The construction industry is one of the major users of arbitration globally. The International Chamber of Commerce’s most recent statistics show that the construction and engineering industry made up a quarter of its arbitration caseload last year. Arbitration clauses are common in the contracts used for the procurement of infrastructure, building of ships, erecting tower blocks and heavy engineering. They are the go-to mechanism for dispute resolution in privately financed projects from Rabat to Rio and Abu Dhabi to Abuja. Yet, in this multi-national, multi-cultural environment, the parties’ expectations of arbitration are often very different. In this article, Mark Lloyd-Williams, Hamish Macpherson, Craig Shepherd, Emma Kratochvilova and Thomas Weimann draw on their experiences to consider how arbitration is used in construction and infrastructure projects around the world.

The starting point for considering the nuances and different approaches is to look at the nature of the disputes which arise on a typical construction project. In construction and infrastructure, perhaps more than any other sector, it is often the scale and complexity of the factual matrix in the dispute which drives procedural questions as to its resolution.

CONSTRUCTION PROJECTS: DISPUTE RESOLUTION IN COMPLEX FACT SCENARIOS

Construction and infrastructure projects are inherently complex, involving a suite of intricate contracts and detailed requirements to address design, procurement, construction, installation, and commissioning, as well as the operation of the project. As a result, it is common for there to be thousands of different activities occurring at any one time while a project is built, and even on the best managed projects, problems arise and delays occur. For every day of delay, the contractor incurs additional overhead and running costs, while the employer sees the date on which it begins to earn a return on his investment deferred, and as each party’s financial position deteriorates, the gap between them grows. The cliché that time is money is rarely truer than on a construction site. It is therefore not surprising that disputes arise and that complex questions of delay are often at their heart.
Broadly, time-related claims fall into 2 categories:
1. Employer’s claims for liquidated or other damages – where the employer seeks to recover its additional costs or losses incurred as a result of the contractor’s delay in completing the works, normally on the basis of a pre-agreed formula; and
2. Contractor’s claims for extensions of time and prolongation costs – where the contractor wants to defer the contractual completion date and avoid (liquidated) damages, while generally also trying to recover the cost of staying on site for longer than anticipated.

Three other types of dispute are also commonplace:
1. Contractor’s claims for loss and expense from disruption – where the contractor wants to recover the cost of working less efficiently (for example where additional resources have been needed to complete elements of the works);
2. Employer’s claims for defects – where the employer wants to claim damages as a result of a fault in the works or where the works are not performing as they should; and
3. Contractor’s claims for variations and final account valuations – where the contractor wants more than the employer thinks he is owed because of a change in the scope of the works.

Construction disputes are unusual because of their factual complexity. While many disputes in other sectors can be of extremely high value, they typically turn on a small number of discrete questions, such as whether a particular promise was made or a particular state of affairs amounted to a breach. Construction cases require an extensive unravelling of the facts and it is essential to have a dispute mechanism which allows the decision maker to properly understand what was happening at any given time in a project where hundreds of activities may be proceeding simultaneously over a period of years. Properly done, arbitration allows exactly that.

CONSTRUCTION ARBITRATION: BEST PRACTICE AND GLOBAL TRENDS

Very few – if any – clients want to take the arbitration process through to its ultimate conclusion, but the points addressed below apply as much to developing a party’s position in order to secure the best commercial resolution as they do to achieving a successful arbitration award.

(i) Documentary evidence: getting your hands on the documents, dealing with the burden of disclosure

The availability of contemporaneous documentation, such as construction programmes, as well as correspondence is paramount. While some court systems allow a party to demand that the other provides relevant documents, many do not. If a dispute is heard in the courts of the UAE or Qatar, for example, it is very unlikely that either party will be ordered to provide any documents and each party will provide only those papers it wants the decision maker to see. This lack of a disclosure process in court pushes parties to use arbitration where a tribunal, even under the rules of most local institutions, will have the power to order the exchange of relevant documents. By way of example, Article 27.3 of the Dubai International Arbitration Centre Rules provides:

“At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence within such a period of time as the Tribunal considers necessary or appropriate and may order a party
to make available to the Tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.”

The production of documents can, unfortunately, become a severe burden. Given the complexity of modern-day construction projects, millions of documents can be produced, and in order to prove a claim or establish a defence, it is often necessary to review thousands of documents and emails created during the construction period. This can be a particular problem in some common law jurisdictions such as Australia. Again, however, arbitration used wisely can prevent the weight of documents from overwhelming the process. It is now common in construction cases for the parties to agree to use, or be guided by, the IBA Rules on the Taking of Evidence in International Arbitration. The IBA Rules represent internationally recognised best practice, providing a compromise between common law and civil law concepts, and limiting the disclosure obligation to narrow and specific categories of documents that are reasonably believed to exist, which are relevant and material to the outcome of the case and which are not already in the possession, custody or control of the requesting party. This middle ground allows an arbitral tribunal to ensure that it has access to the evidence it needs, without the parties being subjected to an overly onerous disclosure process. Further, good counsel can also advise on practical techniques to assist a client to comply with disclosure requirements in an efficient and cost-effective manner, advising on use of document management systems and technologies such as predictive coding. Whilst not all national courts will be familiar with, and accepting of, such tools, arbitral tribunals are often in favour of their use, provided that they do not undermine the parties’ right to a fair hearing.

(ii) The thorny issue of evidentiary privileges and rules against admissibility

A related consideration in terms of important regional differences, concerns the lack of “privilege” or other evidentiary rules which protect documents from disclosure and/or admissibility. Again, using the Middle East as an example, in many of the key jurisdictions in the region the concept of making an offer on a “without prejudice” basis (meaning that the terms of the offer are not admissible before a court or tribunal) does not exist, and even legal advice may not be protected from disclosure in the same way it is in other jurisdictions. Therefore, unless the parties are careful, their expectations of which documents are discloseable and which are admissible, and what remains confidential, may not be met. Any such potential discrepancy between the client’s expectations as to the privilege or protections which attaches to their documents, and the potential for those documents to be discloseable, should be identified at a very early stage. While this issue arises in all sectors, it is a real concern in construction cases where commercial correspondence is often drafted by a claims team with extensive construction knowledge, but no local law training, who will anticipate that marking a letter “without prejudice” will offer it a protection which that law does not recognise.

(iii) Difficulties surrounding witness testimony

Factual witnesses are also very important as they can provide an account of what was happening on site during critical periods of the project. Again, regional expectations differ and this can cause considerable difficulties in administering the process in some of the key markets for construction cases. In Saudi Arabian disputes there can even be contention over who can be a witness in the first place. Saudi court process requires witnesses to be independent and provides that the statements of a party or its employees or agents have no evidential value. Those court rules have no application in regional arbitration; but the fact that one party may strongly dispute the entitlement of a key witness to testify can lead to unnecessary procedural applications. A strong and experienced tribunal is needed to deal with such applications in a way that ensures that the arbitration proceeds without undue delay.
A further issue which is keenly felt in construction cases globally is the availability (or the lack of availability) of factual witnesses after a project completes. Many engineers, surveyors and others are engaged for a project, and when the project completes they move on to other work, in other countries, for other companies and may become reluctant to look back at events several years ago. Indeed, once the project team has been disbanded and access to the site has been terminated, it can become difficult to identify specific losses and their underlying causes. To tackle this it is important to prepare witness statements early, sometimes as soon as a dispute is contemplated, even if they are only in draft.

As with construction projects themselves, a construction dispute is also inherently complex. Often, a construction arbitration can turn on expert evidence from engineers, programming experts or quantum experts relating to the extent and causes of delay, how much additional cost the contractor is entitled to recover, whether the works comply with the specification or why the works are not performing as they should. Typically in construction arbitrations the parties will each appoint experts to assist counsel and to help the tribunal understand its claim or defence, and to assess the damages claimed, often resulting in a claim becoming a battle of the experts. However in several civil law jurisdictions, in particular Germany and some neighbouring countries, it is well established practice for arbitral tribunals (as well as for state courts) to avoid such a battle and appoint a further expert independent from the parties to analyse the technical issues, to testify and to assist the arbitral tribunal. Such an approach can be a surprise where parties are used to each side appointing their own independent expert and moreover can be fundamental to a party’s presentation of its case, and to what type of arbitrator is the right fit for the dispute.

(iv) Rules, seats, governing laws and language barriers

Given the complexities common to construction and infrastructure disputes, seasoned international players commonly opt for institutional arbitration rather than ad hoc proceedings. The choice of arbitral institution was historically linked to a handful of centres, such as London, Paris, New York, Stockholm and Hong Kong. However, more recently, with the increasing number and strength of reputable institutions boasting world-renowned construction arbitrators on their lists, there is now a wider choice, including institutions headquartered in the region of the project, eg, SIAC, HKIAC, BANI, KLRCA and CIETAC in Asia. Some institutions have had less success in growing a name for themselves on the international construction arbitration scene. For example, for their international construction projects, we see that Japanese corporates will commonly agree to the aforementioned Asian institutions over the JCAA in Tokyo.#

English law is still widely accepted as the governing law of choice in construction projects featuring international companies. English law is favoured primarily for its clarity - the fact that it provides a predictable, user-friendly system that supports freedom of contract and will not generally subject those who use it to unwelcome surprises (for example, by introducing extraneous mandatory rules or implied good faith obligations). However, for government funded projects, it is common for the government to impose the law of its own jurisdiction into the head contract. The contractor and subcontractors/suppliers continue to agree that English law should govern their contracts and this mismatch between the head contract and the other contracts can leave a significant risk of liability gaps for the main contractor. Careful analysis is required to understand how the contracts fit together when governed by two different legal systems.

English language has become the lingua franca of international construction contracts. This again is a driver for the use of arbitration as it allows the parties to appoint a tribunal which speaks the language of the contract, and to produce the contract in its original form. Courts in the Middle East require documents to be submitted in Arabic, and as many construction contracts run to thousands of
highly technical pages, the cost and time implications of translation make litigation unattractive. Even in arbitration, one should never underestimate the time and cost associated with dealing with unavoidable language issues. In particular, the time and cost of translating documents and witness evidence, as well as finding a suitably qualified interpreter (both in terms of experience of interpreting at trial and familiarity with technical terms). These matters should be considered in the early stages so as to ensure that there will be sufficient translator resources to meet the procedural deadlines, as well as securing availability of the best interpreter candidates as they tend to be in high demand.

(v) Multiple party/multiple contract issue

One issue on construction projects which tends not be addressed is the implications of the multi-contract environment. While the parties could ensure that the arbitration agreements in the different contracts are compatible and allow for such options as joinder or consolidation, this remains rare. Different contracts will frequently have different dispute clauses and the risk of tribunals coming to different decisions in related cases (such as claims between employer and contractor and between contractor and sub-contractor) is very real.

CONCLUDING THOUGHTS

Arbitration is adopted in construction projects round the globe, and its ability to allow the parties and the tribunal to see documents, hear witnesses, and address the dispute in the most appropriate language means that it will long continue to be the default dispute resolution mechanism. However, the parties’ expectations will not always be met where the sides have different cultural approaches. In these cases, it is vital that as the contract is drafted the parties are not only asked, “do you want to provide for arbitration”, but are also asked, “what kind of arbitration do you want?”

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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