court of Appeal found that an obligation for the parties to "seek to have the dispute resolved amicably by mediation" was unenforceable

for lack of certainty as no provision had been made as to the process by which this mediation was to be undertaken (See, Sulamérica CIA Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638 at [36]). The parties had not defined the mediation process which was to apply, nor referred to the procedure of any specific mediation provider to be applied.

- The High Court considered a multi-tiered dispute resolution provision that required (a) any dispute which had arisen to be referred to a specific person (the Chief Executive) "*with a view to him attempting amicably to resolve that dispute (...) by amicable conciliation of an informal nature" within one month, after which (b) the dispute was to be referred to a three-person panel for another month before arbitration could be commenced. The High Court found that this provision was unenforceable for lack of certainty (See, Tang Chung Wah & Anor v. Grant Thornton International Ltd [2012] EWHC 3198 (Ch)) because it did not provide:*

  (i) the form that the process of conciliation with the Chief Executive or dispute resolution under the panel should take;
  (ii) who should be involved and what their role would be in the process (for example the extent to which the parties to the dispute should participate); and
  (iii) what would suffice in terms of an "attempt to resolve" the dispute on the panel's or the Chief Executive's part.

Latest Guidance from the Court of Appeal

In the recent case of Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Limited, at first instance (See, [2022] EWHC 1595 (TCC)), Joanna Smith J emphasized that the overarching requirement for a dispute resolution procedure to be enforceable is that the provision must be "sufficiently clear and certain by reference to objective criteria" (See, [59]). The Court considered the requirements identified in earlier authorities, namely:

- The process must be sufficiently certain that there should not be the need for an agreement at any stage before matters can proceed (e.g., prescribing how a party can unequivocally commence the dispute resolution process);
- The process or at least a model of the process should be set out so that the detail of the process is sufficiently certain (e.g., what each party must do to put the process into place at each stage, and if relevant, the administrative process for selecting a party to resolve the dispute and to pay that person); and
- The process must be sufficiently clearly defined to enable the Court to determine objectively (a) what is the minimum required of the parties in terms of their participation in the process; and (b) when or how the process will be exhausted or can be properly terminated without breach of the provision.

On the facts, Children's Ark Partnership ("CAP") entered into an agreement with a hospital trust to redevelop a children's hospital, and on the same day, entered into a construction contract with Kajima for the design, construction and commissioning of the hospital (the "Contract"). The Contract adopted the following dispute resolution procedure ("DRP") provision:

- any dispute arising out of or in connection with the Contract had to first be referred to a Liaison Committee (made up of representatives from the hospital trust and CAP) for resolution and any decision by the Liaison Committee would be final and binding unless the parties otherwise agreed;
- the Liaison Committee could adopt the procedures and practices that it considered appropriate from time to time;
- the Liaison Committee was to convene and seek to resolve a construction dispute within 10 business days of referral; and
- all disputes, to the extent not finally resolved pursuant to the procedures set out in the DRP, shall be referred to the Courts of England and Wales.

CAP issued an application to stay court proceedings so that it could carry out the DRP before its limitation period to bring claims expired. Kajima applied to strike out or set aside that application arguing the DRP provision was a condition precedent to commencing court proceedings.

Joanna Smith J agreed with Kajima: she found that the obligation to refer disputes to the Liaison Committee was not defined with sufficient clarity and certainty, such that it could constitute a legally effective precondition to the commencement of proceedings.

On appeal (*See*, [2023] EWCA Civ 292), the Court of Appeal agreed the DRP was simply too uncertain to be enforceable. Coulson LJ gave the leading judgment, finding it was salient that:

- **There was no contractual commitment to engage in any particular procedure, either with respect to the referral, or the process to be followed once the dispute had been referred.** The DRP contained no meaningful description of how a dispute was to be referred or what procedures would be applied after referral: instead, the Liaison Committee could come up with its own rules and procedures. How this would be done was also undefined.
- **There was no binding contractual process with a definable minimum duty of participation.** It was not clear what, if any, level of participation was required by either party to comply with the DRP. On the facts this was further complicated because Kajima had no express right to attend or appear before the Liaison Committee.
- **There was no certainty as to the procedure to be followed after referral. After a dispute had been referred to the Liaison Committee, the Committee had to "***try and resolve the dispute within 10 days" but there was no clear procedure to be followed, nor any method of identifying a procedure (e.g., by recommendation of the CEDR). Everything after the referral would require the parties to reach further agreements to progress the DRP. Further, the fact that the Liaison Committee had a 10-day notice period and a 10-day deadline to "try and resolve" the dispute upon referral meant that the process could theoretically be over before it even began.*
- **There was no clarity as to when the DRP process concluded and when a party could issue proceedings.** Since no procedure had been identified, the parties would need to come to an agreement as to when the process concluded, so that one or both parties could commence court proceedings without breaching the Contract.

There was an additional judgment from Popplewell LJ, which agreed with the unenforceability of the DRP but on a much narrower basis. He said that the only aspect of the DRP rendering it unenforceable was the uncertainty as to how and when the DRP process was complete. Popplewell LJ's *dicta* emphasized the weight which Courts place on contractual autonomy and noted that Courts are reluctant to hold that an agreement is void for uncertainty and will only do so as "a last resort". He considered that there was a sufficiently certain process in place, which depended not on further agreement between CAP and Kajima, but upon the procedure the Committee decided to adopt.

What does this mean for multi-tiered dispute resolution clauses?

While there is no established test as to what makes a multi-tiered dispute resolution provision enforceable and each case will depend on the facts, *Kajima Construction Europe (UK) Ltd v Children's Ark Partnership* has helpfully identified and distilled key principles, which contract-drafters would do well to bear in mind:

- Overall the dispute resolution procedure should be sufficiently certain that there should not be any need for the parties to reach an agreement at any stage.
- There should be a description or model of the process.
- Define the minimum duty of participation such that it is possible to determine objectively whether the parties have done enough to comply with the procedure, or if they are in breach.
- The process should be sufficiently clear that it is possible to determine objectively whether or not the process has been exhausted such that the parties can commence proceedings in court or in arbitration.

ABOUT THE AUTHORS

Roberta Downey *is Head of the firm's International Construction group. She is based in our London office with close to 30 years of experience in commercial dispute resolution, including large trials and highly technical disputes where teamwork together with strategic thinking, effective legal argument and detailed analysis of the evidence is required.*

Roberta's practice focuses first and foremost on the construction, engineering and energy industries. That industry focus has allowed her to build a portfolio of both domestic and international work that spans the full spectrum of energy, power, and major infrastructure projects, including thermal power plants, renewable energy projects, LNG facilities, petrochemical facilities, iconic urban regeneration projects, engineering support services, rail infrastructure, telecommunications, wastewater treatment, recycling facilities, data centres, and automated equipment and control systems.

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SWEDEN

BUILDING FOR A BETTER FUTURE – ARBITRATING DEFECTS IN SUSTAINABILITY STANDARDS IN SWEDEN

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Introduction

Sweden is a country which is well known for its commitment to environmental sustainability. Over the past few decades, Sweden has implemented a wide range of policies and initiatives for the purpose of reducing its environmental impact and promoting sustainable development. One of the key features of Sweden's approach to sustainability is its focus on green energy, with a goal of achieving 100% renewable energy by 2040.

Another notable feature is the country's association with environmental activists such as Greta Thunberg, who has contributed to raise awareness about climate change on a global scale. Sweden is also the home to innovative initiatives such as green steel production, which aims to reduce carbon emissions in the steel industry, and advanced consumer waste management systems that promote recycling and reduce waste. These various features make Sweden a leader in sustainable development and a role model for other countries to follow.

In summary, environmental sustainability is an important topic in Sweden, both politically and socially. Since the construction sector is responsible for approximately 20 % of Sweden's greenhouse gas emissions, it is also a trending topic in the construction industry. As a result of this, the use of sustainability standards in Sweden has increased rapidly in the last decade.

In this article we aim to address the topic of disputes related to environmental sustainability standards for use in the construction industry.

Sustainability Standards in Sweden

Sweden is known for its commitment to sustainable building and construction practices, and there are several sustainability standards and certifications used in the country. Some of the more commonly used standards for construction in Sweden are Miljöbyggnad, BREEAM, LEED, Svanen, and Passive House.

- Miljöbyggnad is a Swedish certification system for sustainable buildings, which evaluates buildings based on several environmental criteria, including energy use, indoor environment, and materials. It is is widely used in Sweden and is recognized by the Swedish Green Building Council (a Swedish non-profit organization and member of founded by Swedish developers, contractors and consultants, which is a member of the World Green Building Council).

- BREEAM is a widely recognized sustainability standard system for buildings that evaluates environmental performance based on several criteria, including energy efficiency, water use, materials, and waste management. It is used in Sweden for many commercial and public buildings.
- LEED is a global certification program that promotes sustainable building design, construction, and operation. Many buildings in Sweden have achieved this certification, including offices, hotels, and hospitals.
- The Nordic Swan Ecolabel is a Nordic standard that sets strict requirements for products and services in terms of environmental impact, health, and quality. It is used for building materials and products in Sweden, including paints, flooring, and insulation.
- Passive House, is a standard for energy-efficient building design that aims to minimize energy consumption and reduce carbon emissions. It is becoming increasingly popular in Sweden, particularly for residential buildings.

In addition to the above, there are many more initiatives and programs that promote sustainable building practices, including those focused on energy efficiency, waste reduction, and sustainable materials.

Also, the Swedish parliament adopted a new Climate Declaration for Buildings Act (2021) in 2022, according to which all construction developers are responsible for filing a climate declaration for their new buildings. The climate declaration describes the building's climate impact and is calculated based on the greenhouse gas emissions from the construction stage, including extraction of raw materials, manufacture of construction products, work at the construction site and transports.

The intention is, according to the Swedish authorities, that the climate declaration gives the developer more in-depth knowledge of various resource flows in the building, their climate impacts, and a documented climate performance. An estimated climate calculation in early construction stages provides a quantitative basis for making well-grounded decisions on how the building's climate impact can be reduced. Increased knowledge provides greater opportunities to reduce the amounts of materials and waste. The costs can thereby also decrease in both the short and long term.

Although the developer is liable for filing the declaration, the contractor may often be involved in the production of necessary calculations and documents.

Defects in Sustainability Standards

If the client under a construction contract in Sweden, such as FIDIC or the Swedish AB system, has included a reference to a sustainability standard as a functional requirement in the Particular Conditions – a failure to attain such a sustainability standard for the building may be considered as a defect, or, depending on the particular construction contract, as a breach of a warranty, condition, or indemnification for which the contractor may be held liable.

Similarly, if the client otherwise has defined what is required in the sense of environmental sustainability, such as the use of a certain percentage of green steel, green concrete, recycled materials, or reductions of greenhouse gas emissions – a deviation from such a set standard may also be considered as a breach of contract for which the contractor may be held liable.

In addition, it may also constitute breach of contract if the contractor has acted negligently in relation to its involvement, if any, with the climate declaration.

It should be noted that the Swedish Supreme Court is quite active in relation to construction law and the most prevalent common forms of construction contract.

In a Swedish Supreme Court judgment dated 17 July 2018 (case n° NJA 2018 p. 653), which concerned *inter alia* the extent of the contractor's obligation to remedy defects, the Court held that the contractor's obligation to remedy defects can be considered to include not only the remedy of the defect itself, but also work, that was foreseeable at the time of the agreement, for accessing the defect and restoring the area afterwards. This applies even if the works required for access and restoration concerns something other than the contractor's own performance. However, the obligation only covers work that has a direct and necessary connection with the remedy of the defect. When the client has the right to remedy the defect themselves at the expense of the contractor, compensation for cost requires that the client has acted reasonably and limited the cost of remedy.

In summary, this means that if the contractor is found to be liable for the defect, that liability covers remedying the defect including works accessing the defect or compensating the client for remedying the defect. If the client is entitled to remedy the defect on behalf of the contractor, the client will be able to claim compensation for costs.

However, there are many practical questions that will arise when arbitrating a complex issue such as environmental sustainability defects.

Practical Approach to Arbitrating Sustainability

In our opinion, there are three principal legal and technical questions to go through before referring any sustainability dispute to arbitration.

First, is it a defect under the applicable construction contract?

- Has a sustainability standard been agreed upon? Who is liable for the design/functionality of the building or plant?
- Has the client requested any design or technical solutions, or otherwise provided any incorrect information, which could affect the energy performance or any other component of the sustainability standard?
- Has the defect been caused by faulty maintenance or otherwise by the client?

Second, what remedies are available under the construction contract?

- Is it possible to remedy the defect?
- Is it possible to identify which parts of the works that have contributed to the failure to attain the sustainability standard, and which parts that it would be necessary to remedy?
- If not, is it possible to claim damages? If yes, is it still possible to claim damages?

Third, is the client liable for any part of the damages?

- Has the client mitigated the damages?
- Has the client fulfilled all contractual requirements for submitting a claim?
- Has the client requested any remedy outside the original scope?
- Has the client provided any incorrect information which could affect the costs?

Depending on the answers to the questions above, the contractor may or may not be liable for a defect in relation to not attaining the sustainability standard. As always, careful analysis of the particular circumstances of the case is required.

Conclusion

In conclusion, while Sweden is a leader in sustainable development and a role model for other countries to follow, it is important to continue to monitor and address sustainability standards in the construction industry.

As environmental sustainability has become a trending topic in the construction industry, the use of sustainability standards has increased within construction projects. However, the increase of sustainability standards may also increase the number of disputes related to defects in such standards where the contractor may be held liable. Contractors should be aware of their obligations and liabilities under construction contracts that reference sustainability standards and strive to meet these standards to promote a better future for all.

ABOUT THE AUTHORS

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Daniel specializes in Swedish and international arbitration with a focus on construction. Daniel has represented Swedish and international parties before courts and arbitral tribunals under various rules, such as ICC *and* SCC*.*

The disputes have concerned construction, infrastructure, advanced technology plants, wind power as well as other energy projects, and challenges of awards before the Appellate Court in Stockholm.

Alexandra Tamm *is an Associate at* Vinge*.*

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MIDDLE EAST & TURKEY

STRUCTURAL SUPPORT: THE ARBITRATION INSTITUTION CONCRETE INSIGHTS - CONSTRUCTION & INFRASTRUCTURE DISPUTES IN 'ARBITRATION-FRIENDLY' SAUDI ARABIA

Already exceeding a market value $120.4bn in 2021, the construction industry in Saudi Arabia is expected to continue to grow during 2023-2026 and beyond (See, Gulf Business, April 18, 2023, "An overview of the latest trends in the Saudi construction sector").

Yet, as recently as 2017, a researcher concluded that, unlike in many other jurisdictions,

> *"litigation is the method commonly used in the construction industry sector to solve disputes."*

In fact, at that time, it was suggested that ADR had been *"rarely used because the public work contract prevents the use of methods other than litigation"* (See, MATEC Web of Conferences, January 2017, "Dispute resolution methods in the construction industry sector in the Kingdom of Saudi Arabia").

Today, Saudi Arabia's dispute resolution landscape has been dramatically transformed into an arbitration-friendly jurisdiction.

Importantly, the Saudi government put in place legislation and regulations that encourage and facilitate the use of ADR in the Kingdom - including making it possible for government contracts to have ADR clauses as part of a streamlined process to approve the use of arbitration.

James Macpherson
Special Counsel
Saudi Center for Commercial Arbitration

Over the last 7 years, the track record of the Saudi Center for Commercial Arbitration ("SCCA") has underscored its attractiveness and suitability to resolve commercial disputes between Saudi and international parties.

Taking into account the scale of local and foreign investment in the Kingdom, especially in major construction and infrastructure projects, many companies and governments are increasingly choosing to seat their arbitrations in the Kingdom and utilizing the SCCA as their arbitral institution. In fact, most international law firms operating in the region have predicted that the number of construction arbitrations seated in the Kingdom is likely to continue to grow.

Judiciary & the Courts

Parties always prefer a jurisdiction with a judiciary that is independent, competent and efficient, with expertise in international commercial arbitration and that is respectful of the parties' choice of arbitration as their method for settlement of their disputes. According to the World Economic Forum's Global Competitiveness Report (2019), Saudi Arabia achieved a global ranking of 16th in 'judicial independence', 17th in 'efficiency of legal framework in settling disputes' and 11th in 'legal framework's adaptability to digital business models'.

Article 8 of the Saudi Arbitration Law and Article 2 of the accompanying Executive Regulations (22 May 2017) stipulate that the competent court for the purposes of arbitration is the Court of Appeal. Furthermore, article 17 of the Executive Regulations ensures that the Supreme Court hears appeals regarding the validity of arbitral awards.

Rights of Representation

The concept of party autonomy is paramount. Both the Saudi Arbitration Law and the institutional arbitration rules of the SCCA allow parties to be represented by any legal representative they wish, both local and foreign. Registration is not required. Further, and contrary to some misconceptions, under the Saudi Arbitration Law, parties can appoint any arbitrator, mediator, lawyer, expert or other representative regardless of gender, nationality or religion. Under article 14 of the Saudi Arbitration Law, however, sole arbitrators and panel chairs must hold a degree in law or Sharia.

Underscoring the Kingdom's commitment to develop the legal profession and raise efficiency, Saudi Arabia has granted foreign licences to major international law firms. In March 2023, the first foreign law firms were granted licences to operate in the Kingdom. Clifford Chance, Herbert Smith Freehills and Latham & Watkins became the first three foreign law firms to be granted licences to practise law in Saudi Arabia since the Council of Ministers approved amendments to the Code of Law Practice on the subject. The ministry had previously approved implementing regulations for licensing foreign law firms. With the rule change, the Ministry of Justice aims to invigorate the legal profession, raise the efficiency of its practitioners and improve the business and investment environment in the Kingdom – including the ADR sector.

Enforcement

Arbitral awards are enforced in accordance with simple, prompt and effective procedures. Under the Enforcement Law, an arbitral award, to which an enforcement order is appended, is considered a writ of enforcement for which compulsory enforcement is permitted. In addition, Saudi Arabia is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Saudi courts are therefore required to give effect to private arbitration agreements and the recognition and enforcement of arbitral awards made in other contracting States.

"The growing track record of government and court support for arbitration in Saudi Arabia", notes DLA Piper's head of litigation and ADR, Henry Quinlan, *"can only give international investors more confidence in bringing their business to the Kingdom"*

New SCCA Arbitration Rules 2023

After an extensive internal review and public consultation process in Saudi Arabia and abroad, SCCA published its revised Arbitration Rules on 1 May 2023. The new Rules apply to all arbitrations filed with the SCCA on or after that date.

SCCA's new rules introduce some internationally benchmarked best practices. Most notably, the revised rules will have the advantage of not specifying a default seat of arbitration. This model could be ideal for many companies that operate in Saudi Arabia, the Gulf Region or have regional headquarters, and for international companies operating in the Middle East and beyond.

The new Arbitration Rules received widespread, favourable reviews across the local and international arbitration community, including in-depth reviews in well-known ADR industry publications and from over 20 international law firms' arbitration practice groups.

Independent commentators have remarked that *"by enhancing the quality and efficiency of the arbitration process, the SCCA is playing an important role (...) helping to position Saudi Arabia as a key player in the global arbitration market"*.

SCCA's 2023 Rules *"also clearly signal an intention by the SCCA to continue reviewing and updating the rules to address practical and commercial concerns identified by arbitration users and practitioners at a pace that few, if any, other arbitral institutions have matched in recent years. In doing so, the SCCA is positioning itself as a forward-thinking, innovative and modern institution"* (See, Dentons, May 4, 2023, "Another small step for the SCCA, another leap forward for international arbitration in the Middle East").

"*Most importantly,"* adds another law firm, *"the changes introduced under the New Rules will bring SSCA arbitrations in line with international best practice and will further enhance the Kingdom's growing reputation as an arbitration friendly jurisdiction"* (See, Clyde & Co, May 8, 2023, "SCCA announces new Arbitration rules: another step forward for arbitration in the Kingdom of Saudi Arabia").

The trend among clients was such that one law firm noted that:

> *"Our experience is that parties active in the Kingdom take an acute interest in dispute resolution clauses that include reference to SCCA arbitration".*

Early Disposal of Claims and Defences

SCCA has introduced new procedures for what is effectively the summary disposal of claims in the context of commercial arbitration. This approach *"should also ensure that claims can be disposed of efficiently"* (See, Herbert Smith Freehills, by Stuart Paterson, Nick Oury and Sean Whitham, May 31, 2023, "New SCCA Rules: strengthening the case for arbitration in the KSA" | Middle East Bulletins).

Outlined in Article 26, the new procedures:

"allow the Tribunal to dispose of jurisdiction, admissibility or legal merit issues raised in a claim or defence without needing to follow every step that would otherwise need to be taken in the arbitration. This essentially amounts to a form of summary judgment and allows the Tribunal to deal with issues such as claims that lack merit, or those where no award could be issued under the applicable law, to be dealt with in a timely manner" (See, Herbert Smith Freehills: here).

Consolidation and Multi-contract Arbitration

> *"The Rules now include consolidation and multi-contract provisions, which are particularly useful for disputes relating to large construction and infrastructure projects that typically involve a number of related contracts on the same project.*
>
> *In particular, Article 11 allows for claims arising out of or in connection with more than one contract or arbitration agreement to be referred to a single arbitration. Article 13 contains provisions in relation to the consolidation of two or more arbitrations commenced under the same arbitration agreement, where the disputes arise from the same legal relationship, or the parties agree to consolidation"* (See, Herbert Smith Freehills: here).

Parties and their counsels are generally keen to see that institutional rules both enshrine principles of party autonomy and choice, while also empowering tribunals to curb party procedural abuses. As UK-based practitioner-arbitrator Michael Patchett-Joyce noted recently: a careful balance has been struck whereby, for example, the SCCA Arbitration rules *"now expressly recognise that parties may be represented by foreign counsel and empower tribunals to supervise and control changes in party representation as a procedural safeguard"* (See, Michael Patchett-Joyce, May 8, 2023, "The New Saudi Rules Reviewed").

Recent Appointments of International Experts

Since 2021, SCCA has added high-profile ADR experts to its board of directors and rules advisory committee as part of its objective to provide first-class rules and services that are responsive to industry needs while being transparent and consistent, and that adhere to international best practices.

A Royal Decree was issued on March 23, 2021, appointing the third independent board of directors of SCCA, chaired by Walid Abanumay with Toby Landau appointed as Vice-Chair. The diverse board includes eminent international arbitration experts from Saudi Arabia, Egypt, France, the United Kingdom and the United States, with experts in law and Sharia as well as business sector leaders.

Half of the incoming board members are leading international arbitration experts, and all are leaders from the business, legal, finance and banking sectors. The new board now reflects more diversity in terms of specialisations, gender and nationalities – with foreign experts comprising 40 per cent of the board, and a foreign Vice-Chair. This diversity enhances and promotes international best practices of SCCA while also reinforcing SCCA neutrality and independence from the public sector.

This decree further implements the SCCA's Statute stipulating that SCCA must have an independent board of directors serving for a term of three years, and that is renewable once.

To ensure the independence of the SCCA committees, world-renowned new members with long-standing experience in institutional arbitration and who are not Saudi nationals joined the SCCA rules advisory committee, which now has 16 members and is chaired by international Arbitration expert Richard Naimark.

In November 2022, SCCA announced the creation of an independent 'SCCA Court' to determine technical and administrative matters related to its caseload, featuring leading international figures including Jan Paulsson as the first President, and two Vice Presidents: Ziad Bin Abdulrahman Al-Sudairy, an arbitrator and principal of the Ziad A Al-Sudairy Law Office in Riyadh and James Hosking, founding Partner of Chaffetz Lindsay in New York. The 15-person court will enhance the consistency of its approach and ensure it is in line with international best practices. It will also improve its operations generally and safeguard quality services into the future.

With arbitration experts from 13 different countries, the SCCA Court is comprised of highly qualified and eminent international arbitrators, former leaders of arbitral institutions, retired appellate judges, partners of international law firms and law professors from renowned universities.

Caseload and Judicial Enforcement

In 2021, courts in Saudi Arabia enforced 204 domestic and foreign awards, representing an aggregate value of US$2.1 billion, with enforcement proceedings being resolved on average within two weeks. Since the Saudi Arbitration Act in 2012, there have been approximately 35,000 applications for enforcement with an aggregate value of enforced arbitral awards coming in at just over US$6.16 billion. In 2019, more applications for enforcement were filed than had been filed between 2013 and 2018.

The latest SCCA study of Saudi case law, related to arbitration published between 2017 and 2022, indicated that of 720 judgments examined there were 814 grounds why a party approached the courts. Of those 814 grounds, 256 (or 31 per cent) related to motions regarding awards (both to enforce and annul). Of the 256 grounds, 131 were related to motions to annul. Of those 131, 120 (or 92 per cent) were denied, leaving an 8 per cent success rate (or 11 motions). Of these 11 motions, seven were granted in full and four only in part. Of the 24 sharia grounds identified, only five were successful (or 21 per cent).

These findings have not only been generally well received by the parties involved in each case, they have also proven compelling and reassuring for local and foreign parties and their counsel assessing Saudi Arabia as a place to do business – and, if needed, enforce arbitral awards.

Saudi Court of Appeal: Statistics and Highlights (2012–2022)

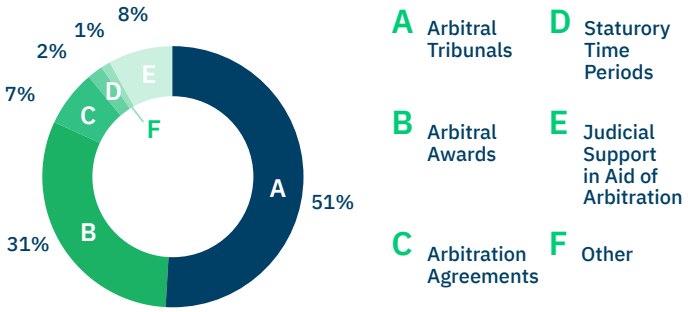
Scope of Study:

720 Judgements issued by the Courts of Appeals between 2017 and 2021

814 Ground for motions registered with the Court of Appeals

38 Judgements issued by the Supreme Court in 2021

Judgements issued by the court of Appeals Ground for Motions relate to:



A Arbitral Tribunals

B Arbitral Awards

C Arbitration Agreements

D Staturory Time Periods

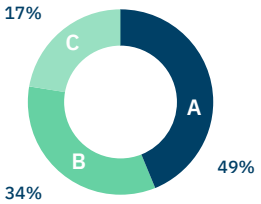
E Judicial Support in Aid of Arbitration

F Other

Saudi Court of Appeal: Statistics and Highlights (2012–2022)

256 Motions to Arbitral Awards

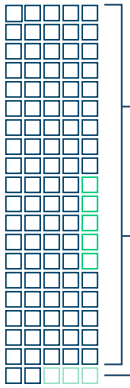
Types of Actions:



A Motions to Enforce/Recognize

B Motions to Annul

C Motions toEnforce/Recognize/Annul in same Proceeding



Of the 131 Annulment Actions:

92% have been denied

5% have been granted in full

3% have been granted in part

Only **3,8%**

of the Arbitral Awards were partially or fully annuled based on

"Violations of Shari'ah & Public Policy"

Judgments issued by the Supreme Court:

The Supreme Court has strictly and consistently followed the requirements for an appeal and dimissed all actions that challenged enforcement orders

"An order to execute the arbitration award may not be appealed, while an order denying execution of the award may be appealed before the competent authority within 30 days from the date of it's issuance"

Article (3)55 of Saudi Arbitration law

Since its launch in October 2016, SCCA has registered almost 300 filings valued at US$1.4 billion, involving domestic and international parties from sectors including banking and finance, capital markets and investment, construction and engineering, and arts and entertainment - and involving over 20 nationalities.

Conclusion

SCCA, launched in late 2016, has established itself as a major player in commercial dispute resolution in the Kingdom and internationally.

Having registered some 300 filings with parties from over 20 different countries since its launch, it has become a well-regarded and trusted arbitral institution. With a solid track record of administering disputes in both the private and public sectors involving 21 different industry sectors, those engaged in the construction and infrastructure disputes can name the SCCA as the institutional provider for arbitration to be administered under its rules with a high degree of confidence.

The decade-long transformation of all aspects of the Saudi ADR practice, profession and industry outlined in this article has been profound, comprehensive and likely to endure. Importantly, the Saudi judiciary has a solid record of skilfully and consistently adjudicating matters related to arbitration, and providing the judicial support required for a consistent record of successful enforcement of local and foreign arbitral awards. With its now well-established local, regional and international reputation as a first-rate ADR institution, SCCA benefits from operating in an arbitration-friendly jurisdiction – reflected in its rapidly increasing caseloads.

ABOUT THE AUTHORS

James MacPherson *is Special Counsel, SCCA, and a leading International Dispute Resolution Specialist with over twenty-five years' experience within public & private sectors as a Neutral (arbitrator, mediator & facilitator), ADR Trainer, Advisor and Systems Designer - including creating three world-class international ADR Centres in the GCC.*

MIDDLE EAST & TURKEY

CONSTRUCTION AND INVESTMENT ARBITRATION TRENDS - TÜRKIYE, CENTRAL ASIA, AND MENA

Diora Ziyaeva
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Partner
BASEAK (Dentons local partnership)

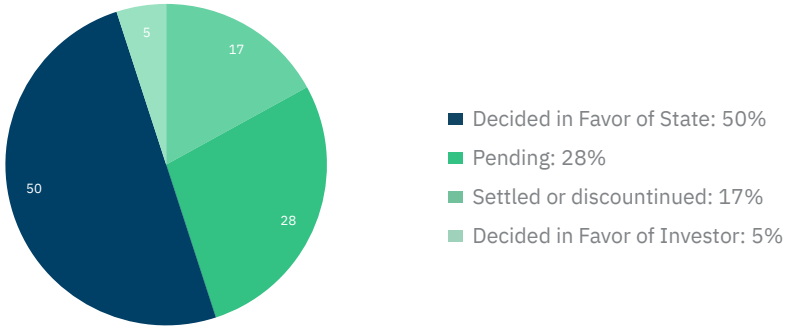
Introduction

Over the past two decades, Türkiye, in addition to Central Asia as a whole and the Middle East and North Africa ("MENA") region, has seen an influx in investment arbitration relating to cross-borders construction projects. This article will analyze the trends apparent in these investment arbitrations, as well as provide guidance to investors in the regions.

General Trends

To understand the trends in investment arbitration in Türkiye, and more broadly throughout the Central Asian and MENA regions, it is important to examine the types of disputes being brought and the relevant countries involved.

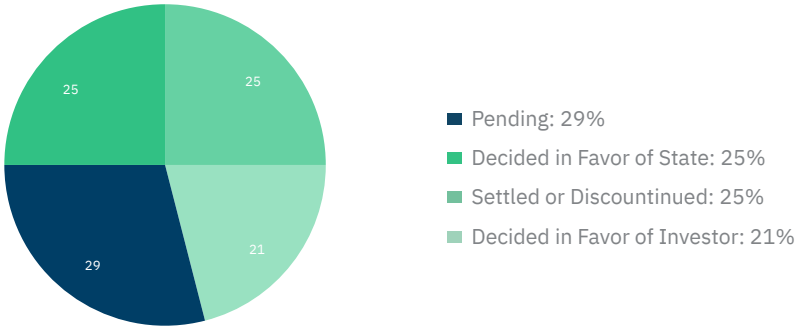
Türkiye has itself been a Respondent in eighteen investment arbitrations.



Investement Arbitrations - Türkiye as Respondent State

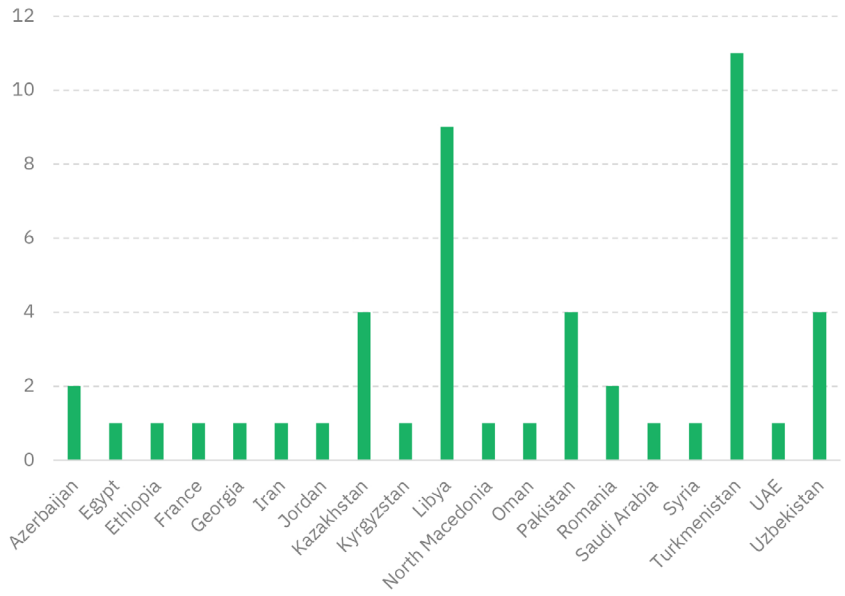
Out of the thirteen cases that have concluded, nine were decided in favor of the State, one decided in favor of the investor, and three settled or discontinued. There have been four cases involving construction projects in which Türkiye was the Respondent, arising out of the: (1) Turkey-United States BIT; (2) Energy Charter Treaty; (3) Netherlands-Turkey BIT; and (4) Austria-Turkey BIT.

Türkiye has been the home state of the Claimant in forty-eight investment arbitrations.



Investement Arbitrations - Türkiye as Home State Claimant

Of the thirty-four cases that have concluded, twelve were decided in favor of the State, ten decided in favor of the investor, and twelve settled or discontinued. Nearly half of these cases – twenty in total – involved construction projects. Similarly, Turkish companies have brought investment arbitrations against a number of states.



Investement Arbitrations by State - Türkiye as Home State of Claimant

The construction-specific cases in which Turkish investors were Claimants have arisen out of the: (1) Pakistan-Turkey BIT; (2) Libya-Turkey BIT; (3) OIC Investment Agreement; (4) Turkey-Turkmenistan BIT; (5) Saudi Arabia-Turkey BIT; (6) Azerbaijan-Turkey BIT; (7) Oman-Turkey BIT; (8) Jordan-Turkey BIT; and (9) Georgia-Turkey BIT .

Turkmenistan has been the most common adversary in these proceedings, appearing as the Respondent State in at least nine arbitrations of construction disputes with Turkish investors to date. Libya has appeared as the Respondent state in multiple arbitrations of construction disputes with Turkish investors as well.

Likewise, other states in the Central Asian region have been involved in a number of investment arbitrations. Turkmenistan has been the Respondent state in sixteen investment arbitrations, the vast majority of which have involved construction projects. Kyrgyzstan has been the Respondent State in eighteen investment arbitrations, several of which involved construction projects. Kazakhstan has been the Respondent State in nineteen investment arbitrations while it has also been the home State of the Claimant in six other investment arbitrations. Uzbekistan has been the Respondent State in nine investment arbitrations and the home State of the Claimant in one other. By contrast, Tajikistan has only been the Respondent State in two investment arbitrations, neither of which involving a construction project.

The Central Asian region is not alone in consistently utilizing investment arbitrations. Dozens more investment arbitrations have been initiated against or on behalf of States in the MENA region. In fact, the MENA region has represented roughly 19% of ICC cases filed in recent years – as well as 9% of recent ICSID cases. A number of these arbitrations have involved substantial awards. For example, a Spanish company prevailed before an ICSID tribunal on a $2 billion USD claim against Egypt in 2018 (*See, Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4).

The increase in investment arbitration participation in Türkiye should come as no surprise as the State has consistently expanded its number of relevant treaties. Just in the last five years, Türkiye has signed an additional eight bilateral investment treaties, in addition to free trade agreements with the U.K. and E.U.

- Türkiye-Uruguay BIT, signed in 2022 [not ratified]
- Democratic Republic of the Congo-Turkey BIT, signed in 2021
- Angola-Turkey BIT, signed in 2021
- Burkina Faso-Turkey BIT, signed in 2019
- Cambodia-Türkiye BIT, signed in 2018
- Turkey-State of Palestine BIT, signed in 2018
- Lithuania-Turkey BIT, signed in 2018
- Turkey-Zambia BIT, signed in 2018 and entered into force in 2020

For the Central Asian region, this increase in participation in investment arbitrations coincides with each State's actions to develop an individual investor-state framework following the collapse of the USSR. As each State continues to develop as economic powers, the need for foreign investment –and with it protections for foreign investors – grows. In the MENA region, while overall levels of participation are strong, the explanation varies from State to State, including both an influx of signed BITs and the effects of events like the Arab Spring.

Noteworthy Cases

The uptick in arbitrations brought on behalf of Turkish construction companies began in the mid-2000s. In 2006, a Turkish construction company Sistem Muhendislik Insaat Sanayi ve Ticaret AS ("Sistem") initiated an ICSID arbitration stemming from a hotel project in the Kyrgyz Republic (*See, Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic,* ICSID Case No. ARB(AF)/06/1). The dispute dates back to a 1992 joint venture between Sistem and a Krygyz company to build and operate the Hotel Pinara in Bishkek. In 1999, due to the bankruptcy of the Krygyz company, Sistem purchased the full ownership share of the hotel and operated it until 2005. In March 2005, following a revolution in Kyrgyztan, Sistem's staff members were physically removed from the hotel and barred from its operation by the former joint venture partner. Shortly thereafter, a local Kyrgyz court reversed the joint venture partner's bankruptcy, and awarded the company the 50% share in the hotel that Sistem had previously purchased. Even though under this scenario Sistem would also own a 50% share in the hotel, the investor was prevented from operating the hotel.

After unsuccessfully resorting to local courts to regain access to the hotel, Sistem brought claims under the Kyrgyzstan-Turkey BIT for expropriation and breach of the guarantee of full protection and security ("FPS"). The tribunal agreed with Sistem on the expropriation, finding that the company was wrongly deprived of its interests in the hotel. While Sistem sought lost profits, the tribunal noted that the BIT's expropriation provision required compensation of the real value of the hotel at the time of the taking. Following expert submissions from both parties, the tribunal awarded $8.5 million USD, plus interest, to compensate for the expropriation. Finally, the tribunal declined to address the FPS claim, finding that Sistem had been fully compensated for the expropriation.

In recent years, two areas in particular have led to interesting developments in investment law in the two regions.

The first area of interest involves two recent arbitrations brought by Turkish companies against Turkmenistan – *Kiliç v. Turkmenistan* (ICSID Case No. ARB/10/1) and *İçkale v. Turkmenistan* (ICSID Case No. ARB/10/24). Each case dealt with the application of Article 7(2) of the BIT, which first requires the investor to resort to the local courts of the host State and how to address that provision in light of multiple, and conflicting, translations. While each tribunal eventually held that only the English and Russian versions of the BIT were authentic, they differed on how to handle disparities between the two versions.

In *Kiliç*, the Claimant alleged that Turkmenistan failed to pay certain amounts owing under various construction projects and sought damages of nearly $300 million USD for violations of the Turkey-Turkmenistan BIT. Likewise, in *İçkale*, the Claimant initiated ICSID arbitration under the Turkey-Turkmenistan BIT stemming from various construction projects. The Claimant sought damages of roughly $570 million USD.

The *Kiliç* tribunal analyzed the translation issue under Article 33(4) of the VCLT and held that the whole of Article 33 reflects customary international law. The tribunal then interpreted Article 7(2)'s requirement of first bringing claims in local courts as a matter of jurisdiction. The *İçkale* tribunal disagreed, holding that this requirement was not "*a condition to Turkmenistan's offer to submit itself to the jurisdiction of an international tribunal to arbitrate investor-State disputes under the Treaty.*" Therefore, it was judged as a matter of admissibility instead, with the tribunal then dismissing the claims as contractual, instead of treaty-based.

A later tribunal dealing with annulment proceedings in *Kiliç* avoided the Article 7(2) issue entirely, focusing instead on Article 52 of the ICSID Convention. The tribunal's decision demonstrates that re-interpretating Article 7(2) of the BIT is neither necessary to annul an award on the basis of Article 52 of the ICSID Convention nor related to the grounds for annulment.

The second area of interest involves arbitrations stemming from the difficulties Turkish construction companies had in Libya following the 2011 civil war.

In 2016, a Turkish company Cengiz İnşaat Sanayi ve Ticaret A.S. ("Cengiz") initiated an ICC arbitration stemming from contracts with the Libyan state to construct a number of infrastructure projects in the Al Haya Valley (*See, Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ). Following the outbreak of civil war in early 2011 in Libya, Cengiz's work camps were destroyed and the company was further prevented from working on the infrastructure contracts. Cengiz brought claims before the ICC under the Libya-Turkey BIT for breaches of FPS, fair and equitable treatment ("FET"), and for war losses. Cengiz sought in excess of $300 million USD.

Initially, Libya argued that Cengiz could not rely upon the Turkey-Libya BIT as it came into force after the civil war began in 2011. The tribunal disagreed, finding that many of the acts and omissions at issue occurred following the BIT's entry into force. Following a hearing on the merits, the tribunal awarded over $50 million USD to the Claimant. In doing so, the tribunal rejected Libya's argument that the claims should be assessed merely in light of a war losses clause in the BIT. The tribunal also rejected the Claimant's attempt to recover future lost profits, limiting its compensation to the amount actually lost on the investment. A similar arbitration before a separate ICC tribunal concluded with a $21.9 million USD award for another Turkish investor seeking compensation for failures to protect construction investments in Libya during the civil war period (*See, Etrak İnşaat Taahut ve Ticaret Anonim Sirketi v. State of Libya*, ICC Case No. 22236/ZF/AYZ). However, not all claims against Libya were successful, take for example *Tekfen and TML v. Libya* (ICC Case No. 21137/MCP/DDA). There, similar claims as in *Cengiz* and *Etrak* failed as the tribunal upheld jurisdiction but found against Claimant on the merits.

Likewise, not all claims brought by Turkish investors outside of Libya have been successful either, take as an example *Muhammet Çap & Bankrupt*

Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6). In that proceeding, a Turkish investor initiated an ICSID arbitration stemming from the cancellation of various construction contracts and the resulting non-payment. The Claimant invested in a local construction company with more than thirty-two large-scale construction contracts. These projects included schools, parks, apartments, a convention center, and a shopping center. Several of these contracts were terminated while others were not paid upon completion.

The Claimant brought claims under the Turkey-Turkmenistan BIT for expropriation, breach of FET and FPS – among others – and sought nearly $500 million USD in damages. Ultimately, the ICSID tribunal rejected the claims. In addition to finding that the Claimant failed to prove the State's acts and omissions led to an indirect expropriation, the tribunal found that: (1) several of the claims should have been brought before local Turkmen courts as they were contract matters falling outside the BIT; (2) Claimant was unable to use the BIT's most favored nation clause to import substantive protections from other treaties signed by Turkmenistan; and (3) the existence of customary international law rights did not create a separate cause of action. Without being able to invoke FPS and FET standards from other treaties or customary international law, Claimant had no claim for those violations.

The *Muhammet Cap* case serves as an important reminder to investors to consider two questions when considering initiating an investment arbitration: (1) what are the substantive rights under the treaty; and (2) what are the procedural requirements under the treaty. It is crucial for investors to understand the specific substantive rights provided under the treaty in question. This includes a review of the treaty itself as well as decisions involving the treaty. Understanding whether one can import substantive rights from separate treaties can help determine exactly what claims can be brought. Without such an analysis, an investor runs the risk of making the same mistake as the Claimant in *Muhammet Cap* – claiming substantive violations for rights that the treaty does not actually provide.

Once an investor determines the specific rights at issue, they must ensure that any procedural steps required by the treaty prior to initiating arbitration are followed, as well as ensuring that the claims brought are those allowed under the treaty. Procedural concerns potentially include jurisdictional issues –such as cooling off periods, admissibility issues, statute of limitations concerns, exhaustion requirements, or issues with the treaty's definition of investor or investment. In *Muhammet Cap*, the tribunal noted that several of the claims brought by Claimant were required to be brought in local courts. Because the Claimant was required under the treaty to bring those claims locally, they fell outside the jurisdiction of the tribunal.

While Türkiye has more often been on the Claimant side in investor arbitrations, a number of claims have been brought against the state as well. In 2011, Tulip Real Estate Investment and Development Netherlands B.V. initiated an ICSID arbitration regarding its investments in a Turkish real estate venture (*See, Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28). The Claimant invested in a local real estate company holding both mixed-use residential and commercial real estate assets. The Turkish State was the majority shareholder of the company. In 2010, the company terminated a contract for one of its more lucrative ventures. The Claimant brought claims under the Netherlands-Turkey BIT for indirect expropriation, FET, and FPS. Claimant sought a damages award of roughly $450 million USD. The tribunal rejected the claims, finding that the contract cancellation could not be attributed to the Turkish State, even though it owned a majority interest in the company. Though the tribunal did not fully analyze the issue, it also held that even if the acts were attributable to Türkiye, they would not have been a violation of the treaty.

Conclusion

In the future, we can expect that the number of investment arbitrations in Türkiye and the surrounding regions will continue to multiply as a result of increasing globalization. As such, it is crucial for investors to remain aware of their substantive rights and protections under the growing number of BITs relevant to investments in the regions. Given the nuance inherent in cross-border construction disputes, it is important to engage professionals experienced in such disputes in the region as they have the necessary expertise to evaluate the options available to investors. Knowledgeable counsel can ensure that the appropriate substantive violations are considered and that any pre-arbitration procedural requirements are completed. Doing so at the outset can help to avoid some of the pitfalls. Without that expert assistance, investors run the risk of limiting their own recovery or otherwise failing to recover for otherwise valid claims.

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MIDDLE EAST & TURKEY

LEGAL UPDATE IN THE CONSTRUCTION SECTOR: KINGDOM OF SAUDI ARABIA AND THE UNITED ARAB EMIRATES

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Construction is one of the key industry sectors in the GCC; notably in Saudi Arabia and the United Arab Emirates ("**UAE**"). The construction sector contributes around US$ 45.5 billion and US$ 36.8 billion to Saudi Arabia and UAE's GDP respectively. In addition, Qatar has seen significant activity with the infrastructure developments required to host the 2022 World Cup.

In 2017, Saudi launched the future city of NEOM, a megaproject with an estimated cost of US$ 500 billion. In October 2018 the Saudi Public Transport Authority signed a memorandum of understanding with China Civil Engineering Construction Corporation regarding project 'Land Bridge', which is a US$ 27 billion railway linking the east and west sides of Saudi Arabia. Multiple other mega projects have also been announced or commenced including Red Sea Global, Diriyah, AlUla, King Salman Energy Park, to name a few.

Similarly, the UAE has seen huge developments in recent years and this looks likely to continue. The development of 'Wynn Resort' located in 'Al Marjan Island' in the emirate of Ras Al Khaimah is expected to open its doors to visitors in 2027, with an estimated cost of US$ 3.9 billion. Similarly, Caesar's Palace has opened on Bluewaters Island, Dubai, home to the troubled Ain Dubai, the World's largest observation wheel. MGM has announced that it is bringing two of its historic Las Vegas brands to Dubai in the MGM and Ballagio hotels. The US$ 30 billion Barakah nuclear power plant in Abu Dhabi is a milestone achievement for the UAE, since it is the first nuclear power plant on the Arabian Peninsula. The Etihad Rail network has commenced operations linking the Emirates and recently announced an agreement to extend the network into Oman. In addition, Altantis – The Royal Residence and One Za'abeel projects are nearing completion; activity on the World Islands is ramping up; Nakheel has hinted at new plans for Palm Jebel Ali; and an extension is planned to the Mohammed bin Rashid Solar Park purportedly making it the largest in the world.

The above is a clear reflection of the region's remarkable growth and the continued upward trajectory of the construction industry in both countries. In parallel, however, the increasing development of this sector requires updates to the laws and arbitration institutes that can accommodate any contractual difficulties arising from the dealings between parties. Both Saudi Arabia and the UAE have taken giant strides to adapt their legal systems to cater for modern challenges.

SAUDI ARABIA

In 2012, Saudi Arabia introduced the new Arbitration Law ("**New Law**") amending the 1983 version. Based on the 1985 UNCITRAL Model Law, albeit with some reservations, the New Law is applicable to any arbitration seated in Saudi. While this may not represent a terribly recent development, we are now seeing the development of the legal and judicial system to support the arbitration process generally.

The New Law addresses some of the lacunas in the former arbitration regime, such as embedding the principle of party autonomy by allowing disputants to select their preferred choice of the procedural law and the procedural aspects of the dispute, *i.e.*, institutional rules, number of arbitrators and language of the proceedings. Additionally, the New Law limits the power of Courts to intervene throughout proceedings.

However, disputants and tribunals must still be vigilant as any award must be compatible with Sharia Law, otherwise, by virtue of Article 50 (2) of the New Law, the Court of Appeal may nullify an award should it be in conflict with Sharia or public policy. Public policy is often given a broad interpretation in the Region.

Encouragingly, recent statistics issued in 2022 by the Saudi Center for Commercial Arbitration ("**SCCA**") on annulment proceedings indicate that there has been no instance of a foreign arbitral award being annulled as a result of violation of Sharia or public policy during the first nine months of 2022.

The New Law was complimented by Royal decree No. M/53 issued in March 2013 which enacted the New Enforcement Law ("**NEL**") and Executive Regulations issued in 2017 that clarified some elements of the New Law. The NEL introduced an Enforcement Judge thereby departing from the traditional enforcement route before the Board of Grievances ("**BOG**"). Currently, an award crauthor can seek enforcement of the award directly before the Enforcement Judge, and a high level view currently shows a Court system recognising, supporting and enforcing arbitral awards.

In a bid to nurture the use of arbitration as a means for dispute resolution, Saudi Arabia has encouraged governmental and quasi-governmental entities to adopt arbitration as a means of dispute resolution, through numerous laws, including:

- **the Government Tenders and Procurement Law 2019**.
- **Franchising Law 2019 enacted by Royal Decree No. M/22**.
- **Article 10 (2) of the New Law**.
- **Royal Decree No.280004**.

Furthermore, on April 8, 2020 Saudi Arabia introduced the new Commercial Courts Law ("**CCL**"). The CCL introduced a number of important changes to the law including:

- A limitation period of five years in relation to commercial claims (subject to exceptions). Under Sharia, it is often said that a just claim never dies so this is a major change.
- Encouraging the use of mediation.
- Making payment orders and class actions available to litigants.

On November 5, 2020, Saudi Arabia adopted the 2019 United Nations Convention on International Settlement Agreements Resulting from Mediation ("**Singapore Convention**") albeit with a reservation that:

> "*The Singapore Convention shall not apply to settlement agreements to which the Kingdom of Saudi Arabia or any of its governmental agencies is a party, or any person acting on behalf of those governmental agencies*".

The Kingdom is promoting the use of alternative dispute resolution which should be welcomed, especially by international entities entering the market.

In 2021, Saudi Arabia announced that it is in the process of improving the legislative environment by issuing several new laws, among them a Civil Transactions Law ("**CTL**"). The CTL will mark a milestone for Saudi Arabia's legislation since it would provide a codified law which will be particularly helpful to parties not familiar with Sharia.

Established in 2014 and operational since 2016, the SCCA is considered a newcomer to institutional arbitration. Nevertheless, and due to its proactivity, the SCCA has witnessed a spike in the number of cases administered by it from less than 10 cases a year to a current total of 220 cases valued at US$ 1.3 billion. It has also now opened an office in the DIFC, Dubai which is a very interesting move given the recent closing of the DIFC-LCIA centre.

The first edition of the SCCA Arbitration Rules was released in 2016 ("**2016 Rules**") and were based on the UNCITRAL Arbitration Rules. On October 15, 2018, the SCCA added Appendices II, III, and IV to the 2016 Rules which introduced expedited procedures, emergency arbitration procedure, and an online dispute resolution procedure.

The SCCA Rules were further amended on 1 May 2023 ("**2023 Rules**"). Amongst other things, the 2023 Rules establish the SCCA Court, an independent body to the SCCA composed of 15 well known and respected arbitration practitioners, current and retired judges, and academics from varied backgrounds.

UAE

The UAE has developed as a popular center for international dispute resolution in the region offering a choice of multiple jurisdictions and forums of dispute. For example, as an alternative to local courts that apply civil law principles, parties may be able to refer disputes to the English common law courts of the Dubai International Financial Centre ("**DIFC**") or Abu Dhabi Global Markets ("**ADGM**"). Along with a developed arbitration landscape, this allows parties a very real freedom of choice in selecting their dispute resolution forum.

The UAE is home to several prominent arbitration centers but Decree 34 of 2021 recently abolished both the DIFC – LCIA Centre and the Emirates Maritime Arbitration Centre ("**EMAC**") and transferred ownership of all assets to DIAC. Consequently, all arbitration agreements referring to the DIFC – LCIA or EMAC are now, by default, referred to DIAC with DIFC being the default seat. DIAC became the sole arbitration institute in Dubai until November 2022 when the SCCA opened its first regional office outside Saudi Arabia. It is worth mentioning that other arbitration institutions are spread across the UAE, for example, ADGM hosts an office for the International Chamber of Commerce ("**ICC**") and the Abu Dhabi Commercial Conciliation and Arbitration Centre ("**ADCCAC**") has been in operation for almost 30 years. The UAE has become the regional leader in promoting arbitration as a means of dispute resolution.

In 2023, DIAC amended its 2007 Rules ("**New Rules**") which became effective on 21 March and apply to any arbitration filed on or after this date. The New Rules represent an evolution to the 2007 Rules and generally adopt international best practice.

In 2019, Abu Dhabi enacted Law No. 2 of 2019 Regulating Partnerships between Public and Private Sectors ("**PPL**") to encourage long term investment of the private sector in major infrastructure projects. Similarly, Dubai promulgated Law No. 12 of 2020 on Contracts and Warehouse

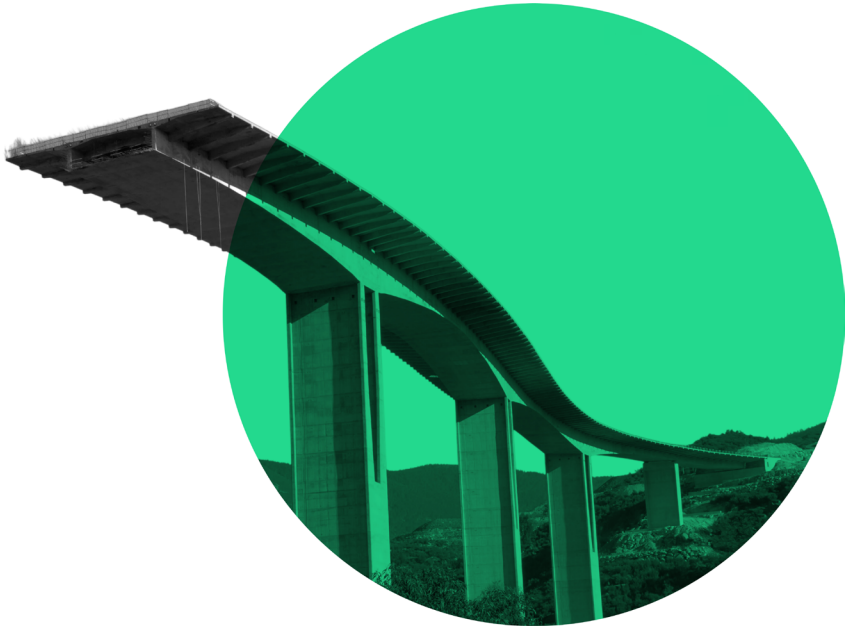
Management in Dubai Government ("**CWMD**") creating a framework and regulations for procurement by Dubai government entities.

In both the UAE and KSA, the *Fédération Internationale des Ingénieurs-Conseils* ("**FIDIC**") form contracts are widely used with a general preference for the 1999 Red Book edition ("**1999 Edition**"). The 2017 edition of the Red Book ("**2017 Edition**") has gained minimal traction in the region. Other forms of FIDIC contract such as the Yellow, Green and White Books are also used, albeit less commonly. The Silver Book (EPC/Turnkey Projects) is often used in Public-Private Partnership contracts ("**PPP**") but UAE government entities generally prefer their own form of contract for use in PPPs.

The FIDIC 1999 Edition includes an adjudication clause (unless agreed otherwise) for the resolution of disputes by a Dispute Adjudication Board ("**DAB**"). DAB can be constituted of either one or three members in the form of a standing board or an *ad hoc* board. The difference is that a standing board is appointed upfront, *i.e.*, before a claim arises, unlike an *ad hoc* board where it is appointed once a claim is raised. The 2017 Edition changed DAB to Dispute Adjudication/Avoidance Boards ("**DAAB**"). Both editions provide that a DAB or DAAB is required to issue their decision within 84 days after receiving reference and any decision is binding on both parties. The concept of dispute boards seems to have particular merit on large projects as the board is acquainted with the project and can determine disputes while the project progresses. Such boards could, for example, prove useful on some of the Saudi mega projects that are now under construction.

Effective from January 2023, the UAE introduced some substantial amendments to its Civil Procedures Law. Of particular note is the option for English language proceedings in local courts subject to certain requirements. This could be particularly helpful in construction disputes which might otherwise require the translation of thousands of pages of contract documents. Furthermore, the Court of Appeal is now empowered to 'filter' applications to appeal, thereby potentially, restricting what has generally been considered an automatic right of appeal.

Finally, it is worth noting that Dubai Courts declared the bankruptcy of Arabtec Holding Company and various of its subsidiaries in October 2022. The Company entered proceedings in January 2021, but the declaration has now been issued. Trustees have been appointed to liquidate the assets of the Company and the market will monitor the process with interest, particularly its crauthors.



In conclusion, the UAE and the Kingdom of Saudi Arabia, in particular, are leading the charge in construction works and are developing their legal processes and dispute resolution options to suit. Dubai has for some time been considered as a regional heavyweight in terms of its support for arbitration and it continues to develop this position. Saudi Arabia is a relatively new entrant onto the international arbitration stage but has taken large strides in a short period of time to display its support for arbitration and we expect this trend to continue over the coming years.

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ISRAEL

CHALLENGES IN ARBITRATING INFRASTRUCTURE CONTRACTS UNDER ISRAELI LAW: MUNCHAUSEN IN THE MIRE

Can Infrastructure Concessionaires Pull Themselves by Their Own Hair? The Israeli Supreme Court Addresses Contractual Stipulations Bypassing the Rule of Contract Interpretation Against the Drafter

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Over the last two decades, the number of Israeli seated infrastructure arbitrations between Israeli and non-Israeli counterparties has grown substantially. This trend stems from various factors, including the surge of public and private infrastructure mega-projects meant to facilitate Israel's rapid population growth. The need to build first-of-their-kind projects made the skills and experience of international contractors in high demand. As a result, they take an integral part of virtually every significant infrastructure project in Israel, whether it is the construction of a privately owned power plant or the light railway project.

Concessionaires traditionally bear most of the project's risk, and by and large, they have the upper hand when negotiating against a sub-contractor or project operator. This power imbalance has two important implications for ensuing court litigation and arbitrations. First, the concessionaires may leverage their negotiation powers to set the seat of the arbitration in Israel and make Israeli law the applicable law of the contract. Second, the concessionaire may dictate contractual language to its advantage, to the extent it excludes the application of interpretation rules meant to protect the weaker contractual party.

Advising clients facing construction arbitrations under Israeli law poses significant challenges, particularly when confidentiality in commercial arbitration makes it difficult to ascertain how Tribunals apply Israeli case law and resolve tensions between interpretational approaches.

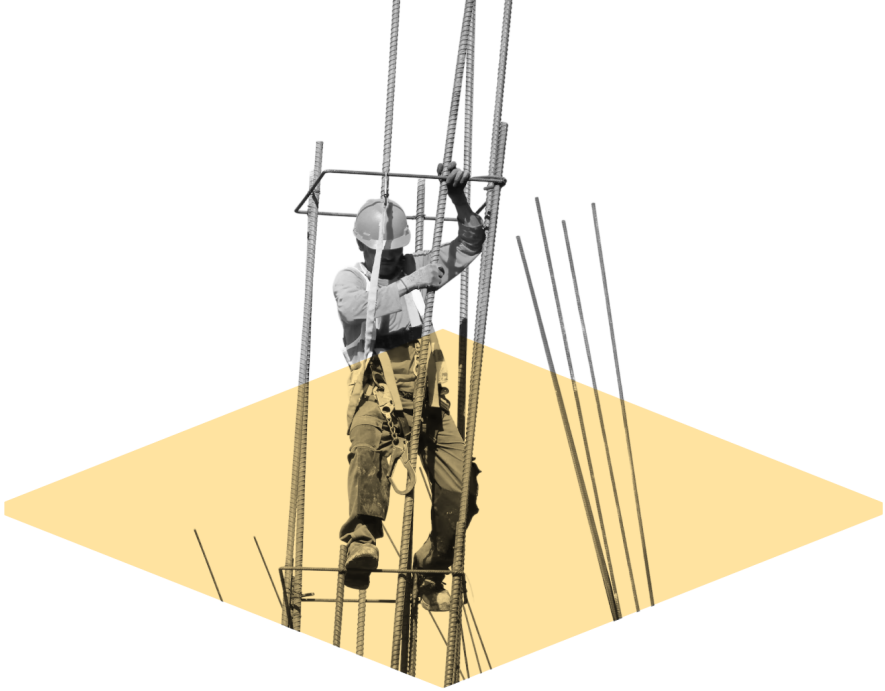
This article will provide an overview of 1) the uncertainties of infrastructure contract interpretation under Israeli law and 2) the implication of concessionaires' practice of bypassing the legislative framework that a contract be interpreted against its drafter.

The Uncertainty of Contract Interpretation under Israeli Law

Article 25(a) of the Contracts (General Part) Law, 1973 ("**Contracts Law**") provides that "*A contract will be interpreted in accordance with the intention of the parties, as it appears from the contract and its circumstances, however, if the intention is expressly implied from the language of the contract, it will be interpreted as it appears from its language*".

Interestingly, the two seminal Israeli Supreme Court cases pertaining to the "intention of the parties" have emanated from construction disputes.

- CA 4628/93 *State of Israel v. Apropim* (6.4.1995) involved a construction dispute between a contractor and the Government of Israel. The contract language allowed the contractor to argue that the State could not sanction it for delays in completing projects in certain geographical areas. The Supreme Court ruled for the State based on extrinsic evidence. Justice Aharon Barack determined that in ascertaining the parties' contractual intentions, a Court must consider the contract's plain language and its external circumstances. He rejected a "two-step" process, where external evidence is considered only when a contract is unclear. According to Apropim, determining the parties' intention is done through examination of the contract's language simultaneously with considering external circumstances.
- CA 7649/18 *Bibi Kvishim Afar & Pituach v. Israeli Railways Ltd* (20.11.2019) involved a dispute surrounding a detailed tender contract between a construction contractor and Israel Railways Ltd. in connection with the expansion and upgrade of certain railroads, a mega project, in Israeli standards. The contractor filed suit arguing that it was owed monies due to additional works beyond the scope of the contract. It is worth noting that over the years, the perceived flexibility of "good faith" interpretation under Israeli law, which lies in the statutory provisions included in Articles 12 and 39 of the Contracts Law, has contributed to an unfortunate practice where contractors underprice their bids to win a tender, expecting to increase their final compensation during the project's life through the flexible interpretation of contractual stipulations relating to additional works and variations.
- The Supreme Court ruled against the contractor based on the contract's plain language. In a plurality opinion, Justice Stein ruled that the contract should be interpreted according to its language without the use of extrinsic evidence because it was a "closed contract" that laid out all its terms: Justice Grosskopf ruled similarly but based his opinion on the distinction between a private contract, consumer contract, and commercial contract. Ruling that the latter should be read according to its written terms as well-represented sophisticated parties agreed it. Justice Vogelman decided that the contract should be interpreted according to its language, arguing that interpreting a public tender according to extrinsic evidence would violate principles of equality.



Implications of Concessionaire Practice of Contracting away Legislation requiring Interpretation against the Drafter

One significant uncertainty facing construction agreement litigants under Israeli law relates to the enforceability of contractual terms that attempt to override statutory interpretation rules benefiting the party with less negotiating power, the *Contra Proferentem* doctrine.

It is often the case that contractual provisions drafted by concessionaires aim to circumvent Article 25(b1) of the Contracts Law, which states:

> "*If a contract is subjected to different interpretations and one of the parties had an advantage in shaping its conditions, an interpretation that against that party, is better than an interpretation in its favour*".

Indeed, *Bibi Kvishim* seemingly empowered concessionaires in mega projects negotiating against sophisticated represented parties to leverage their negotiation power to stipulate that Article 25(b1) shall not apply to their contract. Bidders in mega projects that involve voluminous detailed contracts must consider that contractual stipulations shall be enforced as drafted and that ambiguities will not be read in their favour. They must also consider that there will be no wiggle room for price adjustments as these mega-project contracts will likely be interpreted strictly according to their language.

However, in a ruling subsequent to *Bibi Kvishim*, the Supreme Court has indicated that if the question comes before it, it will find Article 25(b1) to be cogentive and may not be drafted away. In CA 7379/18 *Hadar Yitzhaki v. Ron Yitzhaki (18.12.2019), The Honorable Judge Yitzhak Amit indicated in a non-binding manner, in dicta, that Article 25(b1) should be interpreted as an imperative norm, and as such, parties should not be allowed to stipulate it away. Judge Amit stated:*

> *"I am inclined towards the position that [Article 25(b1)] is an imperative norm, which the parties' agreement cannot steer away from. The attempt of a drafter to escape from this interpretation presumption against him through contractual language that will override this interpretation rule is fabled to the Baron Munchausen's attempt to escape a mire by pulling himself from his own hair".*

The opinion that Article 25(b1) is cogent is also shared by prominent Israeli Jurists Gabriela Shalev, who based her position on "*principles of morality, fairness, rationality, good faith and relative justice» (See, Gabriela Shalev & Efi Zemach, Law of Contracts, 4*th ed. 2019). Jurists Freidman and Cohen hold a different approach; they agree that conditioning Article 25(b1) should be prohibited in uniform contracts or consumer contracts but allowed in commercial relationships between sophisticated commercial parties as part of their freedom of contract (*See, Daniel Friedmann & Nili Cohen, Contracts,* 2nd ed. 2020).

Concluding Thoughts

It is too early to tell if the Supreme Court will determine that Article 25(b1) is cogent or dispositive, however it is likely considering the opinion in *Yitzhaki and the view of prominent* Israeli Jurists. However, as things currently stand regarding mega-projects agreements contracted between two sophisticated and represented parties, contractors and concessioners should be aware that a stipulation bypassing Article 25(b1) may stand judicial scrutiny. Contractors negotiating these agreements should consider their risks and opportunities based on the language of the agreements and not rely on contractual interpretation giving weight to principles of "Good Faith" over "Freedom of Contracts".

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QATAR

THE ENFORCEABILITY OF TIME-BAR PROVISIONS IN CONSTRUCTION CONTRACTS IN QATAR

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Introduction

Contractors in a construction project often have to deal with myriad issues, ranging from the ever-changing landscape of the project, employer's requirements, non-payments, delays, etc. Construction contracts are often employer-friendly in that they prescribe a number of time-bound notices, which contractors must satisfy in order to trigger their entitlement to claims. Therefore, it is not uncommon for contractors either completely to miss those time-bound notices or not to issue them within the prescribed periods. Ultimately, where disputes cannot be settled via amicable talks, the failure to send such notices, whether within the time period or at all, pose a serious threat to contractors' claims.

This article will briefly explore the arguments that are available under Qatari law to a defaulting contractor who has failed to satisfy the requirement of issuing mandatory time-bound notices for its claims.

Position under the Qatari Civil Code

Qatar is a civil law country. Law No. 22 of 2004, which is also known as the "Civil Code", governs the relationship between contracting parties.

The default position under Qatari law is that the contract is the law of the parties. As such, save where other legal provisions provide a carve out, parties are to be held to their contractual bargain (*See*, Article 171(1) of the Civil Code). Likewise, it is generally considered that failure to ad-here to contractual notices does not constitute good faith performance

under Article 172(1) of the Civil Code. That said, there are a number of arguments that are open to parties to take to vitiate the need to comply with contractual notices, especially in circumstances where parties have engaged with each other on claims in the absence of such notices.

This article, however, focuses on two particular legal principles, which are often used to support a contractor's failure to adhere to contractual notices: first, the argument based on the prescription periods in law ("Limitation Argument"); and second, the argument based on abuse of right principles in the Civil Code ("Abuse of Right Argument").

THE LIMITATION ARGUMENT

Put simply, it can be argued that time-bound notice provisions in a contract that impact the maintainability of claims (such as for variations and delays) contradict Article 418 of the Civil Code, in that they seek to reduce the statutory prescription periods.

Article 418(1) of the Civil Code provides as follows:

> "Limitation may not be waived before the right to it has been established. Likewise, agreement may not be made that limitation will occur within a period that differs from the period specified in the law."

There is some debate to be had as to the appropriate prescription period for construction claims: whether it is 15 years, in accordance with Article 403 of the Civil Code; or it is 10 years, in accordance with Article 87 of Law No. 27 of 2006 ("the Commercial Transactions Law").

Article 403 of the Civil Code provides as follows:

> "An action for a personal right will lapse by prescription after 15 years, except in those instances for which another period is prescribed by the law and such instances as are stipulated in the following articles."

Article 87 of the Commercial Transactions Law provides:

> "The traders' liabilities related to the commercial works thereof towards each other shall be barred by prescription upon the lapse of 10 years from the maturity date of the deadline of payment of such liabilities, unless the law provides for a lesser period of time.
>
> The final judgments on the disputes arising from the commercial liabilities referred to in the above paragraph shall extinguish by the lapse of ten years from the date of issuance thereof."

Irrespective of the prescription period one might consider, the upshot of the Limitation Argument is that the statutory prescription period cannot be reduced to a significantly shorter period (which generally is between 14-30 days from the date of event) within which a party must notify its claims to trigger its entitlement.

However, there is a conceptual difficulty with this argument. A party may argue that a time-bound notice requirements do not go to prescription, in that they do not affect the ability of a party to bring a claim. Instead, whilst a party is fully entitled to bring a claim, the failure to adhere to contractual notices would mean that the claim would be a bad one: the condition precedent to trigger that party's entitlement was not met. This is a serious impediment to the success of the Limitation Argument. In the authors' experience, arbitral tribunals particularly those comprising of practitioners from other jurisdictions, do not tend to be persuaded by this position.

THE ABUSE OF RIGHT ARGUMENT

The defaulting party can argue that an exercise of the right by the counter-party, requiring the defaulting party to have adhered to the strict requirements of the time-bound notices, constitutes an abuse of right under Article 63 of the Civil Code.

Article 63 of the Civil Code provides:

> "The exercise of a right will be unlawful in the following cases:

- If the benefit it is sought to attain is unlawful.
- If the only intention is to harm another.
- If the benefit it is sought to attain is totally inappropriate for the damage it inflicts on another.
- If by its nature it inflicts excessive, unaccustomed damage on another."

Out of the various elements of Article 63, it is sufficient for a party to prove any of them to succeed in its argument that insistence on contractual notices is an abuse of right.

By way of example, a party can argue that the benefit that the other party thereby seeks to attain, and the harm/damage that the defaulting party would suffer, is the vitiation of the defaulting party's right to bring contractual claims after the contractual notice periods. And that such a benefit would be unlawful, because it would violate Article 418 of the Civil Code, which prescribes that the statutory limitation period for bringing such claims cannot be reduced through contract. This position comes with its difficulties, as adumbrated above.

The defaulting party can also contend that the non-defaulting party intends to inflict harm on the defaulting party, by curtailing the defaulting party's right to bring claims. That is the only purpose of the insistence on the contractual notice periods. It can be argued that such conduct is contrary to the good faith requirements under Article 172(1) of the Civil Code.

That said, the most persuasive argument, which in the authors' experience has been endorsed by arbitral tribunals, is that the benefit sought by the non-defaulting party and the harm/damage to the defaulting party are inappropriate, excessive and unaccustomed. To this end, if there is a custom or practice between the parties of determination of, or engaging in correspondence on, claims in the absence of contractual notices, such a custom or practice can assist the argument. However, it is not guaranteed that a helpful custom or practice would have been established between the parties.

When assessing this particular argument, the arbitral tribunal must carefully consider whether the non-compliance with the contractual notification requirements caused any harm/loss to the defaulting party, or if they constitute a mere technical requirement. If the arbitral tribunal were to conclude that there was no harm caused to the non-defaulting party, it may find that the non-defaulting party's insistence of the defaulting party's strict compliance with the contractual notification requirements would cause a disproportionate harm to the defaulting party, and therefore constitutes an abuse of right under Article 63 of the Civil Code. However, there is no guarantee that every arbitral tribunal will find this argument to be convincing.

Conclusion

Whilst there are helpful legal provisions on which arguments can be founded to defend non-compliance with contractual notices, there is no guarantee that tribunals will find such arguments persuasive, in circumstances where the contract expressly makes contractual notices a pre-condition to entitlement to claims. Therefore, contractors should carefully review their contracts and engage a competent contracts management team, which is fully aware of the rights and obligations thereunder and the various contractual notice requirements. It might even be helpful for contractors to maintain templates for the various notices, such that those templates can be modified accordingly every time a new notice is due to be sent out.

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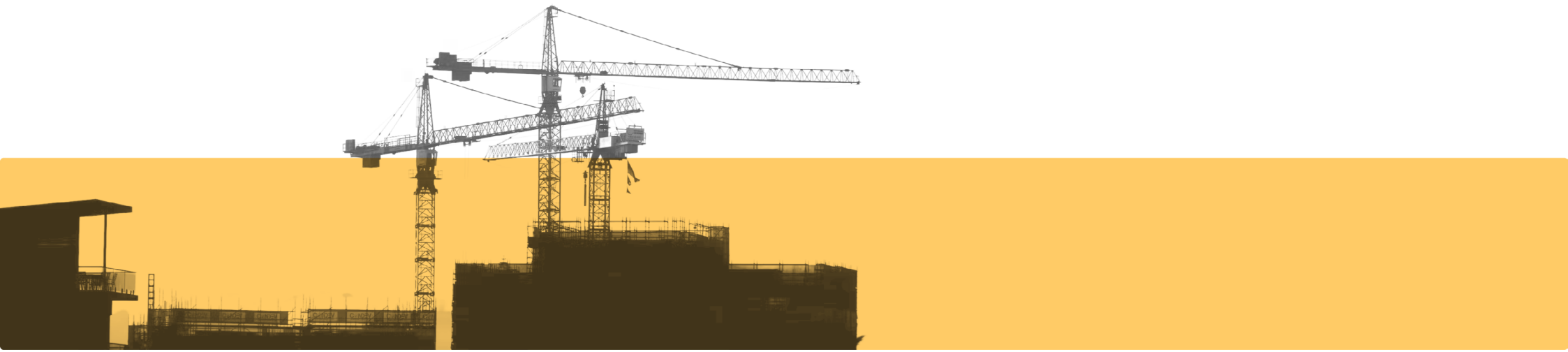

TURKEY
CONSTRUCTION DISPUTES IN TURKEY: WHAT TO EXPECT

Within this article, ISTAC offers a preliminary glimpse into unpublished 2022 statistics, offering tentative insights into their data on construction cases.

Ceren Ak Güngör
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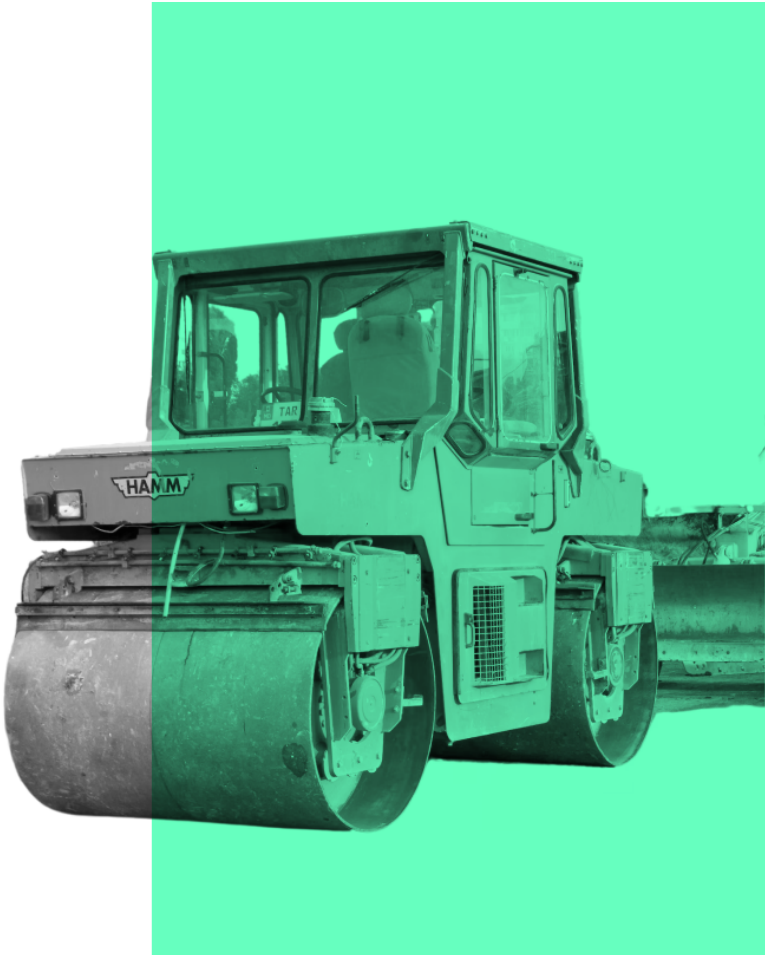
Construction plays a driving role in the Turkish economy and, with around 40 Turkish construction companies ranking in the top 250 of Engineering News Record's ("ENR") list, Turkish contractors are among the key players in the global construction market. Given the importance of the construction sector in Turkey and the inherently complex nature of construction projects, it is no wonder that construction disputes are prevalent in arbitration in Turkey. In this article, we take a brief look at construction disputes and trends in Turkey with a view to lay out what to expect in construction disputes.

It is common for domestic construction contracts to refer parties directly to court-proceedings, especially if there is no foreign funding or international element. This is mostly the case for real estate contracts, which represent the majority of construction projects by number. Although arbitration has long been popular in Turkey in international contracts or large-scale projects, domestic construction contracts rarely referred parties to arbitration and when they did, it usually involved *ad-hoc* arbitration. This may have been due to the lack of arbitration centres in Turkey, which changed in the past few years with the introduction of the Istanbul Arbitration Centre ("ISTAC").

Arbitration has increased its popularity likely from 1999 onwards, which not only marks the year in which the Turkish Constitution introduced a provision so as to allow the State to be party to arbitration agreements, including in concession contracts and the like, but also the year of introduction of the famous 1999 edition of the FIDIC Suite of Contracts. Although Turkish contractors and employers have long shown great interest in the FIDIC Suite of Contracts, perhaps because they provide more clarity, which in turn play an important role in managing employer and contractor expectations, Turkish parties show less interest in dispute resolution boards. It is not uncommon for Turkish parties to remove the Dispute Adjudication Board ("DAB") (or the Dispute Avoidance/Adjudication Boards ("DAAB") as introduced by the 2017 Suite) provisions from their contracts. A 2017 study conducted with contractors and consultants with around 25 years of experience in transport-infrastructure projects showed dispute boards are far less common than amicable settlement and legal remedies including arbitration. Participants cited ambiguity as to how well known the procedure was, as well as obscurity surrounding the legal effect of the dispute resolution boards among disadvantages. Indeed, it may be challenging for parties to internalise any procedure that is simply not the final and binding stop in dispute resolution.

Still, alternative dispute resolution has been on the rise recently, and this extends to all disputes. Turkey recently introduced statutory mediation in all commercial disputes including construction disputes, unless they include an arbitration agreement. With a view to encouraging parties to settle their disputes out of court and to ease the courts' workload, statutory mediation was introduced a few years ago and it requires parties to at least try and settle instead of going down the long and winding road of litigation. ISTAC introduced the novel Med-Arb mechanism, which is a mixture of mediation and arbitration (hence the name). The procedure contains characteristic features of both procedures, such as confidentiality and prohibition of the use of information and documents obtained during the mediation process later in the arbitration proceedings, which is almost exclusively a mediation-related feature. The Med-Arb mechanism is a self-proclaimed multi-tiered dispute resolution procedure that aims to facilitate dispute resolution by way of enabling parties to a find a common ground first, and refer the matter to arbitration should they fail to reach an agreement. The introduction of the Med-Arb Rules is an important step towards generalizing multi-tiered dispute resolution clauses in Turkey. Time will tell if caution against dispute boards will fade with these changes, as well as with the popularization of the FIDIC 2017 Suite of Contracts – perhaps with the help of multilateral development banks- as this suite importantly imposes standing DAABs.

As far as arbitration is concerned, ISTAC is now the leading Turkish arbitration centre. Its popularity seems to be on the rise, which is reflected in their caseload: they announced in 2021 that they have doubled their 2020 caseload. The increase in ISTAC's construction cases is particularly noteworthy: while in 2021 only 12% of ISTAC's cases were in construction cases, this rate almost tripled to a whopping 32% in 2022 (according to ISTAC's unpublished tentative 2022 statistics). These rates include domestic and international arbitration, so it may be too early to label this change a definitive shift to ISTAC in construction disputes, but it certainly shows a trend. Recent changes in the past few years might have played a role in this, an ISTAC-route has been spelled out for public procurement contracts in 2017. Construction projects within the Public Procurement Authority's sphere of application require contractors to be bound by a standard form of contract, and these contracts previously only set forth litigation as the only legal remedy option. Following the change in legislation, these standard forms now provide a right of option to choose between litigation or ISTAC arbitration.



Surely, the reasons for the rise of ISTAC's popularity in construction were manifold. The construction sector has already been in a hard-fought battle with fluctuation of foreign exchange rates before COVID-19, and recent inflation rates and post-COVID 19 effects certainly did not do much help. Likewise, the fact that ISTAC charges over Turkish Lira rather than foreign currency might have been a fresh breath of air for parties.

Other than the cost-aspect, ISTAC's Arbitration and Mediation Rules are almost too familiar to arbitration practitioners in Turkey and abroad as they are heavily influenced by the ICC Rules. Trends in terms of party-autonomy related aspects, however, organically show differences. For example, in most ISTAC arbitrations, arbitrators are chosen among law professors. In 2021, 68% of arbitrators selected were law scholars (*i.e.,* professors, assistant professors, or academics holding a PH. D in law at least) where 30% were practicing attorneys, and a striking 2% were other professionals including civil engineers. In 2022, tentative statistics show no professionals other than lawyers or academics in law were chosen as arbitrators at all. It would therefore be wise to expect that each party chooses a law professor as an arbitrator in proceedings. Another good example is demonstrated by the tribunal-appointed expert rates announced by ISTAC. It is common in arbitrations in Turkey for a tribunal to appoint a panel of experts, particularly in cases with complex technical matters. According to ISTAC's 2021 statistics, the tribunal-appointed expert rate was 72%, which increased to 74% in 2022 (be it upon party request or not).

These tendencies may be related to the fact that Turkey has a civil law system, and Turkish arbitrators may be influenced by the distinctive features of civil law systems, which are distinctively inquisitorial rather than adversarial. This manifests itself in a wide breadth of features in proceedings, notably including collection of evidence and conduct of hearings. By way of example, witness statements are increasingly becoming common practice in foreign arbitration proceedings in Turkey, but some tribunals might be unwilling to attach importance to witness examination and cross-examination in hearings.

ABOUT THE AUTHOR

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TURKEY
FORCE MAJEURE IN CONSTRUCTION ARBITRATION

*This article aims to analyze the classification of Covid-19 as a **force majeure** event, particularly within the context of construction disputes. It will specifically focus on the application of **force majeure** under Turkish law, the International Federation of Consulting Engineers (**FIDIC**) Contracts, and the International Chamber of Commerce ("**ICC**") Force Majeure Clause 2020.*

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Definition of *Force Majeure*

Force majeure is an event that may excuse liability for non-performance when the event is unforeseeable, uncontrollable, and makes the performance of an obligation wholly or partially impossible.

Turkish Law

Force majeure is not defined under Turkish law and the parties are free to agree on the conditions and scope of *force majeure* as long as the cause is *(i)* external, *(ii)* unavoidable *(iii)* unforeseeable and *(iv)* makes the performance of the contract impossible *(Turkish Supreme Court General Assembly, 1978/11-773 E., 1980/2310 K., 17.10.1980).* This freedom is within some limits such as mandatory provisions of law and public order (*See*, Akıncı, Ziya, *International Construction Contracts,* İstanbul, February 2023, p.166).

In practice, parties of construction projects draft an illustrative list of events that might constitute *force majeure* in that contractual relationship. For the same purpose, they may use international standard contracts on *force majeure* such as the FIDIC Standard Contracts or ICC Force Majeure Clause 2020 which are covered below.

FIDIC Contracts

In FIDIC Silver Book 1999 ed. ("**Silver Book**"), *force majeure* is defined under Sub-Clause 19.1, which is non-exclusive. Sub-Clause 17.3 stipulates further provisions related to the Employer's risks.

According to Sub-Clause 19.1, the event must be *(i)* beyond the parties' control, *(ii)* which such Party could not reasonably have provided against before entering into the contract, *(iii)* which, having arisen, such Party could not reasonably have avoided overcome, and *(iv)* which is not substantially attributable to the other party.'

ICC *Force Majeure* Clause 2020

To minimize particularities of national laws on the concept of *force majeure,* ICC prepared its own *force majeure* clause with two alternatives: long and short form. The parties may include this clause in their contract to mitigate disputes on what constitutes *force majeure* by agreeing on a widely accepted language.

In order for an event to be considered *force majeure* under the ICC Force Majeure Clause 2020, all of the following conditions must exist concurrently: the impediment *(i)* should be beyond reasonable control; *(ii)* could not have been reasonably foreseen at the time of the conclusion of the contract; and *(iii)* the effects of the impediment could not have been reasonably avoided or overcome by the affected party.

The ICC Force Majeure Clause 2020 presumes some listed events as *force majeure* including war, currency restrictions, plague and epidemic meeting the requirements under (i) and (ii) above. For the listed events, the affected party has to prove only the condition (iii) above (*See*, Erdem, H. Ercüment, *An Update from the ICC: The ICC Force Majeure and Hardship Clause*, March 2020).

Potential Remedies of *Force Majeure*

In case of a *force majeure* event, the affected party may be eligible for various remedies if it can substantiate the existence of the *force majeure* event and its direct impact on the ability to perform. These usually include extension of time, extra costs and termination of the contract.

Extension of Time

The affected party might be entitled to an extension of time for performance of the contract due to the delays caused by the preventive effect of the *force majeure* event which are not attributable to itself.

As per Sub-Clause 20 of the Silver Book, the party seeking for extension of time due to *force majeure* is required to notify the other parties to the contract within 14 days.

In such circumstances, the parties may agree on a time extension for the completion of the works.

In case the parties have a dispute on the existence or impact of *force majeure*, a delay analysis of the works by a delay expert might be helpful.

Extra Costs

Force majeure can also trigger further costs on the parties. For this reason, parties may agree in advance on whom to leave such extra costs in case of a *force majeure* event. In the absence of an agreement on the matter, the contractor's right to seek compensation for extra costs depends on the provisions of the applicable law.

Turkish law is not clear as to who will bear the extra costs arising from a *force majeure* event. Depending on the circumstances of the case it is possible to argue that the contractor will bear the loss in accordance with Art. 483 of Turkish Code of Obligations ("**TCO**"). The contractor who has the right to ask the judge to adapt the contract to the new conditions pursuant to Art. 480/2 of TCO may also claim additional costs. Since there is no clarity on the subject, it is beneficial for the parties to agree on this in advance while drafting the contract.

As per Sub-Clause 20 of the Silver Book, the parties may seek extra costs due to *force majeure* (except for the causes triggered by nature) are required to notify the other parties of the contract.

Termination of Contracts

In the event of a prolonged *force majeure* event preventing the execution of the works, the parties may be entitled to terminate the contract.

Depending on the applicable law and contractual provisions, the parties may be entitled to terminate the contract via unilateral declaration, which would not require the consent of the other parties. According to the Turkish Supreme Court, the parties are bound by the contract in cases of temporary impossibility until expiration of "*contract tolerance period*" which shall be determined according to the circumstances of each case (*See*, Turkish Supreme Court General Assembly*, 2010/15-193 E., 2010/235 K.*, 28.04.2010).

After the termination of the contract, the parties may seek restitution of performance (if possible) and waive from their receivables. Depending on applicable law, the parties may seek compensation for damages due to non-performance of the contract.

For example, as per Sub-Clause 19 of the Silver Book, if the execution of the works is substantially prevented for a continuous period of 84 days or for multiple periods, which total more than 140 days, then either party may terminate the contract. In this case, the termination shall take effect seven days after the notice is given.

Covid-19 as a *Force Majeure* Event

The Covid-19 pandemic has emerged as a prevalent factor in construction works. Although Covid-19 represents an exceptional circumstance, its acceptance as a *force majeure* event depends on meeting certain criteria *(i)* it must fall within the contract's definition of *force majeure*, *(ii)* be recognized under the applicable law, and *(iii)* directly impact the performance of the party claiming *force majeure*.

According to a recent FIDIC Contracts guidance note, the fact that performing obligations may be more difficult, onerous or that there is delay caused by post Covid-19 difficulties does not necessarily amount to the contractor being prevented as required by the relevant clause.

Recent case law, including arbitral awards and rulings from the Turkish Supreme Court, highlights a consistent stance: Covid-19 alone cannot serve as a sufficient justification for a party's non-performance. To establish Covid-19 as a valid *force majeure* event, it is necessary to demonstrate a direct causal link between the non-compliance or failure to perform and the impact of Covid-19. In essence, the effect of Covid-19 must be the underlying cause for the contract's non-performance or breach.

In Ace Group International LLC and Ace Group Bowery LLC v. 225 Bowery LLC, which was brought before the ICC, a dispute emerged from a hotel management contract. The hotel in question was temporarily closed during the Covid-19 pandemic and, without the consent of the Claimant, was repurposed as a homeless shelter by the Respondent.

The respondent, among other arguments, claimed that it did not breach or repudiate the contract because its decision to use the property as a homeless shelter was "caused" by the Covid-19 pandemic, and this was permitted under the contract's force majeure clause. The discussion revolved around whether Covid-19 or the economic downturn caused the respondent to enter into the homeless services agreement. Under the relevant contract a party's failure to perform its obligations is excused if that failure is "caused in whole or in part" by an extraordinary event. Extraordinary event is defined to include disease, epidemic, and government action, but to exclude causes due to economic downturn or insufficient funds. According to the arbitral tribunal a party seeking to avail itself of a force majeure defense must show that it took "virtually every action within its power" to perform its duties. The arbitral tribunal found that the respondent failed to establish that its non-performance was excused by Covid-19.

In an Istanbul Arbitration Center arbitration, a respondent claimed its non-performance was a result of Covid-19 as a force majeure event. The arbitral tribunal decided that Covid-19 has not prevented the respondent from fulfilling its obligations therefore, Covid-19 could not be considered as a force majeure event. The Court of Appeal did not evaluate the decision due to the prohibition of revision au fond and rejected the request for annulment, this decision was upheld by the Supreme Court (See, Turkish Supreme Court 11th Chamber, 2022/138 E., 2022/3708 K., 10.5.2022).

In another decision, the Turkish Supreme Court stated that the existence of Covid-19 does not automatically constitute a force majeure event. In order for it to be accepted as force majeure, there must be a causal relationship between the consequences of Covid-19 and non- performance of the contract (See, Turkish Supreme Court General Assembly, 2022/537 E., 2022/537 K., 29.9.2022).

In conclusion, the question of whether the Covid-19 pandemic qualifies as a force majeure event hinges on whether the party invoking force majeure has been directly impacted by it. Merely considering Covid-19 as an extraordinary event beyond the parties' control is not enough to trigger the effects of force majeure. The party invoking force majeure must demonstrate that their contractual obligations have been directly hindered or prevented by the Covid-19 pandemic.

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TURKEY
THE ENFORCEMENT OF DAB DECISIONS IN ARBITRATION

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Introduction

Dispute Boards are creatures of contract uniquely designed and specifically used in construction contracts for the avoidance and resolution of disputes throughout the life-cycle of construction projects.

We note that dispute boards' world-wide reputation commenced with the FIDIC 1999 Suite contracts (as "Dispute Adjudication Boards", "DAB"s) and strengthened with the FIDIC 2017 Suite whereby all dispute boards are of a standing nature (as "Dispute Avoidance and Adjudication Boards", "DAAB"s). We separately note that in recent years, dispute boards are also recommended in NEC contracts, which are frequently used as an alternative to FIDIC type contracts.

Despite the fact that the author of this article advocates for the avoidance aspect of the dispute boards rather than the resolution, boards naturally deal with disputes and render decisions. Indeed, when compared to the ultimate dispute resolution methods, dispute boards have crucial advantage for the contractual parties being a fast and low-cost intermediate and alternative dispute resolution method. Accordingly, when it comes to the role of dispute boards in providing decisions, the foremost and first question that we encounter is on the enforcement of these decisions. Although parties may also empower the dispute boards with jurisdiction to provide non-binding recommendations, we will focus on the binding dispute board decisions.

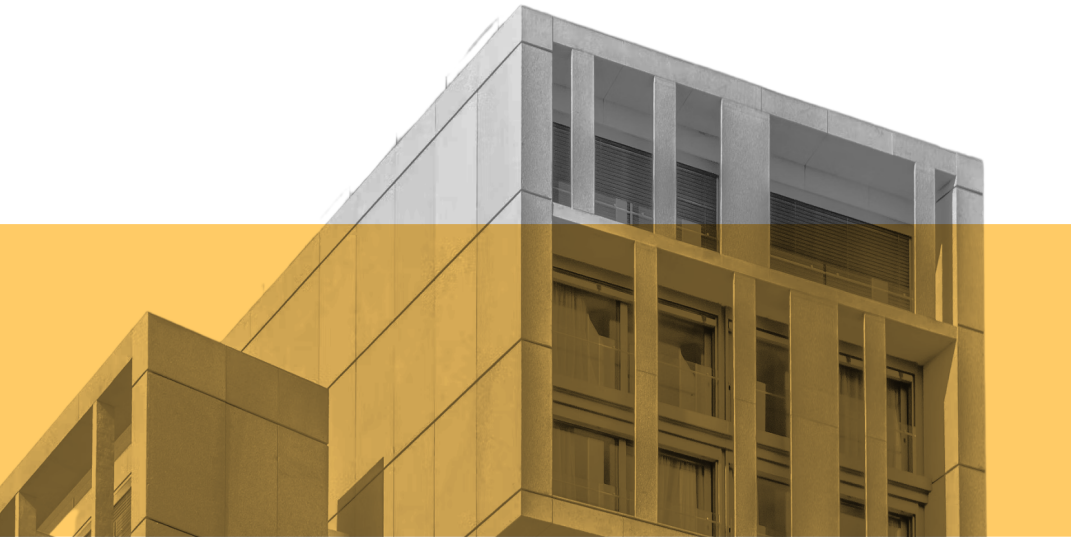
This article will therefore aim to elaborate on the recommended ways to enforce a dispute board decision after tackling and establishing the definition and legal nature of the boards and their decisions.

Legal Nature of a DAB decision

FIDIC suites of contracts establish that dispute boards issue binding decisions that must be complied with immediately irrespective of whether the Parties have provided a Notice of Dissatisfaction against the same decision. In other words, the dispute board decision is binding in both cases. In cases where the parties did not provide a Notice of Dissatisfaction, it further becomes final.

In spite of the binding and at times final nature, the enforcement of the dispute board decision is not the same as an arbitral award or a court decision. It is because the decision is a contractual document at the end of the day. It has no enforcement power unless the specific country the decision is rendered has legislative provisions to provide enforceability. For example, the UK Section 108 of the Housing Grants, Construction and Regeneration Act 1996 provides exactly that. Indonesian Law No.2/2017, Peruvian Law No 30225 and Legislative Decree No 1362 are other examples of legislative forces regulating the dispute board usages and therefore enforceability issues.

Therefore, it is fair to conclude that the dispute board decision is a contractual document and a further step would be required to enforce the decision.



How to Enforce a Dispute Board Decision?

When FIDIC 1999 Suite of Contracts substantially inaugurated and incorporated the concept, little was known as to the practice on the enforcement of dispute board decisions for quite some time. It was clear that the parties to the contract could resort to arbitration for the ultimate resolution of their dispute, which had already gone through the dispute board decision process.

However, arbitration takes considerable time. The goal was therefore to benefit from the interim binding nature of the dispute board decisions through arbitration. But how?

It could be useful to refer to then contemporaneous case-law to understand how the jurisprudence approached the issue and settled the concepts.

The arbitral tribunal in ICC Case No. 10619 stated that a binding but not final decision of an engineer (under the FIDIC Conditions of Contract) may, in appropriate circumstances, be enforced by an arbitral award. As the Engineer's decision procedure was replaced by the Dispute Adjudication Board in the FIDIC 1999 Red Book, it was then considered that the DAB's decision could be equally enforceable by analogy.

In the famous *Persero* saga, the enforceability of a DAB decision has been treated in numerous layers and the result was that 1) an arbitral tribunal may not simply issue an award on the enforceability of a binding dispute board decision without then delving into the merits of the case and 2) an arbitral tribunal on the other hand may issue an interim and/or partial award as the case may be, in order to ensure the enforceability of a binding decision of a dispute board.

Another remarkable decision was the Tribunal's decision on ICC No.15751/JHN, whereby the ruling established that the failure to

promptly comply with a binding dispute decision is a breach of contract, which triggers liability for damages irrespective of other disputes existing between the parties.

Therefore, it could be fair to state that the jurisprudence established after FIDIC 1999 Suites of Contracts' wording that the parties do not need to wait for the final resolution of their disputes through arbitration in order to have enforceability of the dispute board decisions.

Further provisions have been explicitly added to the FIDIC 2017 Suite of Contracts, specifically in Sub-Clause 21.7; whereby now we know that that the arbitral tribunal shall have the power to order the enforcement of a binding or final and binding DAAB decision in the event that a party fails to comply with the DAAB decision. The decision can be enforced in a summary or other expedited procedure by an interim or provisional measure or an award.

Enforceability Issues in Turkey

There are no specific regulations or supreme court decisions about the enforcement of dispute board decisions by arbitration under Turkish Law, wherefore the general rules of law should be taken as basis. As internationally recognized, and as explained above, the failure to comply with a board decision would therefore be qualified as a breach of contract under Turkish law as well, and without specific legal provisions, such breach shall need to be channelled through arbitration in order to obtain enforceability power. For the purposes of this paper, we exclude other options of amicable settlement, mediation and attorney protocol settlement, that the parties may resort to in order to make the dispute board decision enforceable.

Indeed, under Turkish law the arbitral tribunal is empowered to issue both interim injunctions / decisions and final awards which may be partial as well. That said, especially in relation with the execution of the interim decisions, the arbitral decision is usually assisted with the local courts in order to grant an official enforceability.

Accordingly, the author of this article sees no obstacle to use the method of requesting either interim or partial award by an arbitral tribunal in order to enforce a binding (or final and binding) dispute board decision through arbitration.

Consideration could also be given to the use of emergency arbitrator or fast-track arbitration options that are locally available through Istanbul Arbitration Centre or Istanbul Chamber of Commerce Arbitration Centre; both of which provide both options.

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UNITED ARAB EMIRATES

CLAIMS IN CONSTRUCTION IN THE UAE

Hashem AlAidarous
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The Significance of the Construction Industry in the UAE

Construction is one of the most dynamic industrial sectors in the United Arab Emirates (UAE) and plays a crucial role in the growth of the national economy. The UAE construction market is highly competitive, with the presence of major international players, valued at USD 101 billion in 2019 and is expected to reach a value of USD 133 billion in 2028. The construction industry in the UAE will continue to grow rapidly and attract foreign investment being supported by continued large-scale investment in infrastructure, commercial, residential and energy projects.

Special Nature of International Construction Disputes

Construction disputes require a particular treatment that differentiates them from other commercial disputes, as they are distinguished in several ways. They can be factually and technically complex, involving multiple parties, and large amounts of evidence. Construction disputes are inevitable, since differences in perception exist among the participants of the projects.

Available Mechanisms for Resolving International Construction Disputes Under the UAE Legal System

There are certain mechanisms for resolving international construction disputes under the UAE legal system. First, litigation before civil law-based UAE courts as well as common law-based courts of the Dubai International Financial Centre ("DIFC") and Abu Dhabi Global Market. Second, arbitration, as the UAE is one of the principal international arbitration jurisdictions in the MENA region due to the issuance of the modern Federal Law No. 6/2018 on Arbitration that is based on the UNCITRAL Model Law. Arbitration institutions in the UAE include, among others, Dubai International Arbitration Centre ("DIAC") and the ADGM Arbitration Centre - Dubai is also known to be one of the top seven seats globally for international arbitration along with London, Singapore, Paris, and New York. Third, ADR such as negotiation, dispute boards and mediation. This article will focus on litigation before civil law-based UAE courts.

Challenges Encountered in Practice

Given the internationalization of the UAE construction market, there are, certain challenges encountered in practice when resolving international construction disputes. As major international construction projects often involve parties from diverse jurisdictions; the majority of construction contracts are drafted in English and are based on the FIDIC forms of contract with a noticeable widespread use of the FIDIC Red Book Construction Contract (FIDIC Conditions of Contract for Construction); and most of the practitioners, such as contractors, claim managers, quantity surveyors, or consultants, practice in English.

However, the official language of the courts in the UAE is Arabic and the applicable law in most of these contracts is UAE law. So, whether the dispute resolution forum is litigation or arbitration, parties will still need to address UAE law, which is based on civil law tradition and heavily influenced by Sharia principles, with which concerned legal practitioners in the UAE, such as judges, arbitrators, and legal counsel trained in common law jurisdictions are not familiar. This presents practical cultural challenges.

Further, the Courts generally assign experts to address technical issues and those important technical issues such as 'as planned versus as-built' schedule analysis, time impact analysis, time-slice windows analysis, excessive descoping, and the likes generally go unchallenged by the judge. The Court's role is to verify whether an expert complied with due process throughout the reporting process, that is procedural scrutiny only. If the Court is satisfied, then it will generally endorse the expert report and the expert's findings become part of the court's reasoning. However, if the Court is to depart from the expert's findings, then it must provide detailed reasoning for such departure.

Another practical challenge is the language, as court-appointed experts have to submit their reports to the Courts in Arabic and most of the registered experts' command of English is limited.

The Court-appointed expert approach as discussed above may be suitable for low value cases that do not require sophisticated expert analysis; however, such an approach may not be suitable for high value and technically sophisticated cases.

Practical Tips

Having identified the various challenges encountered by construction claims in the UAE courts in general, some useful tips, not necessarily of a legal nature but rather practical, should be kept in mind.

First, to cooperate with your adversary to select an expert, as UAE Courts welcome parties' choice of expert as interlocutory judgment issued by courts appointing the expert, which typically allows parties two weeks to mutually agree on an appointee.

Second, to cooperate with your adversary to agree on the expert's mandate to be specific and not generic, addressing the issues in dispute as the mandate will then be adopted by the court.

Third, to prepare in advance to deal with the court-appointed expert, since the actual trial is before the expert. Parties need to identify the discipline of the expert required, engage in discussions with the adversary to agree on an expert and mandate, and robustly rebut and comment on the expert's report.

Fourth, to commission parties' own expert in addition to the court-appointed one, and to avoid submitting lengthy and detailed reports, because using simple language and brevity is key. Also, parties' own expert needn't submit their report directly to the court as it will hold little weight. It is preferable to appoint a qualified bilingual expert and, if not bilingual, to translate through a qualified Arab engineer into Arabic.

Fifth, to select a suitable lawyer. International law firms typically do not have rights of audience before local courts and have to retain UAE law firms with rights of audience before local courts. In this process, common pitfalls that may arise are that international firms may devise claim/defense strategy in isolation of local firms, and they may prepare lengthy expert reports in English as it would be pleaded in common law courts or international arbitrations and then translate the same into Arabic by ill-suited translators, thus, eventually the message is lost. The solution for this issue is to preferably adopt solicitor/barrister team dynamics, in which an international law firm assumes the role of a solicitor and a local law firm assumes the role of a barrister. The local law firm is to have bilingual proficiency and a working knowledge of construction at least.

ABOUT THE AUTHOR

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Hashem specialises in Dispute Resolution, that is international and domestic commercial arbitration as well as complex litigation before UAE Courts, in the practice areas of Construction Law, Comparative Law, and Corporate and Commercial Law.

UNITED ARAB EMIRATES
CURRENT TRENDS IN THE ANNULMENT OF CONSTRUCTION ARBITRATION AWARDS IN THE UNITED ARAB EMIRATES

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Conducting an arbitration whilst thinking about the enforceability of any resulting arbitration award should be at the forefront of the parties' minds during any arbitration. However, issues affecting the enforceability of an award are all too often only brought into focus after an award has been issued and, inevitably, challenged by an unsatisfied party.

Within the United Arab Emirates there are three possible seats for an arbitration, three separate sets of *lex arbitri* and six supervisory court systems overseeing arbitrations within those seats. Parties are free to elect the seat of their arbitration pursuant to the law applicable to each seat:

- Those arbitrations seated 'onshore' in one of the seven Emirates of the UAE, outside of the Abu Dhabi Global Market ("ADGM") and Dubai International Financial Centre ("DIFC"), are governed by Federal Law No. 6 of 2018 concerning arbitration (UAE Arbitration Law). The Emirates of Abu Dhabi, Dubai and Ras Al Khaimah have their own set of courts, while the other Emirates share the use of the Federal Courts;
- DIFC Arbitration Law No. 1 of 2008 ("DIFC Arbitration Law") applies to arbitrations seated in DIFC; and
- The ADGM Arbitration Regulations 2015 ("ADGM Arbitration Law") applies to arbitrations seated in the ADGM.

The UAE Arbitration Law provides a list of eight grounds upon which a party may apply to the supervisory courts for annulment of an award. There are also two further reasons by which the UAE courts can annul an award of its own finding, namely the arbitrability of the dispute, and whether the award contradicts public order and morality in the UAE.

In DIFC, the DIFC Arbitration Law provides four grounds upon which a party may apply to set aside an award and three further reasons (including whether the subject matter of the dispute is capable of settlement by arbitration under DIFC law) by which the DIFC courts can, of its own volition, set aside an award.

Likewise, the ADGM Arbitration Regulations 2015 provide five party-applicant grounds for the setting aside of an award and two reasons by which the ADGM Courts may, of its own volition, set aside an award.

Recently, in judgments from both the Abu Dhabi Courts and the ADGM Courts, the Courts have considered the correct forum for applications for annulment and setting aside of awards seated in the UAE.

In an interesting judgment in early 2023, the Abu Dhabi Court of Cassation has determined, in an appeal on an application for annulment of an ICC award in a UAE seated arbitration, that the arbitration was in fact seated in the ADGM, due to the opening of the ICC's representative office within the ADGM during the arbitration and prior to issuance of the tribunal's award. In its judgment in Case No. 1045/2022, Abu Dhabi Court of Cassation dated 18 January 2023, the court considered an application by the claimant at arbitration for annulment of an award issued in a construction arbitration. The Abu Dhabi Court of Appeal (the court empowered to hear the initial application for annulment pursuant to the UAE Arbitration Law), in its judgment of 2 November 2022 in Case No. 14/2022, the Abu Dhabi Court of Appeal, rejected the claimant's application for annulment, and its decision was subsequently upheld by the Abu Dhabi Court of Cassation.

In similar but unrelated (and described by the court as 'unusual') proceedings before the ADGM Courts, in its decision of 13 March 2023 in *A6 v B6* [2023] ADGMCFI 0005, the ADGM Court of First Instance adjudicated on an application for set aside of an ICC award but, in doing so applied the UAE Arbitration Law as agreed by the parties in their original contract. It ultimately dismissed the claimant's application, and in applying the UAE Arbitration Law found that the claimant had not in fact evidenced any of the specified grounds for annulment of the award.

In this case, the claimant applied to the ADGM Court of First Instance for the setting aside of an ICC award, seeking re-opening of the arbitration proceedings and instruction of a newly-appointed tribunal to assess its apparent further evidence. The arbitration involved claims by the claimant subcontractor against the respondent main contractor regarding the construction of an integrated gas development pipeline. The agreement between the parties provided for disputes to be resolved pursuant to ICC arbitration *"conducted in Abu Dhabi City (U.A.E)"*. The arbitration clause included an express governing law clause (those being the laws of the Emirate of Abu Dhabi, and those of the UAE), but did not specifically dictate whether it was the parties' intention that 'Abu Dhabi City (U.A.E)' was the seat of the arbitration or the venue for the arbitration.

In its award, the tribunal had awarded the claimant roughly 7% of the sums it claimed, and the claimant therefore commended proceedings before the Abu Dhabi Court of Appeal seeking annulment of the award. The Abu Dhabi Court of Appeal dismissed the claimant's application, citing lack of jurisdiction on the basis that the ICC's branch office was situated in the ADGM, and therefore it was the ADGM Courts that had jurisdiction to hear the set aside application. The claimant appealed the Abu Dhabi Court of Appeal decision to the Abu Dhabi Court of Cassation, which upheld the decision of the Abu Dhabi Court of Appeal, prior to the claimant's application to the ADGM Courts.

Both parties agreed that the ADGM was not the proper seat for *any* ICC arbitration conducted in Abu Dhabi, however in this case both parties had subsequently agreed in writing to submit to the jurisdiction of the ADGM courts as a 'narrow exception'. The ADGM Court of First Instance therefore considered that the parties were at liberty to 'opt-in' to the jurisdiction of the ADGM Courts.

The ADGM Courts recognised the difficulty in the claimant's position: It was asking the ADGM Courts to consider an application for setting aside of an award (which the ADGM Courts were empowered to hear) pursuant to the ADGM Arbitration Regulations 2015, whilst at the same time maintaining that the applicable law of the seat of the arbitration was the UAE Arbitration Law. The ADGM Court of First Instance applied the UAE Arbitration Law on the basis that that had been agreed as the law governing the seat in the parties' agreement.

As to the merits of the claimant's application to set aside the award, the ADGM Court of First Instance found that none of the claimant's contentions, regarding contravention of public policy and natural justice, fairness, misapplication of evidence by the tribunal, and unequal treatment, were proven and therefore any potential criticisms of either factual or legal errors in the award could not undermine its validity. In its decision the court noted:

> "It is well established that courts faced with applications to set aside arbitral awards are loath to trespass upon the duly constituted tribunal's assessment of the case before it except in instances in which egregious and particularly obvious errors have occurred which clearly can be seen to impact upon the intrinsic fairness and veracity of the arbitral process. This basic principle underpins both legislative provision and the substance of judicial pronouncement, and on this point there is a substantial correlation of view between different jurisdictions."

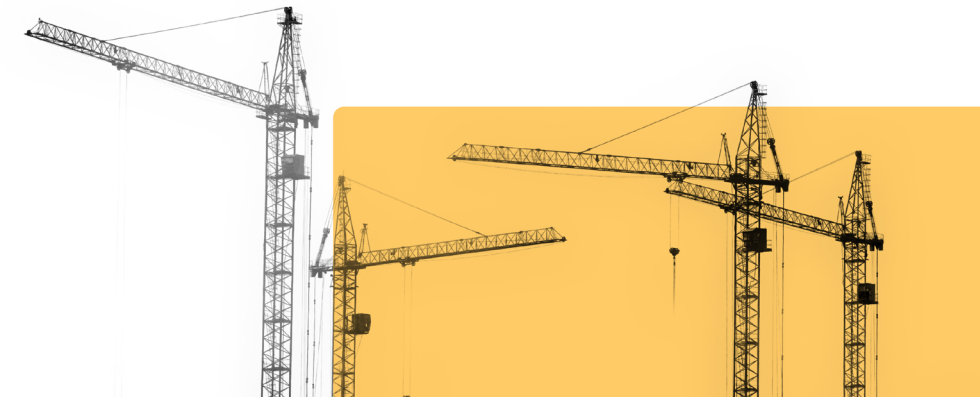
The ADGM Court of First Instance also cited Case No. 1383/2021 Abu Dhabi Court of Cassation, in which the court stated that an application for annulment cannot be founded on either how an arbitrator had applied the law or the extent to which he had violated the law or erred in its application or interpretation, nor on the arbitrator's assessment of the evidence and the documents presented. Any application for annulment was therefore strictly limited to the grounds set out in the UAE Arbitration Law.

Importantly, the ADGM Court of First Instance addressed the fact that the claimant sought to re-open parts of the proceedings as regards underlying parts of the award that it was not satisfied with, stating that there was nothing in the UAE Arbitration Law, nor the ADGM Arbitration Regulations 2015, that allowed for part of an award to be 're-opened'. Any application for set aside of an award was for the setting aside of an award in its entirety.

Subsequently, in its decision of 27 April 2023 in *A6 v B6* [2023] ADGMCFI 0010, the ADGM Court of First Instance refused the claimant's application for permission to appeal.

As a result of these decisions, it appears that the Abu Dhabi Courts have time and time again recently conflated the ICC's branch office (registered and situated within the ADGM) as conferring on parties whose arbitrations are administered pursuant to ICC Rules in Abu Dhabi an express 'choice' of an AGDM seat. Practically, as can be seen, this has then forced parties (whose agreements to arbitrate have specified a UAE seat) to agree to 'opt in' to the jurisdiction of the ADGM Courts in order for the ADGM Courts to assess their applications, not under the ADGM Arbitration Regulations 2015 (for which the ADGM Courts are the supervisory courts), but instead under the UAE Arbitration Law.

To conclude, complexity is the watchword!



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Annex 1 2023 CONSTRUCTION CASES AVAILABLE ON JUS MUNDI

Case	Institution	Type of case	Seat	Date
Awilco Rig 1 Pte. Ltd. v. Keppel FELS Limited	Data not available	Commercial Arbitration	Data not available	2023-04-21
Collage Design and Construction Group, Inc. v. RNB Construction, Inc. and Razvan Puha	AAA	Commercial Arbitration	Data not available	2023-04-14
Autopistas del Atlántico, S.A. de C.V. and others v. Republic of Honduras	ICSID	Investor-State	Data not available	2023-04-12
Municipality of Kerkrade v. Plum Infra B.V.	RvA	Commercial Arbitration	Amsterdam	2023-04-11
British Caribbean Bank Ltd. and Prize Holdings International Limited v. Belize	Ad hoc Arbitration	Investor-State	Data not available	2023-04-03
R.E. Yates Electric Inc. v. Schmid Construction Inc.	AAA	Commercial Arbitration	Data not available	2023-04-03
PQ Builders Pte Ltd v. Maxx Engineering Works Pte Ltd	Ad hoc Arbitration	Commercial Arbitration	Singapore	2023-03-27
Western Surety Company v. PCL Construction Services Inc.	Data not available	Commercial Arbitration	Data not available	2023-03-27

AAA: American Arbitration Association
ICSID: International Centre for Settlement of Investment Disputes
RvA: Arbitration Board for the Construction Industry

Case	Institution	Type of case	Seat	Date
SRG Global Remediation Services (NZ) Limited v. Body Corporate 197281, Maynard Marks Limited, Hobanz Project Assist Limited and Hellaby Resources Services Limited	Data not available	Commercial Arbitration	Data not available	2023-03-20
Awilco Rig 2 Pte. Ltd. v. Keppel FELS Limited	Data not available	Commercial Arbitration	Data not available	2023-03-14
Shelter LLC, Dr. Jason Highsmith and Kacie Highsmith v. Design Gaps Inc., Eva Glover and David Glover	AAA	Commercial Arbitration	Charleston	2023-03-13
MTX Group One, LLC v. Eco Power Florida, LLC	Data not available	Commercial Arbitration	Data not available	2023-02-20
RusChemAlliance LLC v. Linde GmbH and Linde PLC	HKIAC	Commercial Arbitration	Hong Kong	2023-02-20
Tacna Health Consortium v. Regional Government of Tacna (I)	Data not available	Commercial Arbitration	Data not available	2023-02-20
Strabag SpA v. Alto Maipo SpA	ICC	Commercial Arbitration	New York City	2023-02-16
Astron Buildings SA v. Indec N.V.	ICC	Commercial Arbitration	Amsterdam	2023-02-07
Jan de Nul S.A v. Bouygues Travaux Publics MC S.A	ICC	Commercial Arbitration	Paris	2023-02-07
Claimant v. Respondent	DIAC	Commercial Arbitration	Data not available	2023-02-01

HKIAC: Hong Kong International Arbitration Centre
DIAC - Dubai: Dubai International Arbitration Centre

Case	Institution	Type of case	Seat	Date
Limak Soma Joint Venture v. National Highways Authority of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2023-02-01
Ralhan Construction Company v. Mahanagar Telephone Nigam Limited (II)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2023-01-31
KNR Construction Limited v. National Highways Authority of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2023-01-30
Altrad Services BV v. Ballast Nedam Industriebouw BV	RvA	Commercial Arbitration	Data not available	2023-01-17
Reach Dredging Limited and Gayatri Projects Private Limited (JV) v. Inland Waterways Authority of India (I)	Data not available	Commercial Arbitration	Noida	2023-01-17
Reach Dredging Limited and Gayatri Projects Private Limited (JV) v. Inland Waterways Authority of India (II)	Data not available	Commercial Arbitration	Noida	2023-01-17
Reach Dredging Limited and Rashmi Metaliks Limited and SS Electrogrip Products Private Limited (JV) v. Inland Waterways Authority of India	Data not available	Commercial Arbitration	Noida	2023-01-17
Bajaj Electricals Limited v. India Tourism Development Corporation Limited (I)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2023-01-13
Beijing Siyuan Xinye Architectural Decoration Co., Ltd. v. Jinan Chengshi Zhizao Construction Engineering Co., Ltd.	BAC	Commercial Arbitration	Data not available	2023-01-12
Red Vial 5 S.A. v. Republic of Peru	ICSID	Investor-State	Data not available	2023-01-10

BAC: Beijing Arbitration Commission

Case	Institution	Type of case	Seat	Date
Shapoorji Pallonji and Company Private Limited v. Union of India (II)	Ad hoc Arbitration	Commercial Arbitration	Data not available	2023-01-09
MAGIL Construction Corporation v. Republic of Cameroon	Data not available	Commercial Arbitration	Data not available	2023-01-05
Rutas de Lima S.A.C v. Municipalidad Metropolitana de Lima (III)	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-12-29
Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras	ICSID	Investor-State	Data not available	2022-12-20
Supreme Panvel Indapur Tollways Private Limited v. National Highways Authority of India	Data not available	Commercial Arbitration	Delhi	2022-12-20
Downey Construction Limited v. Lakewood Plaza Limited	Data not available	Commercial Arbitration	Data not available	2022-12-08
Luiz Eduardo de Carvalho v. Construir Construtora e Incorporadora Ltda.	Data not available	Commercial Arbitration	Data not available	2022-12-07
China Railway Construction Engineering Group Co., Ltd. v. Shaanxi Mingda Landscaping and Greening Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-12-06
Hoa Binh Construction Group v. Thanh Do Investment Development and Construction JSC	VIAC	Commercial Arbitration	Singapore	2022-12-06

VIAC - Vietnam: Vietnam International Arbitration Centre

Case	Institution	Type of case	Seat	Date
Investors in Nagorno-Karabakh v. Republic of Azerbaijan	Data not available	Investor-State	Data not available	2022-12-05
ICC Case - ID No. 2155	ICC	Commercial Arbitration	Data not available	2022-12-01
ICC Case - ID No. 2157	ICC	Commercial Arbitration	Data not available	2022-12-01
ICC Case - ID No. 2161	ICC	Commercial Arbitration	Data not available	2022-12-01
ICC Case - ID No. 2162	ICCA	Commercial Arbitration	Data not available	2022-12-01
ICC Case - ID No. 2166	ICC	Commercial Arbitration	Data not available	2022-12-01
ICC Case - ID No. 2167	ICC	Commercial Arbitration	Data not available	2022-12-01
ICC Case - ID No. 2171	ICC	Commercial Arbitration	Data not available	2022-12-01
ICC Case - ID No. 2174	ICC	Commercial Arbitration	Data not available	2022-12-01

ICCA :

Case	Institution	Type of case	Seat	Date
Nova Moema Empreendimentos Ltda. v. Lucio Engenharia e Construções Ltda.	Data not available	Commercial Arbitration	Data not available	2022-11-30
PowerChina HuaDong Engineering Corporation (HDEC) and China Railway 18th Bureau Group Company Ltd (CR18g) v. Socialist Republic of Vietnam	ICSID	Investor-State	Data not available	2022-11-29
Oasis Projects Limited v. National Highways and Infrastructure Development Corporation Limited	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-11-19
Berkeley Minera Espana S.L.U. and Berkeley Exploration Limited v. Kingdom of Spain	Data not available	Investor-State	Data not available	2022-11-18
Exyte Energy, Inc. v. SSA Solar of HI 2, LLC, SSA Solar of HI 3, LLC, Sun Financial, LLC, Kenyon Energy, LLC and Bay4 Energy Services, LLC, Clay M. Bidding-er and others	DPR	Commercial Arbitration	Data not available	2022-11-18
Eastern Exterior Wall Systems, Inc. v. Gilbane Construction Company	AAA	Commercial Arbitration	Data not available	2022-11-16
Minmetals International Engineering Co., Ltd. v. Public Joint Stock Company Chelyabinsk Metallurgical Plant	SCC	Commercial Arbitration	Stockholm	2022-11-04
Swastic Construction Company v. Delhi Development Authority	Data not available	Commercial Arbitration	Delhi	2022-11-02
Electrabel SA v. SEPCOIII Electric Power Construction Co. Ltd.	Data not available	Commercial Arbitration	Data not available	2022-11-01

DPR: Dispute Prevention and Resolution, Inc.
SCC: Stockholm Chamber of Commerce

Case	Institution	Type of case	Seat	Date
Gama Güç Sistemleri Mühendislik ve Taahhüt A.Ş. v. Republic of North Macedonia	ICC	Investor-State	Data not available	2022-11-01
ICC Case - ID No. 2145	ICC	Commercial Arbitration	Data not available	2022-11-01
ICC Case - ID No. 2146	ICC	Commercial Arbitration	Data not available	2022-11-01
ICC Case - ID No. 2147	ICC	Commercial Arbitration	Data not available	2022-11-01
ICC Case - ID No. 2148	ICC	Commercial Arbitration	Data not available	2022-11-01
ICC Case - ID No. 2149	ICC	Commercial Arbitration	Data not available	2022-11-01
Abengoa Construção Brasil Ltda. v. Radiotrônica do Brasil Ltda.	Data not available	Commercial Arbitration	Data not available	2022-10-26
Claimant v. Respondents	Data not available	Commercial Arbitration	Data not available	2022-10-21
Allco, LLC and Allco Virgin Islands, LLC v. Aptim Environmental & Infrastructure, LLC f/k/a Aptim Environmental & Infrastructure, Inc. and Jonathon Hunt	AAA	Commercial Arbitration	Data not available	2022-10-18
The Sky is the Limit Corporation v. Looks Great Services of MS, Inc.	AAA	Commercial Arbitration	Data not available	2022-10-14

Case	Institution	Type of case	Seat	Date
Advanced Directional Drilling Solutions INC. v. Limn Broadband Services INC.	AAA	Commercial Arbitration	Daytona Beach	2022-10-10
IJM-Gayatri Joint Venture v. National Highways Authority of India (I)	Data not available	Commercial Arbitration	Delhi	2022-10-07
Continental Engineering Corporation (GEC) v. National Highway Authority of India	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-10-06
ICC Case - ID No. 2133	ICC	Commercial Arbitration	Data not available	2022-10-01
ICC Case - ID No. 2134	ICC	Commercial Arbitration	Data not available	2022-10-01
ICC Case - ID No. 2139	ICC	Commercial Arbitration	Data not available	2022-10-01
ICC Case - ID No. 2140	ICC	Commercial Arbitration	Data not available	2022-10-01
ICC Case - ID No. 2142	ICC	Commercial Arbitration	Data not available	2022-10-01
Star Hydro Power Limited v. National Transmission and Despatch Company Limited (III)	LCIA	Commercial Arbitration	Data not available	2022-09-30
Siyuan Xinye (Beijing) Technology Co., Ltd. v. Shandong Guanzhitong Trading Co., Ltd.	BAC	Commercial Arbitration	Data not available	2022-09-23

LCIA: London Court of International Arbitration

Case	Institution	Type of case	Seat	Date
Ascent Construction, Inc. v. Sugarmont, LLC and Zurich American Insurance Co. Fidelity and Deposit Company of Maryland	JAMS	Commercial Arbitration	Salt Lake City	2022-09-22
Claimant v. Respondent	ISTAC	Commercial Arbitration	Istanbul	2022-09-21
International Process Plants and Equipment Corp. v. Metro Industrial Wrecking and Environmental Contractors, Inc. and First Standard Asurety, LLLP	AAA	Commercial Arbitration	Philadelphia	2022-09-14
LS Black Constructors/Loeffel Construction Joint Venture v. Graef Construction, Inc.	AAA	Commercial Arbitration	Data not available	2022-09-14
AZS Industries, LLC n/k/a Splashtacular, LLC v. Waterpark Construction, Inc.	AAA	Commercial Arbitration	Data not available	2022-09-06
Andal Dorairaj, Vidhya Sharathram and D. Sharatram v. Rithwik Infor Park Pvt., Ltd., Hanudev Info Park P., Ltd. and Rithwik Infrastructure P., Ltd.	MHCAC	Commercial Arbitration	Chennai	2022-09-02
Asha Enterprises Pvt. Ltd. v. Government of the National Capital Territory of Delhi	DIAC	Commercial Arbitration	Data not available	2022-09-02
ICC Case - ID No. 2117	ICC	Commercial Arbitration	Data not available	2022-09-01
ICC Case - ID No. 2119	ICC	Commercial Arbitration	Data not available	2022-09-01

JAMS: Judicial Arbitration and Mediation Services
ISTAC: Istanbul Arbitration Centre

Case	Institution	Type of case	Seat	Date
ICC Case - ID No. 2122	ICC	Commercial Arbitration	Data not available	2022-09-01
ICC Case - ID No. 2123	ICC	Commercial Arbitration	Data not available	2022-09-01
ICC Case - ID No. 2127	ICC	Commercial Arbitration	Data not available	2022-09-01
ICC Case - ID No. 2129	ICC	Commercial Arbitration	Data not available	2022-09-01
George Weis Company v. America 9 Construction, LLC	AAA	Commercial Arbitration	St. Louis	2022-08-29
Claimant v. Respondent	ICC	Commercial Arbitration	Abu Dhabi Global Market (ADGM)	2022-08-26
Nur-Ak Construction and Trade Co., Ltd. v. Republic of Yemen	Data not available	Investor-State	Data not available	2022-08-22
Mid-American Gunite, Inc., d/b/a Mid-American Group v. Swiss Re Corporate Solutions America Insurance Corporation	AAA	Commercial Arbitration	Data not available	2022-08-15
Morcor Financial, LLC v. Lucida Construction Company, LLC	AAA	Commercial Arbitration	Data not available	2022-08-15

Case	Institution	Type of case	Seat	Date
The LCF Group Inc. v. Jerry's Precision Trucking LLC d/b/a Jerry's Precision Contracting and Jerry Lee Betts	MCA	Commercial Arbitration	New York City	2022-08-15
Beijing Hanjing Yilin Technology Co., Ltd. v. Jiangsu Huadian Construction Group Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-08-12
Pristine Mega Logistics Private Limited v. Union of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-08-08
Baosteel Engineering & Technology Group Company, Ltd. v. Heihe Longjiang Chemical Company, Ltd. and China Zenith Chemical Group, Ltd.	Data not available	Commercial Arbitration	Data not available	2022-08-02
ICC Case - ID No. 2086	ICC	Commercial Arbitration	Data not available	2022-08-01
ICC Case - ID No. 2087	ICC	Commercial Arbitration	Data not available	2022-08-01
ICC Case - ID No. 2090	ICC	Commercial Arbitration	Data not available	2022-08-01
ICC Case - ID No. 2091	ICC	Commercial Arbitration	Data not available	2022-08-01
ICC Case - ID No. 2100	ICC	Commercial Arbitration	Data not available	2022-08-01
ICC Case - ID No. 2105	ICC	Commercial Arbitration	Data not available	2022-08-01

MCA: Mediation and Civil Arbitration d/b/a RapidRuling

Case	Institution	Type of case	Seat	Date
ICC Case - ID No. 2108	ICC	Commercial Arbitration	Data not available	2022-08-01
ICC Case - ID No. 2109	ICC	Commercial Arbitration	Data not available	2022-08-01
ICC Case - ID No. 2110	ICC	Commercial Arbitration	Data not available	2022-08-01
IC İçtaş İnşaat Anonim Şirketi v. Rosatom State Nuclear Energy Corporation	LCIA	Commercial Arbitration	Geneva	2022-08-01
Titan 2 IC İçtaş İnşaat Anonim Şirketi v. Akkuyu Nükleer Anonim Şirketi (I)	LCIA	Commercial Arbitration	Geneva	2022-08-01
Titan 2 IC İçtaş İnşaat Anonim Şirketi v. Akkuyu Nükleer Anonim Şirketi (II)	LCIA	Commercial Arbitration	Geneva	2022-08-01
Ajab Singh & Co v. Delhi Development Authority (II)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-07-29
INPEX Operations Australia Pty Ltd v. Daewoo Shipbuilding & Marine Engineering Co Ltd	ICC	Commercial Arbitration	Singapore	2022-07-29
Praetorian Holdings Group, LLC v. Industrial Access, Inc.	AAA	Commercial Arbitration	Cleveland	2022-07-26
Claimant v. Respondent	AAA	Commercial Arbitration	Houston	2022-07-25
Icon Construction, Inc. v. United Excel Corporation n/k/a Structsure Projects Inc.	AAA	Commercial Arbitration	Kansas	2022-07-20
Five Star Constructions Pvt. Ltd. v. Orchid Infrastructure Developers (P). Ltd.	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-07-19

Case	Institution	Type of case	Seat	Date
Cline Avenue Bridge, LLC v. Figg Bridge Builders, LLC	AAA	Commercial Arbitration	Data not available	2022-07-15
Hebei Harvey Technology Co., Ltd. v. China Construction Technology Group Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-07-15
Hebei Juntong Rubber Products Co., Ltd. v. China Construction Technology Group Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-07-15
Tangshan Xinsiwei Trading Co., Ltd. v. China Construction Technology Group Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-07-15
Paltech Cooling Towers & Equipments Limited v. Kanti Bijlee Utpadan Nigam Limited	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-07-05
Armtech (India) Limited v. GAIL (India) Limited	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-07-04
IRB Ahmedabad Vadodra Super Express Tollways Pvt. Ltd. v. National Highway Authority of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-07-04
S&P Infrastructure Developers Private Limited v. Executive Engineer of the National Highway Division	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-07-04
ICC Case - ID No. 2065	ICC	Commercial Arbitration	Data not available	2022-07-01
ICC Case - ID No. 2067	ICC	Commercial Arbitration	Data not available	2022-07-01

Case	Institution	Type of case	Seat	Date
ICC Case - ID No. 2068	ICC	Commercial Arbitration	Data not available	2022-07-01
ICC Case - ID No. 2072	ICC	Commercial Arbitration	Data not available	2022-07-01
ICC Case - ID No. 2074	ICC	Commercial Arbitration	Data not available	2022-07-01
ICC Case - ID No. 2075	ICC	Commercial Arbitration	Data not available	2022-07-01
Tan Tao Investment & Industry Corporation and Maya Dangelas v. Socialist Republic of Vietnam	Ad hoc Arbitration	Investor-State	Data not available	2022-07-01
Wan Sern Metal Industries Pte Ltd v. Hua Tian Engineering Pte Ltd	SIAC	Commercial Arbitration	Data not available	2022-06-28
Tanya Morris and Trevor Morris v. Accent Waterscapes, LLC	AAA	Commercial Arbitration	Dallas	2022-06-21
Comercializadora Mediterránea de Viviendas S.A. v. Kingdom of Morocco	ICSID	Investor-State	Data not available	2022-06-10
Metcon India Realty and Infrastructure Private Limited v. Delhi Metro Rail Corporation Limited	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-06-09
Ascent Construction Inc. v. Sugarmont LLC	JAMS	Commercial Arbitration	Data not available	2022-06-07

SIAC: Singapore International Arbitration Centre
ICSID: International Centre for Settlement of Investment Disputes

Case	Institution	Type of case	Seat	Date
HR Builders v. Delhi State Industrial and Infrastructure Development Corporation Limited	Data not available	Commercial Arbitration	Delhi	2022-06-03
Pink City Expressway Private Limited v. National HIghways Authoitry of India and another	Data not available	Commercial Arbitration	Data not available	2022-06-03
Claimant v. Respondent	ICC	Commercial Arbitration	Abu Dhabi	2022-06-01
ICC Case - ID No. 2045	ICC	Commercial Arbitration	Data not available	2022-06-01
ICC Case - ID No. 2050	ICC	Commercial Arbitration	Data not available	2022-06-01
ICC Case - ID No. 2052	ICC	Commercial Arbitration	Data not available	2022-06-01
ICC Case - ID No. 2053	ICC	Commercial Arbitration	Data not available	2022-06-01
ICC Case - ID No. 2059	ICC	Commercial Arbitration	Data not available	2022-06-01
Keppel Seghers Engineering Singapore Pte. Ltd. v. Qatar Public Works Authority	ICC	Commercial Arbitration	Data not available	2022-05-31
Claimant v. Respondent	ADCCAC	Commercial Arbitration	Abu Dhabi	2022-05-25

ADCCAC: Abu Dhabi Commercial Conciliation and Arbitration Centre

Case	Institution	Type of case	Seat	Date
LB Construction, B.V. v. The Ritz Residence Exploitation, B.V.	AIC	Commercial Arbitration	Data not available	2022-05-24
Denis McCarthy and Sheila McCarthy v. Current Construction	Ad hoc Arbitration	Commercial Arbitration	San Francisco	2022-05-17
Plaza Centers N.V. v. Romania	ICSID	Investor-State	Data not available	2022-05-16
GMR Hyderabad Vijayawada Expressways Limited v. National Highways Authority of India	Data not available	Commercial Arbitration	Delhi	2022-05-13
Cobra Instalaciones y Servicios, S.A. and Shyam Indus Power Solution Private Limited (Joint Venture)v. Haryana Vindyut Prasaran Nigam Limited (I)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-05-06
Cobra Instalaciones y Servicios, S.A. and Shyam Indus Power Solution Private Limited (Joint Venture)v. Haryana Vindyut Prasaran Nigam Limited (II)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-05-06
Kiri Associates Private Limited v. Malibu Estate Private Limited	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-05-04
STX Offshore and Shipbuilding Co. Ltd. v. Mellitah Oil & Gas BV (II)	ICC	Commercial Arbitration	Paris	2022-05-03
ICC Case - ID No. 2032	ICC	Commercial Arbitration	Data not available	2022-05-01

AIC: Arbitration Institute of Curaçao

Case	Institution	Type of case	Seat	Date
ICC Case - ID No. 2035	ICC	Commercial Arbitration	Data not available	2022-05-01
ICC Case - ID No. 2042	ICC	Commercial Arbitration	Data not available	2022-05-01
ICC Case - ID No. 2048	ICC	Commercial Arbitration	Data not available	2022-05-01
Dutch Company X v. Dutch Company Y.	Data not available	Commercial Arbitration	Data not available	2022-04-29
Rwanda Energy Group (REG) v. KivuWatt	Ad hoc Arbitration	Commercial Arbitration	London	2022-04-29
Innovators Façade Systems Limited v. Airport Authority of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-04-25
Flintlock Construction Services LLC v. Arch Specialty Insurance Company and Catlin Specialty Insurance Company	AAA	Commercial Arbitration	New York City	2022-04-18
Satluj Jal Vidyut Nigam Limited v. Jaiprakash Hyundai Consortium	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-04-18
Claimant v. Respondent	DIAC	Commercial Arbitration	Dubai International Financial Centre (DIFC)	2022-04-13
Southern Coatings Inc. v. Protogroup South Tower LLC	AAA	Commercial Arbitration	Data not available	2022-04-12

Case	Institution	Type of case	Seat	Date
Prime Energía Quickstart SpA v. TSK Chile SpA, TSK Electrónica y Electricidad, S.A. and Rolls Royce Solutions America Inc.	ICC	Commercial Arbitration	Data not available	2022-04-11
Rama Construction Company v. Union of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-04-11
Shaanxi Huitian Yunzhu Technology Co., Ltd. v. China Railway Construction Group Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-04-08
GMR Pochanpalli Expressways Ltd v. National Highways Authority of India (I)	Data not available	Commercial Arbitration	Delhi	2022-04-06
GMR Pochanpalli Expressways Ltd v. National Highways Authority of India (II)	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-04-06
CB&I UK Limited v. Republic of Colombia	ICSID	Investor-State	Data not available	2022-04-05
Osho G.S. and Company v. Wapcos Limited	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-04-05
Satish Chand Shivhare and Brothers v. State of Uttar Pradesh and others	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-04-04
ICC Case - ID No. 2004	ICC	Commercial Arbitration	Data not available	2022-04-01
ICC Case - ID No. 2012	ICC	Commercial Arbitration	Data not available	2022-04-01

Case	Institution	Type of case	Seat	Date
ICC Case - ID No. 2021	ICC	Commercial Arbitration	Data not available	2022-04-01
ICC Case - ID No. 2023	ICC	Commercial Arbitration	Data not available	2022-04-01
Sarada Construction v. National Highways Authority of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-03-28
Claimant v. Respondent	ADCCAC	Commercial Arbitration	Abu Dhabi	2022-03-24
Continental Engineering Corporation v. Union of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-03-22
Reynosa Properties, LLC v. 1025 Hialeah Gomez Development, LLC and Gomez Development 1715, LLC	AAA	Commercial Arbitration	Miami	2022-03-22
Abdulmajeed Qasem Othman Ahmed, Al-Ameri for Engineering, Trading and Contracting Company Ltd, and Al-Ameri Intel Company East Africa Constructions Ltd v. Republic of Uganda	ICSID	Investor-State	Data not available	2022-03-21
Shahpari Azzamy Zanganeh v. Cobra (ACS), Inabensa (Abengoa), Indra, OHL and Copasa (II)	ICC	Commercial Arbitration	Data not available	2022-03-09
Shahpari Azzamy Zanganeh v. Cobra (ACS), Inabensa (Abengoa), Indra, OHL, Copasa, Imathia, Siemens, Consultrans and Talgo (I)	ICC	Commercial Arbitration	Data not available	2022-03-09
Tintaya Marquiri Operaciones Mineras S.A. v. Compañía Minera Antapaccay S.A.C.	Data not available	Commercial Arbitration	Data not available	2022-03-09

Case	Institution	Type of case	Seat	Date
C. Stasky Associates, Ltd. v. Philip Falcone and Lisa Falcone	AAA	Commercial Arbitration	Data not available	2022-03-07
Claimant v. Respondent	Data not available	Commercial Arbitration	Data not available	2022-03-04
Liaoning Anzhong Construction Technology Co., Ltd. v. Liaoning Zhonggan Railway Construction Engineering Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-03-04
Elevolution–Engenharia S.A. v. The Islamic Republic of Mauritania	Data not available	Investor-State	Data not available	2022-03-01
ICC Case - ID No. 1983	ICC	Commercial Arbitration	Data not available	2022-03-01
ICC Case - ID No. 1993	ICC	Commercial Arbitration	Data not available	2022-03-01
ICC Case - ID No. 1996	ICC	Commercial Arbitration	Data not available	2022-03-01
Claimant v. Respondent	ICC	Commercial Arbitration	Paris	2022-02-28
Claimant v. Respondent	LCIA	Commercial Arbitration	Doha	2022-02-24
Wuhan Jiuzhou Anxia Engineering Technology Co., Ltd. v. China Railway Construction Group Zhongnan Construction Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-02-24

Case	Institution	Type of case	Seat	Date
Claimant v. Respondent	DIAC	Commercial Arbitration	Dubai	2022-02-22
Admi, Inc. v. Surterra Holdings, Inc., d/b/a Parallel Brands	AAA	Commercial Arbitration	Data not available	2022-02-21
Ashutosh Builders Contractors and Engineers v. Union of India and others	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-02-16
Claimant v. Respondent	ICC	Commercial Arbitration	Singapore	2022-02-15
Gracie Chan Bee Cheng v. LJH Construction & Engineering Co Pte Ltd	Data not available	Commercial Arbitration	Data not available	2022-02-15
Claimant v. Respondent	ICC	Commercial Arbitration	Paris	2022-02-11
Consorcio Supervisor Pucallpa v. Ministerio de Transportes y Communicaciones	Data not available	Commercial Arbitration	Data not available	2022-02-08
Neptune India Ltd. v. New Delhi Municipal Council	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-02-08
Emas Expressway Private Limited v. National Highways Authority of India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-02-07
Mapex Infrastructure Private Limited v. National Highways Authority of India	Data not available	Commercial Arbitration	Delhi	2022-02-07
Claimant v. Respondent	DIAC	Commercial Arbitration	Dubai	2022-02-04

Case	Institution	Type of case	Seat	Date
Oil Industry Development Board v. Godrej and Boyce Mfg Co. Ltd.	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-02-02
Provías Nacional v. JJC Contratistas Generales SA	Data not available	Commercial Arbitration	Data not available	2022-02-02
ICC Case - ID No. 1957	ICC	Commercial Arbitration	Data not available	2022-02-01
ICC Case - ID No. 1958	ICC	Commercial Arbitration	Data not available	2022-02-01
ICC Case - ID No. 1969	ICC	Commercial Arbitration	Data not available	2022-02-01
ICC Case - ID No. 1978	ICC	Commercial Arbitration	Data not available	2022-02-01
Ingenieros Civiles y Contratistas Generales S.A., Andrade Gutierrez Engenharia, S.A. and Constructora Queiros Galvao S.A. Sucursal Perù v. Republic of Peru		Commercial Arbitration	Data not available	2022-02-01
Claimant v. Respondent	DIAC	Commercial Arbitration	Dubai	2022-01-31
Grand Monarch Partners, LLC and Avenida Partners, LLC v. Colorado First Construction Co., d/b/a CFC Construction, Inc. and CFC Construction Corp.	AAA	Commercial Arbitration	Data not available	2022-01-28
Vil Rohtak Jind Highway Private Limited v. National Highways Authority of India	Data not available	Commercial Arbitration	Delhi	2022-01-28

Case	Institution	Type of case	Seat	Date
Discreet Limited v. Global Island Investments Limited (II)	Data not available	Commercial Arbitration	Data not available	2022-01-24
Hebei Jiejuan Construction Labor Subcontracting Co., Ltd. v. Shandong First Construction Construction Co., Ltd.	BAC	Commercial Arbitration	Beijing	2022-01-24
Hindustan Construction Company Limited v. National Highways Authority of India (III)	Data not available	Commercial Arbitration	Delhi	2022-01-12
GAIL (India) Ltd. v. Gupta Bros. (India)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-01-11
Claimant v. Respondent	ADCCAC	Commercial Arbitration	Abu Dhabi	2022-01-10
Ace Group International LLC and Ace Group Bowery LLC v. 225 Bowery LLC	ICC	Commercial Arbitration	New York City	2022-01-04
Acciona, S.A. and Imasa Ingeniera y Proyectos, S.A. v. Greenalia, S.A.	CAM	Commercial Arbitration	Madrid	2022-01-01
AKTOR S.A.-Webuild S.p.A.-Hitachi Rail STS S.p.A. Joint Venture v. Attiko Metro S.A.	Data not available	Commercial Arbitration	Data not available	2022-01-01
Claimant v. Respondent	CRCICA	Commercial Arbitration	Data not available	2022-01-01
Cosapi Johes v. Ministry of Transport and Communications (MTC)	Data not available	Commercial Arbitration	Data not available	2022-01-01

CRCICA: Cairo Regional Center for International Commercial Arbitration

Case	Institution	Type of case	Seat	Date
HALE GmbH v. M. G. McGrath, Inc. Glass & Glazing (MGG)	ICC	Commercial Arbitration	Vienna	2022-01-01
ICC Case - ID No. 1947	ICC	Commercial Arbitration	Data not available	2022-01-01
ICC Case - ID No. 1948	ICC	Commercial Arbitration	Data not available	2022-01-01
Patel Engineering Limited v. Republic of Mauritius	PCA	Investor-State	London	2022-01-01
Sacyr S.A. v. Respondents	CAC-CCB	Commercial Arbitration	Data not available	2022-01-01
Shelley Lynn Vogel and Bret Vogel v. Prestige Building Removals Limited	Data not available	Commercial Arbitration	Auckland	2022-01-01
Técnicas Reunidas, S.A. v. Neptune Energy Norway and Société Nationale pour la Recherche, la Production, le Transport, la Transformation, et la Commercialisation des Hydrocarbures (SONATRACH) S.p.A.	Data not available	Commercial Arbitration	Data not available	2022-01-01

CAC-CCB: Centre for Arbitration and Conciliation of the Chamber of Commerce of Bogotá

Annex 2

2023 SHORTLIST OF TOP CONSTRUCTION COMPANIES IN ALPHABETICAL ORDER

Disclaimer: The following table presenting a shortlist of top construction companies worldwide and their known in-house counsel is solely intended for informational purposes. The list is organized alphabetically and does not signify any hierarchical ranking. The inclusion or exclusion of any particular company does not imply superiority or inferiority compared to others. The information provided in the table is based on publicly available data up until December 2022, and is subject to change.

Name of the Company	Country of HQ	Known In-House Counsel	Position
Acciona	Spain	Jorge Vega-Penichet	Group General Counsel
Actividades de Construccion y servicios (ACS)	Spain	José Luis del Valle Pérez	General Secreatry
AECOM	US	David Gan (CLO)	Chief Legal Officer
Andrade Gutierrez	Brazil	Daniel Esteves	General Legal Counsel
Balfour Beatty	UK	Tracey Wood	General Counsel & Company Secretary
Bauer	Germany	Corina Sirbulescu	Head of Legal and Administrative Department
Bechtel	US	Michael C. Bailey	General Counsel
Bouygues	France	Didier Casas	General Secretary & General Counsel
China Communications Contruction Group (CCCC)	China	Data not available	Data not available
China Energy Engineering Group	China	Data not available	Data not available
China Railway Construction Corporation (CRCC)	China	Data not available	Data not available

Name of the Company	Country of HQ	Known In-House Counsel	Position
China Railway Group (CREC)	China	Data not available	Data not available
China State Construction Engineering Corporation (CSCEC)	China	Hongtao Li	Deputy General Counsel
Consolidated Contractors Company	Greece	Sevag Panossian	General Counsel
Daewoo Engineering & Construction Co.	South Korea	Seungji Ha	Legal Counsel, International Legal Affairs
Eiffage Construction	France	Laurence Ballone Burini	Directrice Juridique
Enka Insaat Ve Sanayi	Turkey	Kaan Aksu (VP)	VP Legal
Ferrovial	Spain	Santiago Ortiz Vaamonde	Group General Counsel
Fluor Corporation	US	Kevin Hammonds	Senior VP & Managing General Counsel
Fomento de construcciones y contratas (FCC)	Spain	Leyre Navarro Aranda	Directora Asesoría Jurídica
Galliford Try	UK	Kevin Corbett	General Counsel & Company Secretary
GEK Terna	Greece	Dimitra Chatziarseniou	Head of Legal Department
Granite Construction	US	Craig Hall	General Counsel, Corporate Secretary & Corporate Compliance Officer
Grupo Carso	Mexico	Jesus Sierra Castillo	Abogado General de Obra

Name of the Company	Country of HQ	Known In-House Counsel	Position
Grupo Empresarial San Jose	Spain	Rafael Sanmartín Muñiz	Avogado
GS Engineering & Construction	South Korea	권호상	Advisor - Head of International Legal Division
Hyundai Engineering & Corporation (HDEC)	South Korea	Jean H. Chang	Chief Legal Counsel
Implenia	Switzerland	German Grüniger	Group General Counsel
Italian-Thai Development Public	Thailand	Data not available	Data not available
Jacobs Engineering	US	Justin Johnson	Senior VP, General Counsel & Company Secretary
Kajima Corporation	Japan	光好田村	General Manager, Office of Corporate and Legal Affairs, Deputy General Mgr. Overseas Operatons Div
Kiewit Corporation	US	David Hecker	Group General Counsel - Claims & Litigation
Larsen & Toubro	India	Hemant Kumar	Group General Counsel
Metallurgical Corporation of China (MCC)	China	Data not available	Data not available
Mytilineos Holdings	Greece	Dimitris Diakopoulos	General Counsel

Name of the Company	Country of HQ	Known In-House Counsel	Position
NCC AB	Sweden	Ann-Marie Hedbeck	Chefsjurist / General Counsel / Head of Legal and Risk
Obayashi Corporation	Japan	Nobuhide Kohno	General Manager Legal Department
Odebrecht Engenharia e Construção	Brazil	Ana Luiza Polak	Head of Legal Corporation
Orascom Construction	Egypt	Alexandre Lousada	Group General Counsel
PEAB AB	Sweden	Karin Malmgren	Chiefsjurist
Porr AG	Austria	Wolfgang Hussian	Head of Legal Department
Power Construction Corporation of China	China	Data not available	Data not available
Royal Bam Group	Netherlands	Stan Beckers	Group General Counsel
Sacyr	Spain	José Luiz Torres Muñoz	Chief Compliance Officer & Deputy General Counsel
SalfaCorp	Chile	Benjamín Pablo Pilasi Marinovich	In-House Lead Attorney
Samsung C&T Corporation	South Korea	Edward Chun	Managing Counsel
Shanghai Construction Group	China	Data not available	Data not available
Shapoorji Pallonji & Co.	India	Zarina Chinoy	General Counsel EPC Division

Name of the Company	Country of HQ	Known In-House Counsel	Position
Shimizu Corporation	Japan	David Sanders	General Manager for Administration
Skanska AB	Sweden	Caroline Fellenius Omnell	Executive VP & General Counsel
SNC Lavalin	Canada	Andrée-Claude Bérubé	Executive VP & General Counsel
Strabag	Austria	Michael. Lueck	General Counsel
Tecnicas Reunidas	Spain	Carmen Rosa Herrera Martín (Director)	Legal Director of Corporate Affairs
Tekfen Holding	Turkey	Muge Cetin	Manager Legal Affairs
Tutor Perini	US	Wendy Hallgren	EVP & General Counsel
Veidekke ASA	Norway	John Strand	Juridisk Direktør
Vinci Construction Grands Projets	France	Gonzalo Jaspe	General Counsel
Vinci Group	France	Patrick Richard	Directeur Juridique
WeBuild	Italy	Vinicio Fasciani	General Counsel
Worley	Australia	Larry Kalban	SVP & General Counsel

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