Global Arbitration Review

The Guide to Construction Arbitration

Editors
Stavros Brekoulakis and David Brynmor Thomas

The Guide to Construction Arbitration

The Guide to Construction Arbitration

Editors

Stavros Brekoulakis and David Brynmor Thomas

Publisher
David Samuels

Senior Co-publishing Business Development Manager
George Ingledew

Senior Co-publishing Manager
Gemma Chalk

Editorial Coordinator
Iain Wilson

Head of Production
Adam Myers

Senior Production Editor
Simon Busby

Copy-editor
Claire Ancell

Proofreader
Gina Mete

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalarbitrationreview.com

ISBN 978-1-912377-00-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following firms for their learned assistance throughout the preparation of this book:

4 NEW SQUARE

39 ESSEX CHAMBERS

3 VERULAM BUILDINGS

ADVOKATFIRMAN RUNELAND AB

CENTRE FOR COMMERCIAL LAW STUDIES,
QUEEN MARY UNIVERSITY OF LONDON

CLIFFORD CHANCE

CLYDE & CO

CORRS CHAMBERS WESTGARTH

CROWN OFFICE CHAMBERS

DECHERT (PARIS) LLP

FRESHFIELDS BRUCKHAUS DERINGER LLP

HERBERT SMITH FREEHILLS LLP

KING & SPALDING

PAKSOY

QUINN EMANUEL URQUHART & SULLIVAN LLP

VINSON & ELKINS RLLP

WHITE & CASE LLP

ZULFICAR & PARTNERS LAW FIRM

Contents

Part II: International Arbitration for Construction Disputes

Part III: Select Topics on Construction Arbitration

Part IV: Regional Construction Arbitration

8

Suitability of Arbitration Rules for Construction Disputes

David Kiefer and Adrian Cole[1]

Introduction

Arbitration continues to be the preferred method of dispute resolution for construction disputes. With many large infrastructure projects being financed, developed, supplied and constructed by companies from countries other than the one where the project sits, international arbitration is the most attractive option for resolving disputes among the interested parties. The driving reason behind this preference is that international companies involved in construction and engineering would rather look to arbitration to resolve their disputes, as opposed to subjecting themselves to the idiosyncrasies of local court systems and their inherent risks. As a result, construction and engineering projects consistently generate the largest percentage of commercial disputes before international arbitral bodies. For example, in 2015, they made up 25 per cent of all cases before the International Chamber of Commerce, which was the largest percentage of any subject matter by a significant margin.[2] With respect to construction disputes involving parties from the same country, domestic arbitration remains an attractive option. The use of arbitration, whether domestic or international, provides parties with a large degree of privacy, as most elements of the arbitration process are kept between the parties and are not subject to public scrutiny. It also allows the parties to select and present the merits of their dispute to seasoned arbitrators with significant experience of construction-related issues.

With such a large number of construction disputes being arbitrated on regular basis, it seems appropriate to ask a threshold question: are arbitration rules well-suited for construction disputes? After all, construction disputes distinguish themselves from other commercial disputes in a number of ways. They can be exceptionally large in scope, involving multiple interested parties with independent contractual relationships and amounts in

1 David Kiefer and Adrian Cole are partners at King & Spalding.

2 2015 ICC Dispute Resolution Statistics.

dispute reaching into the hundreds of millions of dollars, even eclipsing a billion dollars at times. The timelines of these projects – from initial development through engineering, construction and commissioning – span years, with key documentation created daily by dozens of witnesses. This often leads to an enormous amount of data to be reviewed and evaluated as evidence. Disputes concerning issues of time, cost and quality frequently give rise to the need to analyse and assess the cause of project delays through complex schedule analyses and expert testimony. Technical evaluation and testimony from experts is also often needed to address defects arising from the design and construction of complicated equipment. Complex issues of loss and of quantum of claim are common, requiring the input of expert quantity surveyors or quantum specialists. Overall, the rules and accepted practices in arbitration are well-suited for the nuances of construction disputes and allow the parties to prepare and present their cases effectively. That said, parties to construction arbitrations need to be aware of the applicable rules and norms, so they can strategically streamline and present their cases within the boundaries of these constraints.

Joinder of necessary parties

Cost overruns on a construction project can arise from a number of causes, such as delays, inefficiencies and defects, which can be the responsibility of a number of participants in the process. These participants, which include owners, contractors, subcontractors and equipment suppliers, typically enter into a number of separate contractual agreements, each with their own dispute resolution provision. In order to achieve a universal resolution of the entire dispute, parties may want to join all the interested parties into a single proceeding, so an award can be apportioned appropriately and inconsistent decisions avoided.

Arbitration rules generally allow claims arising out of more than one contract to be brought forth and decided in a single arbitration and for multiple arbitrations to be consolidated into one.[3] Consolidation is only appropriate with the consent of the parties or when the disputes arise from the same legal relationship and the arbitration agreements are compatible. While consolidation of all issues arising from the same project presents considerable efficiencies, there are a number of caveats to keep in mind before embracing this approach. First, each of the separate agreements must provide for an arbitration before the same arbitral body. If not, the parties will have to negotiate and agree to a separate dispute resolution agreement that provides for arbitration before the same body or a common *ad hoc* arrangement if an arbitral institution is not adopted. Second, arbitrating all disputes among all of the parties should make sense strategically and not compromise a party's ability to effectively present its case. For example, if an engineering, procurement and construction (EPC) contractor is in an arbitration with an owner over alleged defects in equipment supplied by the EPC contractor, the EPC contractor may not want to join the original equipment manufacturer (OEM) in the arbitration with the owner, but instead pursue a separate arbitration with the OEM under their equipment supply agreement. The reason for avoiding joinder in this case is that the EPC contractor might find itself in the unenviable position of defending the equipment in order to rebut the owner's claim, while

3 See ICC Arbitration Rules, Article 9 (allowing joinder of parties from multiple contracts); ICDR Rules, Article 7 (discussing joinder of parties to an arbitration); ICC Arbitration Rules, Article 10 (providing for the consolidation of arbitrations); and ICDR Rules, Article 8 (allowing consolidation of two or more arbitrations).

simultaneously pursuing a defect claim related to this same equipment against the OEM. This would allow the owner to 'divide and conquer' – a situation which could be avoided if the EPC contractor waited to bring an arbitration against OEM until after obtaining the results of the arbitration against the owner. This same dynamic could be at work where an EPC contractor is a consortium made up of two different companies (e.g., an engineering firm responsible for design in a consortium with a contractor responsible for construction). These consortium partners may want to air their grievances against one another in a forum to which the owner is not privy in order to avoid making allegations that could help the owner's case against the consortium.

Discovery and document exchange

Construction arbitrations are often won or lost based on the availability and significance of documents contemporaneously created at the time the issues in the case arose. Examples of such documents and data include cost accounting records, schedules, meeting minutes and site reports. The party requesting these documents will often need the production of all of these documents in order to recreate a timeline of events for a schedule analysis or to decipher how extra costs were tracked and categorised at the time they were incurred. Requesting all of a type of document can be seen as a 'fishing expedition' by some arbitrators, with the preferred method being requests for the production of specific documents. There is a basis for making broader requests, however, with the ICDR Rules allowing requests for 'specific documents or classes of documents' and the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules), which are typically incorporated in the Terms of Reference in many arbitrations, allowing requests for a 'narrow and specific requested category of Documents'.[4] Therefore, practitioners can pursue these documents by requesting them by category, but will bolster their chances of successfully receiving the documents if they keep the categories specific tailored to issues in the dispute and satisfy the tests of relevance and materiality. For example, a request for all of a contractor's accounting records may be rejected as too broad, while a request for the cost accounting records related to a differing site condition claim being advanced by the contractor is more likely to bear fruit.

Of course, the most voluminous type of document sought in discovery are emails. With project management personnel from all of the parties sending and receiving dozens of emails daily, the pool of potentially relevant emails can easily number into the millions. Unlike the previous set of documents discussed, most parties do not want the production of all of the emails sent and received by the opposing parties. Instead, each party wants only those emails that are germane to the issues it sees as relevant. In order to get those relevant emails, each party must cast a net wide enough to allow for scenarios and circumstances it may only suspect existed, while being focused enough to prevent the reception of data that is wholly irrelevant to its case. It is here that the rules governing most arbitrations fall silent and fail to provide helpful guidance. Therefore, it is up to the parties to come to an agreement on a protocol for the production of electronically stored data, such as emails, and the arbitrators to oversee and insist on a process that is both fair and efficient. Such a

4 ICDR Rules, Article 21; IBA Rules, Article 3.

protocol should recognise the need for metadata showing the provenance of the evidence to be preserved. Preferred methods of culling out irrelevant data include the use of search terms whereby the requesting party formulates its requests and then comes to an agreement with the producing party on a set of search terms to be run against the universe of data to find responsive 'hits'. A newer method is the use of predictive coding, which uses an algorithm to cull out emails relevant to the issues most important to the parties. Because they are largely silent on the issue of electronic discovery, arbitration rules allow the parties and arbitrators to come to an agreement on methods such as these that will allow for the production of key evidence in way that is commensurate with the overarching goal of 'maintaining efficiency and economy'.[5]

Experts

It is difficult to overstate the importance of experts in the proper resolution of construction disputes. Thorough and convincing expert testimony can help a party prevail on any of the host of issues that typically arise in construction disputes. Experts in construction matters are often used to decipher engineering standards, analyse schedule delays, perform forensic accounting and find the root causes of defects. Expert opinions are not limited to these core issues, however, and can speak to everything from market conditions for loss of revenue claims to weather patterns for claims of force majeure. At bottom, a single arbitration can find itself dealing with the opinions of a number of experts, each of which will be expected to testify at the eventual hearing.

Fortunately, arbitration rules have been developed to accommodate and fully utilise expert witnesses. The IBA Rules provide that the arbitrators may require experts opining on the same issue to meet and confer and report on the areas on which they agree and disagree.[6] This is only one tool that arbitrators may employ to bring efficiency and clarity to what can be a morass of expert opinion. It is not uncommon for arbitrators to ask parties to have the experts on the same issues testify together in a panel in front of the arbitrators at the hearing. This practice, which is sometimes referred to as witness conferencing or 'hot tubbing', can also help the arbitrators to make efficient use of the experts in a matter by cutting through posturing and building a degree of consensus. Finally, arbitration rules also allow for the tribunal itself to appoint an independent expert to advise it on issues in the case.[7] This option allows an arbitral tribunal to be independently educated on issues and form the basis for its decision on a source of information untainted by party bias. A common occurrence with this approach, however, is that parties will still seek to engage their own expert advisors to assist them in making their submissions to the tribunal, which can lead to a proliferation of experts and additional cost.

5 ICDR Rules, Article 21; see also ICC Rules, Article 22(1) ('The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity an value of the dispute.').

6 IBA Rules, Article 5(4).

7 IBA Rules, Article 6; ICDR Rules, Article 25.

Interim measures

Recognising that parties cannot always wait the years it will take for an eventual final award to have an exigent issue addressed, arbitration rules allow for interim or conservatory measures. The International Chamber of Commerce and International Centre for Dispute Resolution Rules both provide for such relief and both allow for parties to also seek interim relief from a judicial authority as well.[8] These rules also provide that the requesting party can be made to furnish the appropriate security, as would be typically required by a court of law in the event an injunction was issued.

There are times when parties to construction cases will have the need for such interim measures to maintain the status quo until the tribunal provides the award based on the full hearing on the merits. This need can arise when a contractor seeks to block a draw on a performance bond or letter of credit by an owner. A draw on a letter of credit can harm a contractor's credit rating and put it in the position of having to wait until the final award to attempt to recoup the amount from what may or may not be an insolvent owner. Therefore, a contractor will often want a determination that the owner should be prevented from making the draw before it happens. A contractor may also want to block an owner from terminating its contract. In either scenario, the parties can get an interim ruling that addresses the exigent issue while the remainder of the case moves towards the full hearing. It should be pointed out, however, that while these rules can assist the arbitration, there can be many times when they are not as effective as a party may wish. Tribunals are often unable to enforce the interim or conservatory measures they grant and national courts in some jurisdictions will not enforce partial awards.

Case presentation

Most arbitration rules afford tribunals and the parties considerable flexibility in how they present their cases. This flexibility can facilitate efficient case management and avoid unnecessary delay or expense. For example, the use of Scott Schedules for tabularising the positions of parties or experts on multiple headed claims (such as defects, variations or quantum issues) can provide a structured framework for readily assimilating the case as presented and for recording the tribunal's decisions upon it. This sort of flexibility would most likely not be found in the courts of most judicial systems. Practitioners before arbitral tribunals should also expect arbitrators to ask witnesses questions directly.[9] This practice also helps to focus the presentation on the issues the tribunal believes are important to its eventual decision and award.

Although tribunals will allow for flexibility, practitioners will also be held to commonly accepted standards of fairness in presenting evidence. Privileged communication between clients and attorneys will be maintained, although the degree of recognition of this privilege will vary depending on the law governing the dispute.[10] Tribunals are also expected to

8 ICC Rules, Article 28; ICDR Rules, Article 24.

9 See, e.g., IBA Rules, Article 8(3)(g) ('the Arbitral Tribunal may ask questions to a witness at any time.').

10 See ICDR Rules, Article 22 ('The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client.'); IBA Rules, Article 9(2)(b) (providing that the Tribunal shall exclude evidence based on 'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.').

consider concepts of relevancy,[11] burden,[12] general admissibility,[13] weight of the evidence[14] and fairness[15] in determining what evidence to allow into the hearing. These rules give tribunals considerable leeway as gatekeepers to determine exactly what evidence they will consider. For example, there are no provisions expressly calling for the exclusion of hearsay, however, a tribunal could rightfully exclude such evidence on the grounds of admissibility and fairness.

National law

Notwithstanding the considerable freedom that national laws grant to parties to resolve their disputes in arbitration rather than in state litigation, care must be taken to ensure that applicable arbitration rules are not inconsistent with or contravene provisions of applicable national law. In the Middle East, for example, there are a number of national law requirements, some unstated, with which compliance is mandatory if an award is to be enforceable. Some of these requirements are not addressed or are inconsistent with the rules of some of the international arbitration institutions. These requirements impact, among others, the giving of evidence of witnesses, the taking of oaths and the timing and signing of arbitration awards.

Conclusion

In conclusion, arbitration has become the preferred method of resolving construction disputes for good reason. Arbitral institutions and their rules generally allow parties and tribunals the flexibility needed to accommodate the unique nature of these disputes, within the overarching goal of achieving economy and efficiency. Furthermore, such rules may be amended or supplemented by agreement to reflect the needs of a particular dispute or the jurisdiction in which it is seated. In short, the construction industry is well served by arbitration and it follows that construction disputes will remain a significant portion of the caseloads of all major arbitral institutions in the years to come.

11 See ICDR Rules, Article 20(6); IBA Rules, Article 9(2)(a).

12 IBA Rules, Article 9(2)(c).

13 ICDR Rules, Article 20(6).

14 Id.

15 IBA Rules, Article 9(2)(g).

Appendix 1

About the Authors

David Kiefer
King & Spalding

David Kiefer is a partner in King & Spalding's International Arbitration Group in New York. Mr Kiefer's practice is focused on construction disputes, primarily arising from energy and infrastructure projects. Mr Kiefer routinely counsels clients on avoiding disputes, resolving claims and, when necessary, preparing for litigation or arbitration. In his nearly 20 years as a litigator, Mr Kiefer has successfully prosecuted and defended large and complex claims before federal and state courts, as well as domestic and international arbitration panels. He has been named one of New York's Best Lawyers in America for Commercial Litigation. Mr Kiefer holds a JD from The George Washington University Law School.

Adrian Cole
King & Spalding

Adrian Cole is a partner in King & Spalding's international arbitration group and leads the Middle East Dispute Resolution Practice. He is a construction law specialist advising on disputes relating to energy and infrastructure development. Prior to becoming a lawyer, Mr Cole qualified as an engineer/quantity surveyor and has first-hand experience of the practical issues in the engineering and construction industries. Mr Cole has been listed by *Who's Who Legal* as one of the top 25 construction dispute resolution lawyers in the world. He is an experienced arbitrator, adjudicator and mediator and is a Fellow of the Chartered Institute of Arbitrators and a member of the Chartered Institute of Building.

King & Spalding
1185 Avenue of the Americas
New York
NY 10036
United States
Tel: +1 212 556 2100
Fax: +1 212 556 2222
acole@kslaw.com
dkiefer@kslaw.com
www.kslaw.com

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

ISBN 978-1-912377-00-8