Kluwer Arbitration Blog

Efficiently Resolving International Construction Disputes

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Anecdotally, the time and cost of arbitrating international construction disputes is one of the biggest sources of dissatisfaction. This was reflected in the discussion on the final day of London International Disputes Week at the international construction disputes panels. This is unsurprising as previous Queen Mary University of London (**QMUL**) surveys identified cost and lack of speed as some of the worst characteristics of international arbitration, and the construction industry accounts for a significant number of international arbitrations.

What is perhaps more surprising is that notwithstanding concerns about the time and cost of arbitration, it continues to be overwhelmingly preferred over litigation. In the 2018 QMUL/White & Case Survey, 92% of in-house counsel respondents preferred international arbitration for resolving international disputes. This is an increase from the first Survey, in 2006, that found 73% of corporations prefer international arbitration over litigation for resolving cross-border disputes.

At the same time, arbitration faces competition from newly established international commercial courts, such as in China. This comes at a time when the construction sector, and consequently international construction disputes, are forecast to increase. Globally, the construction sector is forecast to grow to reach a total size of US$17.5 trillion by 2030. To take one example, arising from China's belt and road initiative it is predicted that disputes will be arbitrated.

Whilst arbitration remains popular, to serve its current and likely expanding user base effectively, it is clear that changes will need to be made. It is in this context that the 2019 QMUL International Arbitration Survey seeks to understand existing user experiences and identify ways to improve the efficiency of resolving international construction disputes. The survey, conducted in partnership with Pinsent Masons, is now available here.

Filling the information gap about efficiency

Before considering how to improve the efficiency of international construction arbitration, we first need to understand the nature and extent of the problem. The first challenge is that there is no agreed definition of efficiency in international arbitration, let alone in international construction arbitration. The time and cost to resolve a dispute are common understandings of what is meant by efficiency, but there is more to efficient dispute resolution. For example, resolving ancillary disputes related to the construction project, such as bonds or guarantees, as part of the resolution of

the key construction issues can help to avoid future disputes. Similarly, resolving a dispute before it reaches arbitration, such as by a dispute board, can avoid significant expense; but what is less clear is the role arbitration should play in supporting that pre-arbitral dispute resolution. When looking at the conduct of the arbitration itself, identifying the key causes of inefficiency can help us to understand what efficiency means. For example, arbitrator or counsel inexperience in international construction arbitration may prove to be significant causes of inefficiency.

Whilst international arbitration continues to be preferred over litigation, that does not necessarily mean that parties prefer arbitration because of its efficiency. The 2018 Survey found that enforceability of awards and avoiding specific legal systems/national courts are the most valuable characteristics of arbitration, whilst speed and cost were amongst the lowest ranked. To understand the extent to which concerns about efficiency are hindering the resolution of international construction disputes, we can use the proxy of whether parties have chosen not to pursue international construction arbitration because of concerns about its efficiency.

Another dimension to efficiency is the possibility of parallel proceedings. The same, or similar, factual matter can be arbitrated before both an investor state and an international commercial arbitral tribunal. For example, arising out of the planned Ras Sudr International Airport in Egypt was both an ICSID investor-state arbitration and CRICA arbitration under the contract. This occurred notwithstanding the different paradigms of the two types of arbitration. What is less clear is whether the difference in paradigms means that there are different views about efficiency in the conduct of those arbitrations. One way to measure this is to look for the appetite for an in-built arbitral appeals mechanism. The approach taken also differs between the two. For example, Article 3.39 of the EU-Vietnam Investment Protection Agreement would establish an internal arbitral appeal mechanisms. However, the internal appeals mechanisms established as part of the AAA/ICDR is optional. This might suggest that in-built arbitral appeals mechanisms are more palatable for investor-state awards. Alternatively, it may also just be a reflection of the different parties negotiating the investment treaty (both states) compared to a construction contract where it is more likely that only one party will likely be a state.

Improving efficiency of international construction arbitration

Regardless of the paradigm of arbitration, the issue of due process paranoia can arise. Identified in the 2015 survey, this is ‘a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully’. However, in their disputes, parties may be willing to forego due process elements, so as to reach a quicker and cheaper conclusion. It is through a non-identifiable form, like the Survey, that respondents can guide arbitrators about the due process aspects that they would be willing to forego without directly affecting any existing arbitrations. More significantly, understanding the due process elements that a party would be willing to forego can serve as an indication of when an award should or should not be set aside when enforced in domestic courts.

Looking at the arbitral procedures themselves, there is significant scope to improve efficiency. Procedural efficiencies have been suggested (see here). To implement those, and other, procedural improvements, actors will need to act efficiently. How those actors can act with greater efficiency may be unclear to other actors. It is easy to see the responsibility for acting more efficiently being borne by an actor other than oneself. Further, the non-identifiable format can allow actors to

communicate with each other without compromising their current disputes. For example, an expert may wish to inform an arbitrator how they can be better used to resolve the dispute. Impartiality and due process concerns can prevent experts from making these statements in the course of an arbitration, but through a non-identifiable survey, experts can share their views for the benefit of their clients.

These are just some of the improvements to efficiency that the 2019 QMUL International Arbitration Survey seeks your responses. Others include, improvements to arbitral procedure, the role of pre-arbitral dispute resolution, diversity, costs, and dispute resolution agreements.

Conclusion

This week the QMUL, in partnership with Pinsent Masons, is opening its international construction arbitration survey to respondents (here). We are grateful to our focus group for their comments on the Survey. This is, however, not the end of the empirical research, interviews will be conducted. If you would like to be part of those interviews please contact the Pinsent Masons Research Fellow in International Arbitration, Alexander Ferguson at alexander.ferguson@qmul.ac.uk.

The survey will be available until Friday 26 July 2019. We look forward to sharing the results with you in the latter part of 2019.

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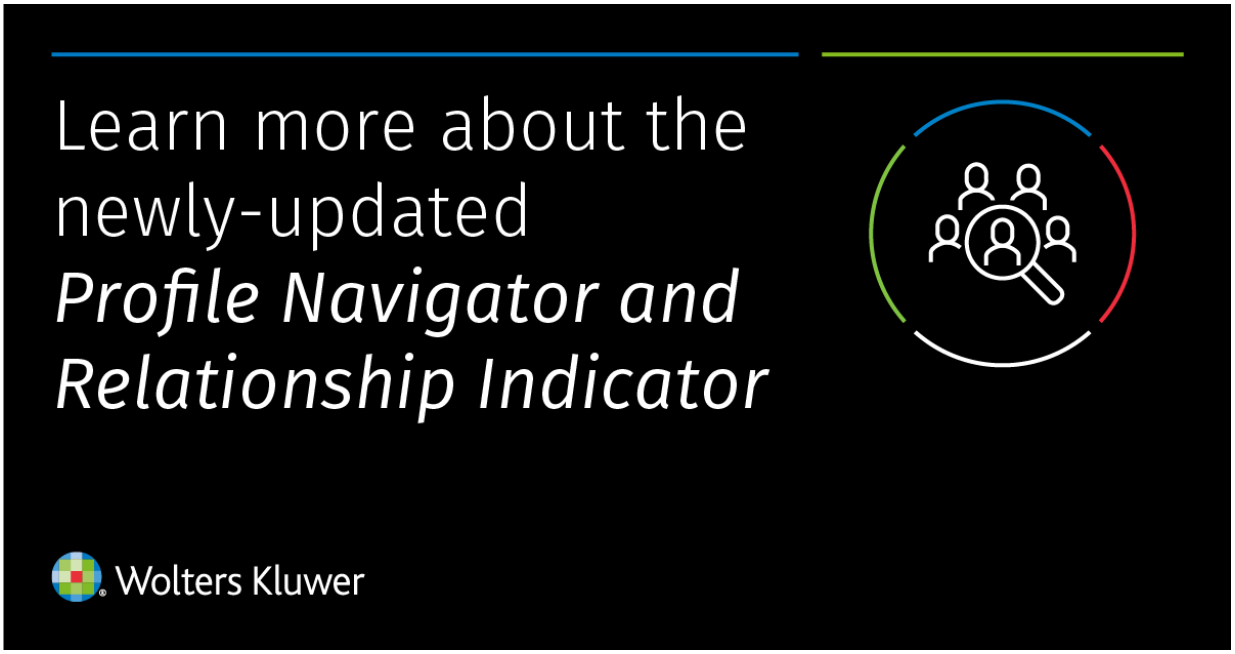

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