

Kluwer Arbitration Blog

Paris Arbitration Week Recap: The Impact of COVID-19 on International Construction Projects and Disputes: Is It Really All That Bad?

Fabian Bonke (Hogan Lovells) · Wednesday, July 15th, 2020

How severely are international construction projects affected by global COVID-19 pandemic? What does the COVID-19 pandemic mean for international construction disputes? As with so many other questions arising in relation to the pandemic, these questions will only be answered definitively in retrospect. For construction arbitration practitioners though, one of the immediate and graspable effects has been the cancellation of a trip to Paris for the annual GAR Live Construction Disputes embedded in the [Paris Arbitration Week](#), which for the first time took place on 9 July 2020 in a virtual format.

Key Note Address “*Quo Vadis International Construction Arbitration*”

The key note address “*Quo Vadis International Construction Arbitration*” which was delivered by Professor *Doug Jones*, focused not only on the impacts of the COVID-19 pandemic but discussed the topic which was probably already the most imminent one for the industry even before the outbreak: [what is needed to resolve cross-border infrastructure disputes in a fair and efficient manner](#). According to *Jones*, resolution of these disputes, which are characterized by their ever-growing factual and technical complexity and the large amounts of evidence involved, is a tremendous challenge for the arbitrators. To successfully “*manage the unmanageable*”, it is crucial for *Jones* not only to be aware of the [available procedural tools](#), but also of the right time when these tools shall be deployed.

As an example, *Jones* pointed out that for the Case Management Conference it is particularly important to strike the right balance between creating a degree of certainty as to the length of the proceedings and providing enough flexibility to react to issues unfolding as the arbitration proceeds. *Jones* proceeded with a reference to the recently introduced Rules on the Efficient Conduct of Proceedings in International Arbitration (so-called “Prague Rules”), which he – in particular for parties with a Civil Law background – considered as another positive measure to [promote efficiency of arbitral proceedings](#).

In this context, *Jones* also focussed on the issues of document production and expert evidence. Regardless of the general debate as to whether disclosure is a necessary feature for a fair and efficient dispute resolution, *Jones* stressed the need to keep pace with the rapidly evolving data technology assisting in voluminous amounts of documents being produced electronically. With regards to the idea of tribunal-appointed experts, *Jones* acknowledged that a more active role of the tribunal might indeed in some cases be useful to achieve the aim of rendering arbitration proceedings more efficient. However, he pointed out that the vast majority of experts in reality are party-appointed and suggested six steps be followed for their use, for e.g. the establishment of a common list of questions and the production of a joint report on undisputed issues with separate reports only on disputed points, to enhance the efficiency of arbitration proceedings.

With regards to technological innovations, *Jones* pointed out that in construction arbitration cases investments into technologies necessary to conduct virtual arbitration hearings might have the potential to outweigh travel and accommodation costs. Even though virtual arbitration hearings would be unlikely to fully replace in-person hearings, they could be one of the mechanisms for the future to render arbitration proceedings more efficient if deployed at the right time (e.g. during Case Management Conference).

Panel “*The show must go on*”

Under the title “The Show Must Go On”, moderated by Peter Rosher (*Reed Smith*) the first panel discussed the challenges of the global pandemic for construction projects in different regions worldwide.

With regards to the situation in the Middle-East, *Erin Miller Rankin (Freshfields)* mentioned that the precarious financial situation for many players in the construction industry might even end some international contractors’ presence in the gulf region. Especially in the context of labour camps, *Miller Rankin* stressed that social distancing measures are currently still difficult to be implemented due to many workers’ housing situation. She suggested that for the way forward parties would renegotiate their force majeure-clauses to cover the possibility of a potential second or third wave of the pandemic. She explained that most COVID-19 related disputes would currently be on the subcontractor level.

For the Asian region, *Dan Perera (Reed Smith)* reported that many construction projects have been negatively affected due to travel restrictions preventing many international consultants, architects and engineers from being able to travel to site. A similar issue exists with regards to the interruption of supply chains. Even though there has just been a slight reopening of the borders, leading to construction projects being continued, it is however currently too early to assess in detail whether these COVID-19 related impacts will lead to an increased number of arbitration proceedings.

For the UK, *James Doe (Herbert Smith Freehills)* reported that there has been considerable initial confusion as regards governmental guidance in March and April.

Even though the government did not formally order construction sites to be closed, many contractors felt pressured to do so. This in turn led to many projects being severely delayed. With regards to dispute resolution, *Doe* pointed out that there seems to be increasing suspicion amongst employers that contractors are trying to use COVID-19 as a cover for delay incurred prior to the pandemic.

Panel: “If you could turn back time”

Under the topic “*If You Could Turn Back Time*” moderated by Jane Davies Evans (*3 Verulam Buildings*), a particular focus was put on the impact of COVID-19 on progress of ongoing construction projects and how delays can be determined with regards to claims for extension of time and whether there is a threat of COVID-19 being in fact used by contractors as a “*get of jail free card*”, this time from the delay experts’ perspective.

Don Harvey (Secretariat Advisors) suggested an assessment of the impact of COVID-19 in two steps – first, by identifying the real practical impact on materials, workforce and productivity, and second, by quantifying the COVID-19 impact on a specific event. He also distinguished the situation in metropolitan and rural areas. While in areas such as Manhattan, safety measures such as social distancing might severely affect works to be carried out e.g. in a 60 stories commercial building because of the limited number of people being allowed to use an elevator, the situation might be different for an onshore windfarm in a rural area.

Simon Braithwaite (BDO) drew a distinction between non-essential construction projects negatively affected by the COVID-19 shut down and the critical projects that remained active during this phase of the pandemic in New York. Due to the shut-down, some non-essential infrastructure projects would be stuck. Some critical projects, however, could even benefit from the reduced number of commuters which enabled infrastructure works to be carried out even faster than planned. For instance, in the case of some railway projects for which the reduced schedules would allow for larger windows to execute works.

Lucy Fusager Johnsen (Barslund) even reported that the lockdown in Denmark would actually have no negative delay effects on the projects that she would currently work on. The pandemic actually even allowed for a quicker resolution of problems at site due to reduced traffic and the efficient use of virtual inspections.

In any case, considering the ripple effects of the pandemic that will likely be seen in about a year, *Anamaria Popescu (BRG)* rightly pointed out that the need for proper project documentation has become even more important than what it was prior to the pandemic. Even if not appreciated by all project parties, documentation should always be kept at a level of sophistication that allows the parties to initiate arbitration proceedings if need be.

Conclusion

Is the impact of COVID-19 on international construction projects and disputes really all that bad? The event showed that this is not necessarily the case. As always, a crisis – such as COVID-19 – also provides for chances.

As the pandemic does not affect all countries and regions to the same extent, international construction projects are, of course, not affected in a uniform manner worldwide. The effects are differing but international supply chains and the global deployment of technical specialists across borders sometimes cause unexpected disruptions. As confirmed during this event, some regions have so far experienced only very limited negative effects, while others have even seen some positive effects due to less impediments on site and the efficient use of digital tools. Unsurprisingly, it has nevertheless become a global phenomenon that contractors with poor performance have started attempts to use COVID-19 as an excuse. To identify and adequately deal with the delays and effects which were actually caused by COVID-19 will be one of the key challenges to come.

One can only hope that all firms involved in major construction projects will act reasonably with regards to open claims related to COVID-19 and try to find commercially viable solutions to avoid long-term negative effects for the entire industry. So far, it seems – which was also confirmed during this event – that there is a cooperative approach between the parties to deal with the crisis in commercially practical ways. This is, of course, not the case for all projects as in some cases emergency arbitrations have been initiated which shows that immediate conflicts occurred and could not be instantly resolved.

For those conflicts that will need to be resolved by way of arbitration proceedings, an efficient conflict resolution will require the professional and timely (!) use of the available and established tools. The growing popularity of virtual hearings might be an interesting additional feature for greater efficiency and reduced costs, which are strongly demanded by the construction industry. Virtual hearing tools might even prove to be effective to avoid an escalation to full-fledged arbitration, as they can equally be used by permanent dispute adjudication boards for regular meeting and “site visits”. This event was a good proof that such a format can be very useful – although it certainly cannot compensate for a missed trip to Paris.

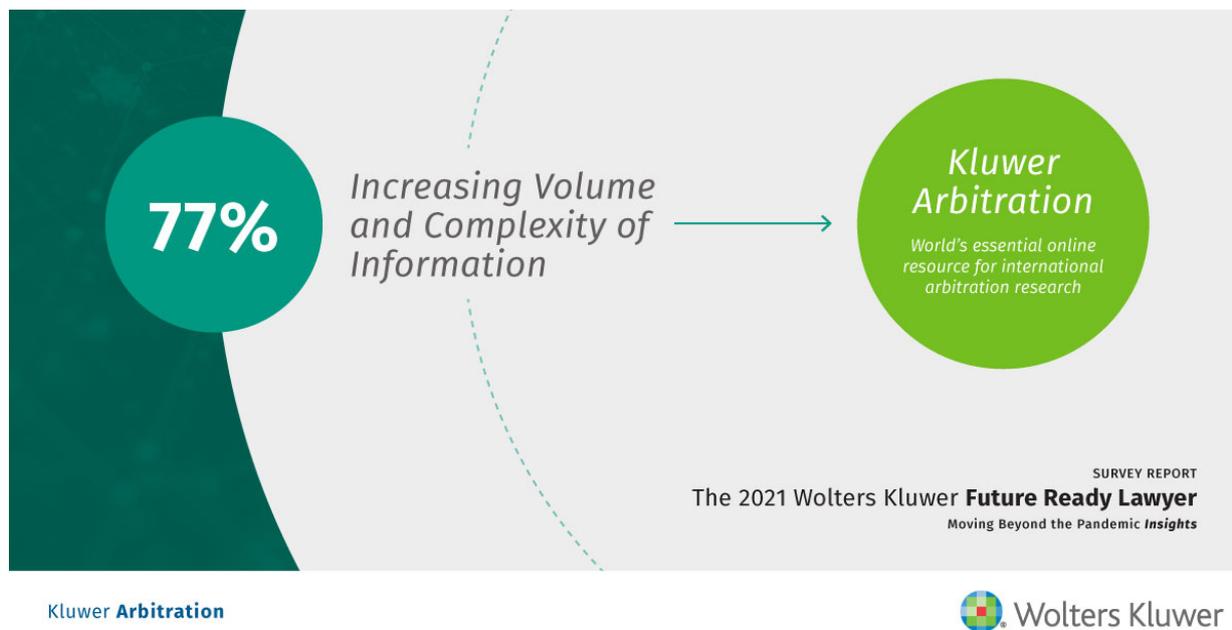
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