THE PROJECTS AND CONSTRUCTION REVIEW

TENTH EDITION

Editor
Júlio César Bueno

THE LAWREVIEWS

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Júlio César Bueno

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PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey,
est de résister et de réagir contre les vices de son époque.
Michel Villey, *Critique de la pensée juridique modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I would like to thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have a chapter from Turkey in this edition. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and law firms that graciously agreed to participate.

Finally, I dedicate this tenth edition of *The Projects and Construction Review* to a dear friend, the late Vinayak P Pradhan, who died on 8 March 2020. Vinayak Pradhan was an advocate and solicitor of the High Court of Malaya and the Supreme Court of Singapore. He was a partner and consultant at Skrine for more than 45 years, recognised throughout his legal career as a talented advocate, whose oratorical brilliance regularly outshone the best and was immensely respected in the arbitration world. Vinayak was appointed director of the Asian International Arbitration Centre in November 2018. The then Honourable

Attorney General of Malaysia, in announcing the appointment, described Vinayak as 'the doyen of arbitration in Malaysia and recognised the world over for his ability, experience and leadership in the field of arbitration'. He is survived by his wife, Varsha, and his two children, Avinash and Anisha.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
June 2020

Chapter 2

DISPUTE RESOLUTION IN CONSTRUCTION PROJECTS

Robert S Peckar and Denis Serkin[1]

Disputes are as integral to the construction process as the preparation of plans and the placement of concrete. However, most industry participants yearn for the reduction – if not the elimination – of project disputes. They correctly argue that disputes disrupt and often irrevocably poison the good working relationships between project participants that are essential to project success. While this is a noble goal, it is unlikely to be achieved any time soon. Hence, it is important on any project, especially an international project, to have the appropriate dispute resolution mechanisms in place for the inevitable confrontation. Indeed, adhering to dispute resolution mechanisms required by contract may lead to the resolution of the dispute short of formal processes.

Anyone participating in the construction industry knows that disputes take on lives of their own and usually result in further exacerbation of the project's underlying problems, themselves causing delays and costs. Certainly, the dispute resolution processes involve expenditure and diversion of valuable company resources – attention and time as well as cost – but we must never forget that construction companies are in the business of building, not litigating. Disputes are part and parcel of many major international projects and, as a result, on some of these projects the parties include allocations in their budget for this eventuality.

Fundamentally, the paradigm of dispute resolution may, at least for the time being, change because of the ongoing covid-19 pandemic. It is not clear what effect this declared pandemic will have on the construction industry, which in many countries has been mothballed except for the most essential projects, but it will most certainly generate claims and, thus, engagements. However, how those lawyers engage in dispute resolution while travel and in-person meetings are sometimes forbidden, scrutinized, and certainly strongly discouraged, remains to be seen. In fact, in March 2020, the International Chamber of Commerce (ICC) postponed hearings scheduled to take place at the ICC Centre in Paris. In other instances, parties to a dispute resolution proceeding have postponed and cancelled their sessions. Increased adaptation of rapidly evolving video conferencing, data sharing, and cyber security related technologies are already being adopted by dispute resolution providers to facilitate dispute resolution processes during the pandemic. Consistent with that trend,the International Centre for Dispute Resolution (ICDR) is encouraging parties to hold virtual meetings, mediations, and arbitration hearings. Moreover, staff at ICC, ICDR and the London Court of International Arbitration (LCIA) all worked or continue to work remotely. But, will these technologies and means of communication replace the dynamic of a face-to-face meeting or a traditional working session? Will remote witnesses be coached during

1 Robert S Peckar is a founding partner and Denis Serkin is a partner at Peckar & Abramson PC.

testimony without the knowledge of the arbitrators or opposing counsel, will arbitrators be able to evaluate the credibility of a witness through a television monitor and will arbitrators be able to get control of their proceedings if one or more of the legal counsel insist upon talking over others in an effort to control the video screen? All these and other related factors are going to impact the timing, cost and, to some degree, the substantive content of dispute resolution processes in ways not yet predictable.

I CONSTRUCTION DISPUTES IN DOMESTIC AND INTERNATIONAL PROJECTS

Complications are a normal, everyday component of the construction process; indeed, it is the constant challenge of diverse problems on construction projects that makes the process as exciting as it is. The people who lead projects, on all sides of the agreement, tend to be smart, tough, demanding and self-confident – and having such strong personalities, more often than not, significantly complicates any possibility of reaching an amicable resolution in the first instance.

Resolving disputes at the project level typically prevents negative impacts on both schedule and budget. When disagreements escalate from 'problem' to 'claim' and then to 'dispute' status, those potentially valuable project-level benefits are lost to processes that have little to do with the construction process and tend to take on a life of their own.

On an international project, in which the strong players who represent their companies come from different cultures, speak different languages and consider contractual issues against the backdrop of different legal systems, the challenge to work through problems to a solution at the project or even at the executive level is challenging, but critically important. Moreover, fully understanding the dispute resolution mechanisms, and where enforcement or a challenge to an award may need to be pursued, is an absolute necessity and must be addressed with an increased level of diligence, even before a contract is executed.

II SOLVING PROBLEMS AT THE PROJECT LEVEL

The best place and time to resolve claims, or even potential claims, is at the project level. On projects in which the parties fail to engage regularly in constructive and pragmatic discussions and thereby resolve issues at the field level whenever they arise, unsolved problems tend to accumulate quickly in substantial numbers as claims beget more claims. The larger the number and value of unresolved problems, the greater the amount of money in dispute and the more difficult it becomes for the parties to resolve matters amicably without a formal dispute resolution process. Therefore, it is extremely important to construct a well-thought-out dispute resolution mechanism that will, if necessary, effectively, quickly, and economically resolve disputes while giving the parties an opportunity to cool down and reassess situations. In recent years, the trend of including mandatory cool-down periods in contract documents, both bespoke and form, before a commercial dispute can commence has only accelerated.

III THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN EARLY PROBLEM-SOLVING AND DISPUTE AVOIDANCE

Fortunately, the participants in international construction projects are typically sophisticated and not afraid to use the various dispute resolution techniques that have proved to be effective in achieving an early solution to problems – processes that are timely, cost-effective and provide added value. These processes fall within the moniker of alternative dispute resolution (ADR). The 'alternative' in ADR refers to alternatives to arbitration and litigation. These processes may occur as early as during pre-construction and may occur as late as the eleventh hour before formal hearings are held in arbitration or court. To address concerns of cost and efficiency, most of the national and international arbitral bodies have adopted expedited resolution processes for both small and large projects. The key is to understand the many available options and properly match them to the specifics of a particular project.

IV THE GROWTH OF ADR

It is true of many industries, but especially of construction, that anyone legitimately involved in major domestic and international projects has, at least once, participated in an extensive and costly dispute resolution process. This is especially so in the international arena. The mandatory resolution of disputes in the employers' national courts, or in arbitration administered by local arbitration providers of the employers, is often not the preferred venue for resolving the open issues. In some jurisdictions, proceedings in the local courts can be biased, very costly and may take on a life of their own. In fact, arbitration, which is generally billed as being a faster and cheaper alternative to litigation, has proven to be anything but. Hence, the rise in the use of ADR processes around the world and the criticality of fully understanding and properly structuring the ADR mechanisms.

V ADR MECHANISMS

i Partnering

Despite its name, 'partnering' does not create an economic or legal partnership between the project participants. Rather, it is a process led by a trained neutral facilitator in which the representatives of project participants (e.g., employer, main contractor, professional design team) gather together for a day, or perhaps more, with their counterparts to create personal relationships and understandings that should result in collegiality and dispute avoidance, notwithstanding the different responsibilities and risks that each has in the project. Although partnering was created in the United States by the Corps of Engineers to address the adversarial nature of normal construction project interactions, it has enormous potential for international projects in which culture, language, personal history, business conduct and other essential differences can lead to disharmony. As can be seen below, the structure of a partnering agreement, by its open and collaborative nature, can overcome most differences by encouraging open discourse and cooperation.

The parties will typically adopt a project 'treaty' or 'credo' in which they express their dedication to the goals they have set to work together in the best interests of the project and to avoid disputes. That document is signed by each of the participants and posted in their project and regular offices. There have even been instances of a partnering logo being adopted. From a practical perspective, the best value and results are achieved when participants meet

regularly to review past and current project issues. These meetings, if properly guided, will result in increased collaborative effort and camaraderie among the participants. Ultimately, success is measured by issues resolved or discussed and prepared for future resolution. An added value of partnering is the end-of-project review and lessons-learned evaluation to improve future processes.

The process of partnering should result in fewer disputes when properly carried out with a trained, or at least experienced, professional facilitator. For the international project, the potential value of partnering is clear.

ii The decision-tree analysis

Whether the result of partnering or otherwise, each project should benefit from the establishment of a decision tree, in which the key project participants set out the names of their decision makers at project level, project executive level, company executive level and then the chief executive officer (CEO) of the company, on the understanding that resolution of problems should be made at the lowest possible level. In the absence of a resolution within a stated time, however, the problem-solving responsibility shifts upwards to the next level for a stated time until it reaches the level of the company CEO. This process has enjoyed success for several reasons:

a decision makers at each level are identified at the beginning of the project;

b decision makers at each level tend to get to know each other before they are confronted with a problem to solve;

c decision makers at each level are reluctant to see problems go to a higher level as many such situations could reflect poorly on their performance;

d the mere imposition of time limits at each level assures focused prompt attention rather than deferral to a later time (which often leads to no resolution at all);

e the successful resolution of problems becomes part of each participant's responsibility, rather than the creation of claims as a measure of success; and

f the successful resolution builds upon itself and creates an atmosphere of success that benefits the project.

iii Alliancing

Alliancing is the delivery method pursuant to which the diverse key parties to a project create a project team from their people with the most relevant and substantial experience, and challenge that team to operate with the singular purpose of on-time, on-budget completion of a high-quality project. While project participants can readily see advantages to participating in an alliance, it requires a major leap of faith on the part of the employer as the traditional separation of responsibilities with their attendant contractual protections must yield to the more collaborative model in which greater trust must be placed in the alliance team to achieve high-quality performance at the best cost based upon the best interests of the project. While there is likely to be a project budget that may not be exceeded, the team members are not limited to fixed-price contracts for their work and the project budget will be used by the team members as they decide collaboratively. Thus, the selection of the alliance team members is perhaps the most important decision that the employer can make as they must not only bring leading technical expertise to the table, but they must be capable of working effectively in this collaborative team arrangement, placing the interests of the team and the project ahead of what would normally be their own interests.

Because of the nature of the contract between the project employer and the alliance team, and because of the collaborative relationships that must be formed by the team members to work together to achieve the project goals, this model encourages the resolution of any and all disputes among the project participants in a prompt and business-like fashion, rather than through the customary dispute avoidance and dispute resolution techniques relied upon by parties in traditional contractual relationships. This result is enhanced by the presence of an alliance leadership team, with each participant represented by a senior colleague and the inclusion of the employer's senior representative. Trust, relationships and personnel commitment to the successful outcome of the project are irreplaceable elements of any alliancing arrangement.

In June 2018, the NEC, as part of its fourth suite of contracts, released the NEC4 Alliance Contract, formalising the alliance model in a suite of documents. This new document codifies traditional principles of collaboration and sharing of risk and award as well as providing a structure and definition to the major players (i.e., client, alliance board, alliance manager, among others).

iv Dispute review boards

The use of dispute review boards (DRBs) has become more prevalent. Indeed, in some more complex projects where there are multiple layers of significant legal exposure, more than one DRB may be in place, dealing with specific contractual relationships.

The DRB model can be whatever the parties want it to be. However, a typical model would look something like the following:

a Prior to project commencement, two parties each select a member of the DRB who may be independent and neutral (independence and neutrality are preferred, even for the party-appointed members).

b Those two appointed parties select a third who must be independent and neutral.

c The DRB will meet either at the call of either party or periodically to hear and resolve disputes between the parties that the parties have not resolved themselves. For best results, it is preferable to keep the DRB members apprised of project developments through regular, planned updates and, if possible, site visits.

d The DRB hearing is usually informal and may or may not include attorneys; the purpose of the hearing is for the DRB panel to understand the dispute sufficiently to render a decision.

e The DRB will promptly render a decision. Normally, the finality of the DRB's decision will depend on its authority under the parties' contract. Typically, the DRB's decision will be binding on the conduct of the parties while the project is under construction but not binding upon their legal rights. In other words, if the DRB directs the employer to pay the contractor additional compensation for claimed extra work, the employer must do so. However, after the project, the employer may assert that it had no legal obligation to make that payment and seek reimbursement from the contractor. Experience indicates that few project participants challenge DRB decisions at the end of the project simply because there have been no unresolved disputes, and the incentive to go to arbitration or litigation, with all the accompanying disruption and expense, is far less attractive under those circumstances. Additionally, if the DRB functions as it should, its decision is likely to be respected by the parties.

f The parties can also ask the DRB to issue advisory opinions to engender project-level negotiation and resolution. In fact, by fostering communications during the project, a well-informed DRB may prevent a formal DRB hearing or determination, or a subsequent litigation or arbitration.

The use of DRBs has become so prevalent that the Dispute Review Board Foundation – an organisation to promote the use of DRBs and advance the technique and quality of DRBs – was formed. It has published a practices and procedures manual, and holds conferences and seminars, maintains a database of members who offer their services for DRBs, and offers counsel to those employers who might consider this dispute avoidance technique.

v Planned early negotiation

Typically, litigators prefer a later resolution, believing that their clients' best interests are served by first beating up the adversary a bit. However, most clients typically prefer the security of an earlier resolution – again, construction companies are in the business of building, not litigating. Planned early negotiation (PEN) is unique in that the parties agree to negotiate at the outset instead of focusing on contentious resolution. This approach is atypical because offering to negotiate at an early state of a dispute is traditionally considered a sign of weakness. Parties committed to PEN agree to forgo the typical posturing and instead agree to focus on early case assessment, business concerns, costs and time, and ways to resolve disputes (i.e., mediation, a neutral or a conciliator). To avoid derailing the process, the parties are best served by entering into an agreement that should set forth the parties' desire to negotiate and the steps and mechanisms the parties will use to achieve that goal. It is important that the parties understand each other's risks and commercial considerations during their discussions – and these factors should drive a positive business outcome. Key to a successful PEN process is the parties' understanding of their respective positions, and a joint effort to identify potential third-party claims and similar other obstacles to a negotiated resolution.

vi Mediation

Mediation is an extremely valuable process, which, while not adjudicative, is basically an enhanced negotiation aided by a neutral facilitator, known as a mediator, who assists the parties in their negotiation and helps them achieve resolution and closure. The key advantage of mediation is that the process focuses on finding a practical resolution of a dispute as opposed to adjudicating the parties' contentions and rights.

Unless agreed otherwise by the parties, a mediator makes no rulings and has no power to command that the parties act in a particular way. The process is voluntary and, when properly established, is completely confidential so that what is said by the parties during the process is not allowed to be repeated in arbitration or litigation. Often mediation is designated as a prerequisite to arbitration to provide a non-contentious resolution mechanism before the parties harden their positions. With the soaring costs of litigation, even in arbitral forums, mediation is becoming more important as parties seek to avoid contentious dispute resolution when possible.

For its part, the ICC renamed its Amicable Dispute Resolution Rules as Mediation Rules and issued Mediation Guidance Notes, which, as the name suggests, 'provide guidance on issues that deserve attention when choosing and organising mediations'.

The new mediation rules complement the 2012 revision to the ICC's arbitration rules that encourage arbitrators to help parties always consider different settlement scenarios. The Mediation Guidance Notes continue this trend and encourage arbitrators to actively guide the parties towards a non-contentious resolution of disputes.

In the international construction world, the fact that parties speak different languages and have differing cultural attitudes and prejudices (particularly as regards the obvious need for a commitment to compromise) adds to that scepticism as one or more parties refuse to believe that a mediator who is not from their country and culture can lead them fairly through a negotiation process; many reject mediation because they refuse to accept that what they tell the mediator in confidence will remain in confidence. Another factor to consider when agreeing to mediation is the good faith of the parties participating in the process. Because of mediation's non-binding nature, there is no pressure on the parties to be fully prepared, as in arbitration or DRB proceedings. Hence, it is especially important that parties mediate, and prepare for mediation, in good faith to avoid a situation in which one of the participants chooses to treat mediation as a mere formality and not as an opportunity to resolve the dispute.

vii Ad hoc ADR

An ad hoc arbitration is a creation of the participating parties. It can be modelled on and follow the rules and procedures of a particular ADR organisation, such as the ICC, but without that body's actual administration and oversight – alternatively, the participants may choose their own script. For example, the parties may determine the number of arbitrators and the process for appointing the arbitrators, as well as the conduct and procedure of the arbitration, by referring to an ADR organisation's rules and procedures. The immediate and most obvious benefit of the ad hoc process is the lack of a – generally substantial – filing fee and the subsequent maintenance fees. Naturally, this process places a heavy burden on the project participants to adequately describe the ADR mechanism in such a way that the locale, composition or identity of the tribunal, the applicable law and procedures, and the method for negotiation of arbitration fees, are adequately encapsulated in the underlying contract documents. The ad hoc approach places a significant burden on the arbitrator, and to some extent the parties, to make sure that the proceeding is timely and adequately and thoroughly administered – functions usually handled by an ADR organisation's professional staff. To that end, in February 2017, the Chartered Institute of Arbitrators (London) issued recommended ad hoc arbitrator guidelines to address the drafting of an ad hoc agreement itself, as well as other considerations such as costs, confidentiality and bias.

VI CONCILIATION

Conciliation is an ADR mechanism whereby the parties retain the services of a conciliator. The conciliator, unlike a mediator, will typically work with parties individually to frame relevant issues and come up with a list of ranked, desired outcomes to be reconciled in a negotiated settlement agreement. Typically, the parties never meet face to face, which can be helpful in an industry such as international construction, which is dominated by strong personalities.

VII NEUTRAL EVALUATION

As the name suggests, the parties can retain the services of a neutral evaluator, either independently or through one of the several international ADR organisations, to evaluate their dispute. Typically, this permits the parties to quickly exchange their claims and backup materials without fully committing to a contentious proceeding. Normally, the neutral will evaluate the parties' positions and issue either a binding decision with an explanation or a non-binding report that can serve as a framework for a negotiated settlement. Alternatively, a neutral could also be tasked with evaluating the parties' position before providing a recommended course of action that is the least disruptive to the project and the parties' relationship. Using a neutral is especially beneficial on construction projects in which long-term cooperation between participants is especially important. As with any ADR method, it is important to make sure that the proceeding and any generated report are kept in confidence.

VIII ARBITRATION

The preceding sections have addressed methods designed to avoid the necessity of submitting a mature dispute to a finder of fact, be that an arbitrator or a judge. All the foregoing methods have in common the ability of the project participants to control the resolution of problems without yielding that control and authority to the ultimate adjudication of a binding award or judicial edict. However, there are some circumstances for which, for a vast variety of reasons, the intervention of an arbitrator or judge will be needed to achieve resolution. There is little point in discussing litigation in the international construction context here as treatises have been written about litigation in each jurisdiction. However, there are some observations that can usefully be made about international arbitration of construction disputes.

The complexities of international arbitration continue to expand as contracting practices change. In this ever-developing global world of construction, many international arbitration proceedings are faced with challenges that in some respects can make the process more complicated, time-consuming and expensive than was the case in past decades. There are many reasons for this, which include the following:

a Many project teams now comprise parties from around the globe, not just regional participants. It would not be unusual for engineering and design to be performed by a team of, say, US, French or British designers with designers from the country in which the project is located, while construction is led by a consortium of Spanish, French, Brazilian, Italian, Chinese, Korean, Japanese, US or other lead contractors with subcontractors also coming from diverse countries.

b Because of the variety of languages and experience brought by companies from around the globe, it is not unusual for contracts to be some form of the International Federation of Consulting Engineers contract (known as FIDIC) but modified by local practice and local legal perspectives. Contractual choice-of-law clauses may designate a jurisdiction that may have as one of its prime virtues the fact that it is not the law of any of the participating parties. For example, it is not unusual to have 'New York' as the choice of law when none of the project participants is from the United States, or even the state of New York. It is also not unusual for project participants to have little more than a very generic understanding of what New York law, or the law of any other designated jurisdiction, really provides for in the context of disputes that may arise until they are actually facing arbitration. The designation of locales for hearings that are not home to

any of the project participants or the law of arbitration may not have been considered by the parties when the designation was made. However, the parties must have a very clear understanding of the law where the project is located and how that jurisdiction treats foreign forum selection and choice-of-law clauses. In 2018, in the context of bilateral investment treaties, the Court of Justice of the European Union refused to enforce an arbitration clause because it had, in the Court's opinion, an adverse effect on EU law and was therefore incompatible with the European law. The matter to watch is whether this type of rationale will extend to purely commercial transactions, such as construction contracts, and the ADR provisions contained therein. The worst possible outcome is conducting an arbitration, only to learn that the award is invalid or unenforceable.

c Many arbitration clauses are customised by the parties and may include party-appointed arbitrators with no reference to their independence or neutrality, schedules for the hearing process that bear no resemblance to reality, and references to standard arbitration rules (such as those of the ICC, ICDR, London Court of International Arbitration, China International Economic and Trade Arbitration Commission and the many other providers of arbitration throughout the world) but with customised clauses inconsistent with those rules, which create ambiguity or confusion as to how the process will work.

d The variety of nationalities participating in the project team among whom the disputes arise is accompanied by very different perspectives on the arbitration process and the role of lawyers in that process can result in the creation of complex procedural and substantive issues that interfere with the efficiency of the arbitration process.

e The arbitrators who have been selected may know nothing of the law of the choice-of-law jurisdiction and may not speak the language (both the idiom and the culture) of the other arbitrators, never mind the participants.

f Although it could be argued that the development of document management through electronic databases, and software that can sort and facilitate analysis of documents and other electronic communications, aids the fair resolution of project disputes, it can also be convincingly argued that this development has added to the complexity of arbitration as some parties seek to engage in large-scale document and communication discovery within the arbitration process, and other parties passionately resist such discovery. This type of confrontation is understandable in the international context, particularly as practitioners from common law countries tend to be far more accepting of discovery in arbitration, while those from civil law countries consider broad discovery invasive and unacceptable in arbitration. When emails are included in the scope of what one party seeks to obtain from the other, the volume and associated costs of the electronic data that could be exchanged and then analysed can result in very substantial expense and the consumption of many months of discovery, all of which is part of the debate on this issue. It tends to be one of the challenging complexities facing project arbitration.

Arbitration remains a popular method of resolve international disputes. ICC announced that it registered its 25,000th case in early 2020. In 2019, ICC registered a record 869 cases of which 851 were new arbitration cases, slightly besting 842 cases filed in 2018. In 2019, ICDR managed 9,737 cases (an increase from 8,983 cases in 2018), with 9 per cent coming from the construction industry. In fact, the construction industry tied for the largest ICDR claim

of 2019 – at US$1 billion. According to its most recent statistics, in 2018 LCIA handled 317 arbitrations, 271 under its own rules, with construction and infrastructure comprising 10 per cent of said total.

When it comes to international construction, few projects compare to China's Belt and Road Initiative (BRI), which will establish new land and sea corridors between China, its neighbours and beyond to western Europe. Disputes will undoubtedly arise from a project of this magnitude, but it remains to be seen how and where these disputes will be adjudicated. The ICC, for one, through its Belt and Road Commission, has been very much up front about its expertise and its ability to help resolve the arriving and coming claims. For its part China established international commercial courts in Shenzhen and Xi'an which administered their first cases in the middle of 2019. It remains to be seen how and where the BIR disputes will be administered and resolved.

On 31 January 2020, the United Kingdom withdrew from the European Union. With the actual final withdrawal scheduled for 31 December 2020, the negotiations are proceeding on the commercial terms. While it is not clear how United Kingdom court will be enforced, or if, after 31 December 2020, it appears that London will remain a preferred venue for international arbitrations. In general, Brexit has highlighted the advantages and security provided by the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) against the uncertainty of how court judgments will be enforced in the post-Brexit world.

Clearly, the nature of international construction arbitration has not in itself become a more complex process, but rather it reflects the increased complexity of global construction projects and the differences brought to the table by parties from different nationalities and different legal systems. Thus, the need for the parties and their legal counsel to reflect on the challenges specified above – as well as others that may be more specific to the particular project and its participants – is key to creating an arbitration process that can be efficient, effective and responsive, and one that will credibly resolve their disputes.

Furthermore, perhaps the time has come for greater standardization of international construction dispute arbitration, with a single arbitration provider taking the lead in developing well thought-out rules, procedures and administration that will respond to the new model of the truly international project.

IX DATA PROTECTION AND CYBERSECURITY

In November 2020, International Council for Commercial Arbitration (ICCA), New York City Bar and International Institute for Conflict Prevention & Resolution jointly issued a Protocol on Cybersecurity in International Arbitration. The purpose of the protocol is 'to provide a framework to determine reasonable information security measures for individual arbitration matters'. Specifically, Schedule A to the Protocol sets forth baseline security measures arbitration participants should consider when considering how to protect, present and share data. In addition, in February 2020, the ICCA, jointly with the International Bar Association, issued a draft Roadmap to Data Protection in International Arbitration (the Roadmap) to 'help arbitration professionals better understand the data protection and privacy obligations to which they may be subject in relation to international arbitration proceedings'. Comments on the Roadmap are presently due before 30 June 2020. The

Protocol and the Roadmap are very important in international dispute resolution because there is a great variety of data protection principles around the world – such as the European Union's General Data Protection Regulation and the California Consumer Privacy Act.

X COSTS AND CONFIDENTIALITY

There are several considerations that must be carefully thought out before using mediation and arbitration to resolve project disputes. An agreement to arbitrate is, by its very nature, a contract; this means that the parties can agree and define the terms of the arbitration or mediation proceeding beforehand.

To conduct mediation or use DRBs, the parties must retain – and pay – a neutral or several neutrals, depending on the contract agreement and the size of the dispute, and retain lawyers and experts in most cases. While that cost can be significant, it is generally lower than the costs associated with formal legal processes before the courts. More important, however, is the value added by those processes when they successfully resolve disputes in a timely manner that benefits the project and helps avoid the true costs of formal dispute resolution in the courts, which go beyond fees, and may include an adversarial relationship between the parties as the project progresses, which in turn may lead to yet more disputes.

Arbitration, while known as an ADR process, is a substitute for litigation with many benefits. Cost savings may or may not be among them, however, depending upon the manner in which the arbitration is administered by the sponsoring organisation (e.g., the ICC or the ICDR), or by the conduct of the parties and their lawyers. Notwithstanding that fact, the parties do have the advantage of being able to control these costs through their contracts. The parties can agree to limit the number of hearings, witnesses and neutrals, and – especially – the extent of discovery. Similarly, a contractual provision can be negotiated to determine, based on the size of the dispute, how the aforementioned factors will be addressed.

Another issue to consider when engaging in ADR is confidentiality. While in many jurisdictions the record of court proceedings may be obtained by a third party, because of the contractual nature of ADR, the parties can provide that the proceeding will be confidential. The extent of confidentiality could range from an agreement that the proceeding will not be recorded in any way to destruction of exhibits and documents exchanged after conclusion of the hearings, or a full-blown confidentiality agreement binding all parties, including any neutrals. Depending on the nature of the dispute, the potential benefits of true confidentiality are numerous, especially where trade secrets, pricing information and other proprietary data are involved. Most of the amendments considered by established arbitral seats, as well as new and amended state legislation, place particular emphasis on confidentiality.

XI INTEGRATED PROJECT DELIVERY SYSTEMS AND BUILDING INFORMATION MODELLING

The use of integrated project delivery systems, in which project designs, data and other information previously segregated among the various project team members in a manner consistent with their contractual responsibilities and rights are now shared through a secure website, is considered by many to be a revolution in the industry likely to reduce disputes simply because of increased communication and collaboration among those team members. Similarly, the use of building information modelling, whereby team members collaborate by inputting designs and information traditionally communicated through shop drawings

into a common database resulting in three-dimensional renditions and analyses of those locations where elements conflict with each other, is starting to reduce disputes. With significant advances in pure 3-D modelling and the introduction of artificial intelligence, it is likely that clashes or inconsistencies in coordination may soon become a thing of the past. Notwithstanding the virtues attributed to these developments, the legal landscape in terms of contractual and other legal responsibilities among the project participants when there is a disagreement is largely untested in the courts and arbitration. When an employer elects to pay for the use of such systems, with the goal of increasing collaboration and reducing or eliminating disputes, the benefits of using an ADR process when problems and disagreements are encountered seem all but self-evident.

XII THE ROLE OF CONSTRUCTION LAWYERS

When it is clear to a project team member that arbitration or litigation must be commenced, there is no doubt in that party's mind of the need to retain and be represented by legal counsel. However, that timing hardly presents that party with the best value that can be achieved with legal counsel: that best value occurs when legal counsel is part of the team from the very beginning of the project, as a guide through the various options and processes set out in this chapter, while also guiding the client with regard to the appropriate protections provided by contractual and legal rights, so that the client is in a position to obtain the relief to which it is entitled. Much is said and written about the unhappiness of the construction industry with the costs associated with legal processes and thus with their lawyers; however, the simple reality is that sound legal advice from qualified construction lawyers who are familiar with all these processes, and who share with their clients a passion for successful construction projects, is the least expensive and best use of construction lawyers.

XIII CONCLUSION

Problems arising during construction projects should not automatically develop into claims and disputes. Methods are available to help the project team avoid solvable problems becoming formal dispute resolution processes. These methods allow the participants, indeed with the aid of their attorneys, to maximise the opportunities to solve problems efficiently from the first days of the project, to build on those solutions to establish problem-solving as the norm for the project, and to focus more of their efforts on the achievement of a successful project rather than successful arbitration or litigation.

Appendix 1

ABOUT THE AUTHORS

ROBERT S PECKAR

Peckar & Abramson PC

Robert S Peckar is a founding partner of Peckar & Abramson PC, one of the largest and leading construction law firms, with 10 offices in the United States and affiliated offices in the United Kingdom, China, India, Mexico, Brazil and Peru. He has been a leading construction practitioner for 49 years. He has been integrally involved as a legal adviser and advocate for major contractors and projects throughout the world. He is highly respected for his unique ability to guide project participants through troubled projects and difficult relationships to solutions that do not require formal dispute resolution, while having major success as a litigator of construction disputes when efforts to avoid formal dispute resolution are not successful. In addition to providing project specific advice, Mr Peckar's practice has focused in recent years on counselling both international and US contractors in the formation of joint enterprises, including consortiums and other collaborations in the United States and abroad, and guiding construction companies in the formation, implementation and oversight of corporate integrity programmes that comply with domestic and international requirements.

Mr Peckar is a fellow of the American College of Construction Lawyers and a member of industry and professional associations, as well as serving as general counsel of several US associations and as a legal adviser to others. He is an author and a frequent lecturer.

DENIS SERKIN

Peckar & Abramson PC

Denis Serkin is a partner in the construction law practice at Peckar & Abramson PC. Mr Serkin represents construction managers, developers, general contractors, speciality contractors, owners, and subcontractors in contentious and non-contentious dispute resolution. He regularly provides project support to clients in many market segments, including construction management, general and EPC contracting, real estate development, power and energy, and infrastructure. A large part of Mr Serkin's practice is devoted to implementation and oversight of corporate integrity programmes that comply with domestic and international requirements. In addition, Mr Serkin advises clients in the drafting and negotiation of various levels of construction agreements. Prior to entering the legal profession, Mr Serkin worked as a project engineer.

PECKAR & ABRAMSON PC

1325 Avenue of the Americas, 10th Floor
New York, NY 10019
United States
Tel: +1 212 382 0909
Fax +1 212 382 3456
rpeckar@pecklaw.com
dserkin@pecklaw.com
www.pecklaw.com

an LBR business

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