Global Arbitration Review

The Guide to Construction Arbitration

Editors
Stavros Brekoulakis and David Brynmor Thomas QC

Fourth Edition

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Construction Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the fourth edition of this guide on construction arbitration.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Construction Arbitration*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, mining, challenging and enforcing awards and M&A, in the same practical way. We also have books in the series on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). My thanks to the editors, Stavros Brekoulakis and David Brynmor Thomas QC, for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

David Samuels
Publisher, GAR
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Introduction

Stavros Brekoulakis and David Brynmor Thomas QC[1]

After two years of hiatus, we are delighted to introduce the fourth edition of *The Guide to Construction Arbitration*. And what a two-year break it has been! For the past 20 months, we have witnessed an unprecedented public health emergency that has significantly disrupted construction contracts and projects and has given rise to a significant number of construction arbitrations worldwide. There are two types of covid-19-related disputes that the pandemic has brought about. First, disputes concerning delay and disruption that has occurred at all developing stages of construction projects, including procurement, engineering, supply and building. Many construction sites had to suspend their works in the course of 2020. Now that construction work has started to resume, projects experience significant slowdown in supply chains for materials due to border closures, steep rises in freight rates and costs of materials, including, for example, steel prices, which have more than doubled in the past 12 months in Europe and the United States,[2] and labour shortages due to illness, self-isolation and travel restrictions. Contractors, subcontractors and suppliers have to abide by new health protocols that involve severe restrictions in the number of workers that can be on site at a certain time. These restrictions have affected the level of productivity and the ability of contractors to mobilise manpower, and have caused significant disruption and delays.

Second, disputes arising out of concession contracts concerning the operation of infrastructure projects. Because the pandemic has disrupted people's ability to travel and commute both internationally and domestically, operators and developers of infrastructure projects such as airports and highways have seen a dramatic decline in their earnings,

1 Stavros Brekoulakis is a professor and the director of the School of International Arbitration at Queen Mary University of London and an associate member of 3 Verulam Buildings. David Brynmor Thomas QC is a barrister at 39 Essex Chambers and visiting professor at Queen Mary University of London.

2 Turner & Townsend, 2021 International Construction Market Survey, p. 9.

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which has left them exposed to financing and operational debts. As a result, they are now filing arbitration claims against states that have taken measures restricting travel to protect public health.

Against this background, the Guide aims to offer helpful insight in the field of international construction contracts and dispute resolution. A question that often arises is why international construction disputes are different from other types of commercial disputes and why do they require specialist arbitration knowledge? In the first place, construction projects are associated with a wide range of risks, including unexpected ground and climate conditions, industrial accidents, fluctuation in the price of materials and in the value of currency, political risks such as political riots, governmental interventions and strikes, legal risks such as amendments in law or failure to secure legal permits and licences, and – as we have all recently learned – global pandemics.

Further, time is typically critical in construction projects. A World Cup football stadium must be delivered well in advance of the commencement of the competition. Similarly, the late delivery of a power station can disrupt the project financing used to fund it.

In the second place, delay and disruption claims in construction arbitrations tend to be complex. Many phases of a construction project, such as engineering and procurement, can run concurrently, which often makes it difficult to identify the origins and causes of delay. Legal concepts such as concurrent delay, critical path and global claims are unique features in construction disputes.

Equally, the involvement of a wide number of parties with different capacities and divergent interests adds to the complexity of construction disputes. A typical construction project may involve not only an employer and a contractor, but also several subcontractors, a project manager, an engineer and architect, specialist professionals such as civil or structural engineers and designers, mechanical engineers, consultants such as acoustic and energy consultants, lenders and other funders, insurers and suppliers. A seemingly limited dispute arising from one subcontract may give rise to disputes under the main construction contract and the other subcontracts, as well as disputes under much wider documentation such as shareholder agreements, joint operating agreements, funding documents and concessions. Disputes involving several parties may give rise to third-party arbitration claims and multiparty arbitration proceedings.

Another important feature of construction disputes is the widespread use of standard forms, such as the FIDIC or the ICE conditions of construction contracts. Efficient dispute resolution requires familiarity and understanding of the, often nuanced, risk allocation arrangements in these standard forms. Good knowledge of construction-specific legislation is necessary too. While the resolution of most construction disputes usually turns to the factual circumstances and the provisions of the construction contract, legal issues may also arise in relation to statutory (frequently mandatory) warranty and limitation periods for construction claims, statutory direct claims by subcontractors against the employers,[3]

3 For example, in France, Law No. 75-1334 of 31 December 1975 on Subcontracting.

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statutory prohibition of the pay-when-paid and pay-if-paid provisions[4] and legislation on public procurement.[5]

Finally, construction disputes are procedurally complex, requiring efficient management of challenging evidentiary processes, including document management, expert evidence, programme analysis and quantification of damages. The evidentiary challenges in construction arbitrations have given rise to the use of tools such as Scott Schedules (used to present fact-intensive disputes in a more user-friendly format), that are unique in construction arbitrations.[6]

It is for all these reasons that alternative dispute resolution and arbitration of construction disputes require special focus and attention, which is what *The Guide to Construction Arbitration* aims to provide.

The Guide to Construction Arbitration is designed to appeal to different audiences. The authors of the various chapters are themselves market-leading experts so that the Guide can provide a ready reference to specialist construction arbitration practitioners. At the same time, the Guide has been compiled and written to offer practical information to practitioners who are not specialists in international construction contracts and dispute resolution. For example, the Guide will be a practical textbook for in-house lawyers who may have experience in negotiating and drafting construction contracts but are not familiar with the special claims and remedies that exist under standard forms of construction contracts. Equally, construction professionals who may have experience in managing construction projects but lack experience in the conduct of construction arbitration will find the Guide useful. Last but not least, students who study construction arbitration will find it to be a helpful source of information.

While the main focus of the Guide is the resolution, by arbitration, of disputes arising out of construction projects, it also contains chapters that address important substantive aspects of international construction contracts. To understand how construction disputes are resolved in international arbitration, one has to understand how disputes arise out of a typical construction contract in the first place, and what are the substantive rights, obligations and remedies of the parties to a construction contract.

Thus, this book is broadly divided into four parts. Part I examines a wide range of substantive issues in construction contracts, such as the foundation of construction projects, the FIDIC suite of contracts, allocation of risk in construction contracts, contractors' claims, remedies and reliefs, employers' claims, remedies and reliefs, and examination of the critical topic of concurrent delay.

Part II then focuses on the processes for the resolution of construction disputes and addresses topics such as the claims resolution procedures in construction contracts, methods of dispute resolution in construction contracts, dispute boards, alternative dispute resolution in construction and infrastructure contracts, the suitability of various arbitration rules for construction disputes, arbitration clauses in construction contracts, subcontracts and

4 For example, in the United Kingdom, with the UK Housing Grants Construction and Regeneration Act 1996.

5 For example, EU Directive 2014/24.

6 J Jenkins and K Rosenberg, 'Engineering and Construction Arbitration', in Lew, et al. (eds), *Arbitration in England*, Kluwer (2013).

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multiparty arbitration in construction disputes, interim relief and emergency arbitrators in construction arbitration, organisation of the proceedings in construction arbitrations, the management of documents and experts in construction disputes, and awards issued in construction arbitrations.

Part III examines a number of select topics in international construction arbitration by reference to some key industry sectors and contract structures, including the field of investment arbitration, the energy sector, the mining sector, offshore construction disputes and concession contracts and turnkey projects. Part IV examines construction arbitration in specific jurisdictions of particular interest and with very active construction industries.

Overall, the fourth edition builds upon the outstanding success of the first three editions, which have made *The Guide to Construction Arbitration* one of the most popular guides in the GAR series. The structure and organisation of *The Guide to Construction Arbitration* is broadly based on the LLM course on international construction contracts and arbitration that we teach at Queen Mary University of London. The course was first introduced by HH Humphrey Lloyd in 1987 and was taught by him for more than 20 years. Humphrey has been an exceptional source of inspiration for hundreds of students who followed his classes, and we are personally indebted to him for having conceived the course originally and for his generous assistance when he passed the course on some years ago.

We want to thank all the authors for contributing to *The Guide to Construction Arbitration*. We are extremely fortunate that a group of distinguished practitioners and construction arbitration specialists from a wide range of jurisdictions have agreed to participate in this project. We further want to thank Bevan Woodhouse and Hannah Higgins for all their hard work in the commission, editing and production of this book. They have made our work easy. Special thanks are due to David Samuels and GAR for asking us to conceive, design and edit this book. We thoroughly enjoyed the task, and hope that the readers will find the result to be useful and informative.

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Part II

Dispute Resolution for Construction Disputes

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Suitability of Arbitration Rules for Construction Disputes

David Kiefer[1]

Introduction

The construction industry is a frequent user of both domestic and international arbitration to finally resolve its 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 2017, they made up 23 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

1 David Kiefer is a partner at McDermott Will & Emery LLP. The author would like to acknowledge retired King & Spalding partner Adrian Cole for his contribution to previous editions of this chapter. The information in this chapter was accurate as at September 2019.

2 2017 ICC Dispute Resolution Statistics.

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disputes in a number of ways. They can be exceptionally large in scope, involving multiple interested parties with independent contractual relationships and amounts in 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. The arbitral institutions recognise the challenges that arbitrating construction disputes can pose with the ICC for example, issuing guidance notes on construction industry arbitrations. 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

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).

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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 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

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

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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 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] Indeed, it is becoming the accepted practice for experts of like discipline to receive common instructions so as to ensure that their evidence is relevant and comparable to that of the opposing expert. This is only one tool that arbitrators may employ to bring efficiency and clarity to what can be a morass of expert opinion. Others include requiring experts to meet on a 'without prejudice' basis to discuss their respective positions and to prepare a statement of what its agreed and disagreed allowing for an earlier crystallisation of contested evidence. It is also 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

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 and value of the dispute.').

6 IBA Rules, Article 5(4).

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for the tribunal itself to appoint an independent expert to advise it on issues in the case.[7] This option, perhaps more common in civil law jurisdictions, 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.

One criticism of expert testimony in arbitrations is that the applicable rules do not provide tribunals with an adequate 'gatekeeping' function to prevent experts from testifying as to issues beyond their expertise and qualifications. Arbitrators typically do not perform the sort of robust, pre-hearing screening process judges do to ensure that an expert's testimony is not only relevant, but based on a reliable foundation. As a result, experts in construction arbitrations have been known to drift into the realm of contract interpretation and provide their 'expert opinion' on how to interpret the commercial terms agreed to by the parties. Discerning tribunals will limit such testimony by instructing counsel to focus his or her questioning on more useful topics or by simply ignoring the testimony when it comes time to write the award. Even in such cases, however, the gatekeeping does not occur until the hearing at the earliest. This inefficient approach can create an incentive for experts and counsel to push the boundaries of expert opinion in ways that they would not if their case were in a court before a judge.

Witness statements

A defining feature of international arbitration is the use of prepared witness statements in lieu of live direct testimony. The witness statements provide a written recitation of the witnesses' account of their testimony and are provided to the tribunal and the opposing party well in advance of the hearing. Attached to the statements are the exhibits to which the witness is referring and will, presumably, support the points he or she is making. In construction cases, these exhibits can include voluminous and technical project documents, such as monthly reports and root cause analyses. This method of providing direct testimony presents real benefits to the parties and the tribunal. To the extent permitted by applicable laws, the presenting party can prepare and perfect the statement of the witness as it relates to the exhibits without having to worry about rehearsing a flawless live performance at the hearing, which can be difficult and awkward when a witness is speaking to large and confusing documents. The opposing party will have ample time to review the witness statements and prepare an efficient cross-examination that does not need to be crafted in the brief moments between direct and cross-examination in a courtroom. Finally, the tribunal will have the benefit of an organised presentation of the evidence provided by the witness and can come into the hearing with its own thoughts and questions it wants answered by the witness. Overall, the use of witness statements makes for an efficient, comprehensive and orderly process that it is tailored to accommodate the type of evidence introduced in construction disputes.

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

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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. Where interim measures are required at the outset of a case before a tribunal has been appointed, emergency arbitrator procedures promoted by the leading arbitration centres may be of assistance. 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. Parties are often unable to enforce the interim or conservatory measures obtained 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. This is especially so if notice is taken of available guidance on techniques for controlling time and cost in arbitration. 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

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.').

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this privilege will vary depending on the law governing the dispute.[10] Tribunals are also expected to 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. Furthermore, while practitioners should demonstrate the behaviour expected of professionals, new rules and guidance are emerging to sanction those that engage in guerrilla tactics and other unacceptable conduct.

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. Fortunately, over time, esoteric local requirements are being superseded by new arbitration laws, often based on the UNCITRAL model law as states recognise the commercial benefits that a modern arbitration law can bring.

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.

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.').

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).

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Edited by the academics who run a course on construction contracts and arbitration at the School of International Arbitration, Global Arbitration Review's *The Guide to Construction Arbitration* brings together both substantive and procedural sides of the subject in one volume. Across four parts, it moves from explaining the mechanics of FIDIC contracts and particular procedural questions that arise at the disputes stage, to how to organise an effective arbitration, before ending with a section on the specifics of certain contracts and of key countries and regions. It has been written by leaders in the field from both the civil and common law worlds and other relevant professions.

This fourth edition is fully up to date with the new FIDIC suites, and includes chapters on expert witnesses, claims resolution, dispute boards, ADR, agreements to arbitrate, investment treaty arbitration and Brazil. It is a must-have for anyone seeking to improve their understanding of construction disputes or construction law.

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