Chapter I

The Arbitration Agreement and Arbitrability

Renato Nazzini/Aleksander Godhe
Adapting Arbitration to the Construction Sector:
Ensuring Efficiency Through Arbitration Avoidance and
Case Management Techniques

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Adapting Arbitration to the Construction Sector:
Ensuring Efficiency Through Arbitration Avoidance and Case Management Techniques

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I. Introduction

Arbitration is considered a last-tier forum for resolving construction disputes – an extreme, final option.[1]) There are good reasons for this. The intention behind any construction project is that it runs smoothly, without delay and on budget. This, however, happens relatively infrequently. Much more often, construction projects experience delays and cost overruns. In such circumstances, arbitration or litigation may become necessary but they may also add to project delays, break down the relationship between the parties that otherwise envisaged a long-term collaboration, and subject them to the potentially exorbitant costs of proceedings.

In many ways, therefore, an unnecessary or inefficient arbitration can become the antithesis of what employers, contractors and subcontractors need.

Rather paradoxically, empirical evidence paints a different picture. Statistical data reported by arbitral institutions suggests that construction arbitrations are as frequent as ever. At the International Chamber of Commerce, which is the most frequently selected arbitral institution for administering arbitrations,[2]) construction sector accounts for the largest proportion of cases at 38 per cent.[3]) What is even more impressive, construction cases accounted for 49 per cent of the 340 cases registered by the Dubai International Arbitration Centre.[4]) Construction arbitrations also account for 7 per cent of the caseload of the London Court of International Arbitration, taking fourth place behind banking and finance, energy and resources and transport and commodities

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1) Julian Bailey, Construction Law 1988 (3d ed. 2020).

2) Queen Mary University of London, 2021 International Arbitration Survey: Adapting arbitration to a changing world (2021), https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf,

3) ICC, ICC Dispute Resolution Statistics: 2020 (2021), https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.

4) DIAC, Annual Report 2022 (2023), https://www.diac.com/wp-content/uploads/2023/06/diac-annual-report-2022.pdf?LinkSource=PassleApp.

industries,[5]) and almost 11 per cent of the cases administered by the Vienna International Arbitral Centre.[6]) This suggests that still a significant number of construction disputes need to be resolved by arbitration, an otherwise last-tier, extreme option.

This paper will first outline the endemic features of construction disputes that necessitate a deeper search for cost-effectiveness by the parties, party representatives and arbitrators. It will take primarily the perspective of English law on the matter, given that a recent survey indicated that England, Wales and Northern Ireland remained the most popular seat of arbitrations among its international respondents.[7]) In addition, England & Wales, perhaps more than many other jurisdictions, has developed a variety of alternative dispute resolution mechanisms and case management techniques while taking a strongly pro-arbitration approach through the courts.

Secondly, the paper considers other types of dispute resolution as a method of avoiding the need for arbitration altogether. In some cases, resorting to another dispute resolution mechanism is not optional and is provided for in a multi-tiered dispute resolution clause. Regardless of whether these clauses are mandatory or not, arbitration avoidance may have numerous advantages.

Finally, the paper considers the various case management techniques that are available to arbitrators. In other words, if arbitration is a permanent feature of construction dispute resolution, how can its procedural flexibility aid in resolving cases? Employment of such tools is aimed at addressing the endemic challenges that occur in construction disputes.

II. Endemic Features of Construction Disputes

Construction disputes have several characteristics that distinguish them from other types of commercial disputes. First, as explained by May LJ in the English Court of Appeal case of *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd*,[8]) construction contracts are inherently susceptible to disputes. Construction disputes tend to be considerable in number and a common phenomenon in the lifecycle of a construction project. There are many reasons for this contentious environment, ranging from *force majeure* events to the fact that every construction project is unique – always a new, untested 'prototype' – and its participants cannot foresee all its risks in advance.

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[5]) LCIA, 2021 Annual Casework Report (2022), https://www.lcia.org/lcia/reports.aspx.

[6]) VIAC, VIAC Statistics 2022 (2023), https://www.viac.eu/en/statistics.

[7]) BCLP, Annual Arbitration Survey 2022 (2022), https://www.bclplaw.com/en-US/events-insights-news/bclp-arbitration-survey-2022-the-reform-of-the-arbitration-act-1996.html.

[8]) *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd* [2003] EWCA Civ 1750.

Secondly, construction disputes also involve complex technical issues and a sheer volume of evidence that, for particularly larger projects, often spans many years of data in great detail. Therefore, construction disputes not only benefit from clear rules on the taking of evidence but require sophisticated ways of dealing with expert, documentary and other factual evidence.

Thirdly, since construction projects are inherently collaborative in nature, requiring the input of many disciplines, construction disputes tend to involve multiple interested parties, the relationship between which is typically governed by independent contracts. The involvement of international parties, particularly in larger cross-border projects, further complicates this relationship as does the widespread use of bonds and other forms of security or complex funding arrangements.

Fourth, as a result of the above characteristics, construction disputes necessitate an expedited, efficient and, insofar as possible, amicable resolution of disputes. At the heart of construction dispute resolution is the desire to progress with the projects without significant interruption. Therefore, construction dispute resolution clauses are frequently multi-tiered, involving various methods of ADR such as mediation, expert determination, and dispute adjudication boards. This pursuit of expedited dispute resolution gave rise to some endemic features of the system, such as statutory adjudication in the United Kingdom enshrined in the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA 1996').

Further, emergency arbitration procedures or the corresponding court powers to grant interim measures are often of fundamental importance in construction disputes and are used in a variety of scenarios, for example to preserve evidence or to prevent a party from calling an on-demand bond.

Finally, construction disputes are affected by the influence of standard forms on construction contracts and sector-specific legislation such as the aforementioned HGCRA 1996. Construction cases may be also subject to arbitration rules designed for this sector specifically: the Construction Industry Model Arbitration Rules,[9]) the Institution of Civil Engineers Arbitration Rules[10]) or the Rules of the Institution of Chemical Engineers[11]) used in England-seated construction arbitrations.

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[9]) Joint Contracts Tribunal, CIMAR (2016), https://www.jctltd.co.uk/docs/JCT_CIMAR_2016.pdf.

[10]) ICE, ICE Arbitration Procedure (2012), https://myice.ice.org.uk/ICEDevelopmentWebPortal/media/Documents/Disciplines%20and%20Resources/09-2-ICE-Arbitration-procedure-2012-04-30.pdf.

[11]) IChemE, IChemE Arbitration Rules (2019), https://www.icheme.org/knowledge/forms-of-contract/dispute-resolution/.

III. Avoiding Arbitration Through Other Methods of Dispute Resolution

Arbitration, despite its many advantages, also has attractive alternatives that are often used to resolve construction disputes. Broadly, these have been divided into three categories:

- Negotiation and its derivatives, including techniques such as early warning or executive negotiation, expert appraisal or early neural evaluation, characterized by the parties attempting to problem-solve bilaterally, without the involvement of a third party.
- Mediation or conciliation, involving an intervention by a third party but one that does not lead to a decision binding on the parties.
- An adjudicative process where the ultimate outcome of the dispute is imposed by a binding decision of a third party. These include most types of dispute boards that lead to a binding decision and construction adjudication.[12])

These alternatives to resolving construction disputes may in fact be a mandatory step in bringing a claim to arbitration. Many construction contracts provide for a tiered dispute resolution mechanism providing for various forms of ADR that constitute a condition precedent to the commencement of arbitration. FIDIC forms include a default dispute resolution clause that refers all disputes to arbitration under the rules of the International Chamber of Commerce but are preceded by a tiered dispute resolution mechanism which typically provides for a dispute board decision as a condition precedent to arbitration and then a cooling-off period of amicable settlement.[13]) However, multi-tiered dispute resolution clauses typically bring about one of three issues:

- Whether this method of dispute resolution is sufficiently defined to give rise to enforceable rights.
- Whether each of the steps in the dispute resolution process is mandatory or voluntary.
- Whether failure to follow one of the steps precludes a party from proceeding to the next step.[14])

This section will discuss the key issues surrounding the main methods of resolving construction disputes, whether mandatory through the operation of a multi-tiered dispute resolution clause or entirely voluntary.

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[12]) Karl Mackie et al, An ADR Practice Guide: Commercial Dispute Resolution (3d ed. 2007).

[13]) 2017 FIDIC Conditions of Contract (Second Edition) Clause 21.6.

[14]) Sir Vivian Ramsey, *Multi-tier dispute resolution clauses in construction contracts,* in Nazzini, Transnational Construction Arbitration 27.

A. Dispute Avoidance Panels/Dispute Manager

Dispute avoidance panels are tasked with making non-binding suggestions and recommendations to the parties to prevent the dispute from arising. Given that the preservation of the relationship between the parties is at the heart of dispute avoidance panels, they are particularly well-suited for large construction projects and megaprojects.

The preparation for the 2012 London Olympics involved 55 major projects pursuant to more than 100 contracts and a budget of £9.3 billion. The dispute resolution provisions provided a tiered process that included two DBs in the form of an Independent Dispute Avoidance Panel ('IDAP') and an Adjudication Panel. IDAP comprised 11 construction professionals all with experience in major projects, but with a breadth of varied expertise and skills to address any type of issue. The members were designated to specific projects to which they would dedicate particular attention. The panel focused on finding pragmatic solutions before potential problems could turn into disputes that might require lengthy resolution measures. Disputes not capable of resolution through the IDAP consultation process could be referred to the dedicated Adjudication Panel.[15])

The dispute avoidance panel process relating to the London Olympics contracts was successful in avoiding disputes. Only two were referred to adjudication and there was no subsequent court litigation. The construction projects themselves were delivered on time and within the budget. The model was adopted for the 2016 Rio Olympics.

B. Early Warning or Executive Negotiation

The NEC4 Engineering and Construction Contract provides that both parties must give early warning of anything that may delay the works or increase costs as soon as they become aware of it.[16]) They should then hold an early warning meeting to discuss how to avoid or mitigate impacts on the project. Provided the process is managed effectively and the right contractual framework is in place, this could avoid disputes.

The main issue with early warning or executive negotiations is that a clause to that effect might not be enforceable due to the vague commitments to negotiate therein. In *Sonatrach Petroleum v Ferrell International*, the court held that a clause providing that the parties '*attempt in good faith to resolve the dispute or claim*' was not enforceable.[17]) In *Emirates Trading v Prime Mineral*

[15]) Paula Gerber and Brennan Ong, Best Practice in Construction Disputes: Avoidance, Management and Resolution 197–200 (2013).

[16]) NEC4 Engineering and Construction Contract Clause 15.

[17]) *Sonatrach Petroleum Corpn (BVI) v Ferrell International* [2002] 1 All ER (Comm) 627, 1041, 1049.

Exports, the court held that the obligation to seek to resolve a dispute by '*friendly discussions*' was nothing more than an agreement to negotiate with a view to settling.[18]) This is because an obligation to negotiate is uncertain and the court has no objective criteria to decide whether there is a breach.[19])

Even if the clause is enforceable, it might be unspecific and ambiguous as to the conduct of the procedure. Therefore, the dispute resolution clause might give some description as to the steps that the parties should take in the course of the early warning mechanism negotiations.

C. Mediation

Mediation has received a lot of attention in the past year through the introduction of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation'). The Convention brings about several advantages to mediating construction disputes: (i) expedited enforcement in Article 1 preserves the confidentiality of mediation, (ii) mediation may take place anywhere in the world: there is no requirement that the mediation should be conducted in a jurisdiction that has ratified the Convention and (iii) the Convention contains liberal formality requirements. It contains no requirement for settlements to be notarized as long as they are made in writing. On the other hand, the Convention relates only to international commercial settlements.[20])

The importance of mediation to the resolution of construction disputes is evidenced by the Technology and Construction Court Pre-Action Protocol for Construction and Engineering Disputes that requires parties in dispute to meet, at least once before litigation commences, to discuss whether some form of ADR, typically mediation, would be a more appropriate means of resolving the dispute.[21]) Mediation may be also particularly suitable for the resolution of smaller disputes. So much so that the UK Government is also considering mandatory mediation for all civil claims below £10,000.[22])

However, the issue surrounding mediation is that it assumes some degree of cooperation between the parties in their willingness to discuss solutions and

[18]) *Emirates Trading v Prime Mineral Exports* [2015] 1 WLR 1145 [38].

[19]) *Ibid*., [39]. Also *see* [47]-[48] for a discussion on the public policy of encouraging alternative dispute resolution and whether it is in the public interest to enforce executive negotiation clauses.

[20]) Shouyu Chong, *Chapter 3 The Singapore Convention on Mediation: Its Impact on International Construction Disputes,* in Nazzini, Construction Arbitration and Alternative Dispute Resolution 29.

[21]) Pre-Action Protocol for Construction and Engineering Disputes, § 9.3.

[22]) Ministry of Justice, Government reveals plans to divert thousands of civil legal disputes away from court (2022) https://www.gov.uk/government/news/government-reveals-plans-to-divert-thousands-of-civil-legal-disputes-away-from-court.

engage with the mediator. If the parties are unwilling to make an effort and the mediation fails, the procedure has the effect of delaying and increasing costs of dispute resolution. This issue becomes particularly acute in multi-party disputes. One method of mitigating this disadvantage is to conduct mediation in parallel to other proceedings, although the line between these different fora might become blurred.

D. Early Neutral Evaluation

This form of involving a third-party evaluator boasts a flexible procedure under the ambit of the contract. It can particularly help parties weigh their chances of success in litigation or arbitration and facilitate settlement. It may also resolve a particularly stark impasse in dispute resolution or disillusion a party as to the merits of their allegations. Early neutral evaluation is typically non-binding unless the parties agree otherwise.[23])

However, early neutral evaluation might be unsuitable for complex disputes given the costs of the neutral evaluation and the possibly unavoidable dispute resolution.

Under English law, the early neutral evaluator can be a judge as a part of his or her general powers of management with the aim of helping the parties settle the case.[24]) In *Telecom Centre v Thomas Sanderson*, the court analyzed the procedure stating that is it flexible and the judges were permitted to make evaluative statements, such as those relating to repudiatory breaches, in order to foster settlement.[25])

In *Seals v Williams*, the court emphasized the advantage of early neutral evaluation where it could provide an authoritative albeit provisional view of the issues at hand, particularly if the parties have vastly different views on the success of their claims.[26]) The court noted that the expression of provisional views, which is similar in operation to an early neutral evaluation is not dependent on the consent of the parties as it is simply part of its inherent jurisdiction in determining how to control proceedings.[27]) Such a process, although largely unknown in most other jurisdictions, arguably supports judicial economy and the disposal of unmeritorious claims through settlement.

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[23]) Victoria McCloud, Judicial Early Neutral Evaluation (Amicus Curiae, 2020), 492.

[24]) Civil Procedure Rules 1998/3132, rule 3.1(2)(m).

[25]) *Telecom Centre v Thomas Sanderson* [2020] EWHC 368 (QB) [8]-[10].

[26]) *Seals v Williams* [2015] EWHC 1829 (Ch) [3].

[27]) *Ibid.*, [7].

E. Construction Adjudication

The Housing Grants, Construction and Regeneration Act 1996 gave birth to a statutory right to adjudicate most disputes concerning a construction project in the United Kingdom. Adjudication has several key characteristics. First, disputes are resolved quickly, typically within 29 to 42 days from the moment of the referral. Secondly, any dispute, and not just payment disputes, may be adjudicated. Thirdly, decisions of adjudicators are interim binding and courts will enforce them by way of a summary judgment, subject only to jurisdictional or natural justice objections. Finally, despite the interim binding nature, adjudicators' decisions can be referred to litigation or arbitration for final determination pursuant to a 'pay now, argue later' philosophy.

A recent report by the Centre of Construction Law & Dispute Resolution at King's College London is a testament to the considerable success of adjudication as a quick, relatively affordable and enforceable method of resolving construction disputes. Just between May 2021 and April 2022, there were over 2,000 reported adjudications with a typical claim value between £125,000 and £500,000.[28])

Although adjudication has been adopted in many common law jurisdictions, it remains largely unknown in civilian systems. The differences between jurisdictions are also considerable. In some Australian states, for example, only payment disputes are capable of adjudication. In Singapore, adjudicator decisions are publicly available, and the respondent must pay the amounts ordered within seven days of notice of the decision.[29])

F. Dispute Boards

There are many types of dispute boards established at the start of the construction project (standing boards) or when a dispute arises (*ad hoc* boards) that can either be adjudicative or advisory in nature, depending on party agreement. However, dispute boards have obtained a global reach through FIDIC forms that contain dispute boards in their tiered dispute settlement clauses.[30])

The main advantage of dispute boards is that they allow for a fast resolution of disputes by members of various professional backgrounds depending on the needs of the parties. If the dispute board is a standing one, the members will also have unparalleled awareness of the underlying project. A dispute board

[28]) Renato Nazzini and Aleksander Kalisz, 2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform (2022).

[29]) *See* Bailey, *supra* note 1.

[30]) *E.g.*, 1999 FIDIC Conditions of Contract for Plant and Design Build (General Conditions), Clause 20; 2017 FIDIC Conditions of Contract for Plant and Design Build (General Conditions), Clause 20.