Freshfields Bruckhaus Deringer

Developments in the Recommended Tools and Techniques for Effective Management of Arbitrations under ICC Arbitration Rules

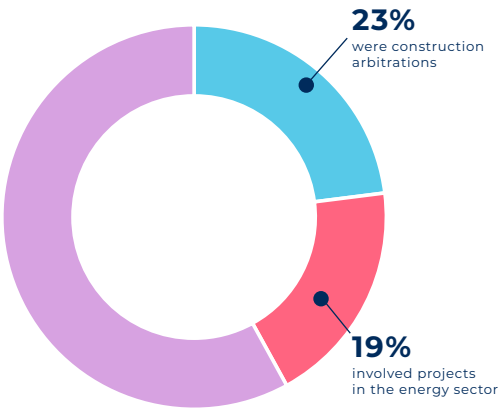
Key developments to note

"Construction arbitrations need careful handling…" So began the terms of reference for a group, led by Nael Bunni and Humphrey Lloyd, who in 2001 produced a report on construction industry arbitrations.[1] This report was deemed necessary as whilst it was felt that the ICC Rules of Arbitration provided a good framework for construction arbitrations, there was still a need to understand what was required for the efficient management of large and complex commercial arbitrations.

Eighteen years have passed since the original report, during which various modifications have been made to the ICC Rules of Arbitration, as revised in 2017 ("the Rules") and there have been many significant developments in the practice of arbitration in construction disputes. As a result, Aisha Nadar and Christopher Seppälä have overseen the updating of the guidance, benefiting from advice from Dr Bunni and His Honour Humphrey Lloyd QC, and nineteen industry experts, including Jane Jenkins and Erin Miller Rankin of Freshfields Bruckhaus Deringer.

The 2019 report[2] provides recommendations across twenty two categories. The report merits full consideration but the following points are of particular interest.

Of the 810 new cases filed at the ICC in 2017



(Source: 2017 ICC Dispute Resolution Statistics, as published in the ICC Disputes Resolution Bulletin 2018, Issue 2.)

1. Selecting your arbitrator

The 2019 report helpfully identifies six issues which should be considered when selecting an arbitrator(s). First, **the arbitrator should be familiar with industry and cultural nuances**. They need not be a "polymath", but should be a *"cross-functional 'construction professional' and possess the ability to grasp – and ideally the intellectual curiosity to wish to understand – technical issues (if a lawyer) and legal issues (if not)."*

Secondly, **parties should consider the arbitrator's familiarity with the relevant law and/or main legal traditions**, with familiarity with civil and common law legal systems presenting an advantage but not a necessity.

Thirdly, **the arbitrator should possess strong case management skills**. There is an increasing need for our tribunals to be IT-literate. Whereas the original report suggested that *"some familiarity with computers"* would almost certainly be required, unsurprisingly the 2019 report goes further, suggesting that familiarity with computers is required, *"sufficient to manage submissions, documents and other evidence (witness statements and expert reports, etc), trial bundles and transcripts that are stored and accessed electronically"*. A potential need for experience with Building Information Modelling ("BIM") and lean procurement systems is also flagged.

[1] The Final Report on Construction Industry Arbitrations, 2001, ICC International Court of Arbitration Bulletin Vol. 12 No. 2.

[2] See "ICC Commission Report for Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management of Arbitrations", February 2019.

Whereas the 2001 report recommended that *"the tribunal should be comprised of people with proven experience in seeing how an international arbitration about a construction dispute is carried through from start to finish"*, the 2019 report limits the scope of this recommendation to *"at least two of the members of the tribunal"*.

Fourthly, **the tribunal should be "balanced" in terms of its attributes**. *"In a tribunal comprising more than one arbitrator, if the co-arbitrators do not have all the ideal attributes between them, then the president of the tribunal should certainly possess the attributes they do not have."* A sole arbitrator should possess all of the required attributes.

Fifthly, **the arbitrator's availability should be considered**, due to this being a critical factor in the handling of heavy construction cases. The 2019 report refers to the requirement for prospective arbitrators to sign a statement confirming their availability for a case before their appointment, and suggests that this should be supplemented by the parties' enquiries to ensure sufficient availability to devote time to the case, and provides, by way of example, the ICC website's tool listing all arbitral appointments since 1 January 2016[3], allowing parties to check the capacity of a potential appointee.

Finally, and unsurprisingly in 2019, the report recommended that parties consider diversity, an issue which was not addressed in 2001. Diversity should be considered as it *"can help to broaden and enrich the field of selection"* and should include the *"gender, race and ethnicity"* of arbitrators. The Equal Representation in Arbitration ("ERA") Pledge[4] is mentioned, as this can be a useful tool when searching for female arbitrator profiles. Freshfields has been at the forefront of the ERA Pledge, by which a cross section of the international arbitration community (including arbitral institutions, law firms and corporates) has committed to increase the number of female arbitrators on an equal opportunity basis, to seek to achieve a fair representation of women. Sylvia Noury, a partner in Freshfields, founded the pledge (our firm is a founding signatory) and co-chairs its steering committee.

The construction industry employs about 7 percent of the world's working-age population and is one of the world economy's largest sectors, with $10 trillion spent on construction related goods and services every year.

(Source: McKinsey Global Institute: February 2017)

2. A sole arbitrator might be suitable for disputes up to US $30 million

Both the 2001 and 2019 reports recognise that costs can be saved by the use of a sole arbitrator, as opposed to a panel of three. The 2001 report recommended consideration of a sole arbitrator for projects with a value of not more than US $20million at tender stage. The 2019 report recognises that the use of a single arbitrator is understood to be common and to work well in England and certain other common law jurisdictions even for large value disputes, but notes that this is not generally common or accepted in civil law countries, concluding *"unless parties would prefer a solution in accordance with English legal culture, the practice of the ICC Court is generally endorsed, that being that the Court rarely departs from a sole arbitrator when the amount in dispute is below US $ 5million, and would rarely appoint a sole arbitrator if the amount in dispute is above US $ 30 million, meaning that when the value of the dispute is between US $ 5 and 30 million, the parties should give consideration to whether they appoint one or three arbitrators."*

3. The Terms of Reference must be produced quickly

The 2019 report highlights Article 23(2) of the Rules, namely that the tribunal should finalise the Terms of Reference within 30 days of the date on which the file was transmitted to it and before the first Case Management Conference.

[3] https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals

[4] http://www.arbitrationpledge.com

4. Parties should provide more to the Tribunal during the "Initial Stages"

Whereas the 2001 report suggested that the tribunal might wish to request a chronology from the parties, the 2019 report recommends that after the signing of the Terms of Reference, or even before then, the parties' further pleadings or memorials should usually be accompanied by: (i) a list of the key persons involved; (ii) a chronology of relevant events, and (iii) a glossary of terms.

5. The first Case Management Conference ("CMC") is of critical importance

Both reports identify the importance of the first CMC. The 2019 report provides a helpful checklist of matters which might be discussed e.g.:

- whether there are any mandatory requirements of the law applicable to the proceedings and what the parties' common expectations are with regards to the procedure of the arbitration;
- the potential need for clarification of the tribunal's duty to establish the facts;
- whether it is desirable for each party to present submissions accompanied by the evidence each considers necessary to establish its case;
- the need for expert evidence;
- the need (if any) to split the case and/or resolve certain issues by way of partial awards of procedural decisions;
- the need (if any) for site visits; document management; translation and interpretation issues; and
- settlement discussions and the use of a Sealed Offer(s) procedure, if applicable.

The 2019 report also flags the need for further CMCs to address other issues, the dates for which should be fixed at the first CMC, and which could be held by conference call or video, and subsequently cancelled if not required.

6. There is an even greater emphasis on the need for measures to be cost-effective

The 2019 report reminds us that one of the reasons why selection of the right arbitrator(s) is so important is that the tribunal's judgment regarding how best to resolve the dispute is crucial to securing a cost-effective arbitration. The 2019 report contains further emphasis of the importance of measures being cost-effective, e.g.:

- reminders that whatever procedure is adopted must be cost-effective, as required by Article 22(1) of the Rules;
- that as a general rule, all site visits must be justifiable in terms of both their utility and savings in arbitrators' fees and the parties' costs;
- that unless the parties agree or there are obvious reasons for promptly proceeding with a split case, decisions about splitting a case into parts should be left until it is clear that it will be sensible and cost-effective to do so;
- that if the parties require more general production of documents held electronically, as part of its duties under Article 24 of the Rules the tribunal should ensure that parties will manage and control e-disclosure in a cost-effective manner; and
- that in order to reduce costs, witness evidence (factual and expert) could be given by video link.

"Capital project and infrastructure spending globally expected to total more than US$ 27 trillion between 2015 and 2020.

(Source: PwC and Oxford Economics 2016)

Warnings regarding cost consequences of certain actions (or inaction) are also included in the 2019 report, e.g. a reminder of the ICC Court's indication that it intends to adjust arbitrators' fees to take into account the speed (or lack thereof) by which arbitrators deal with a case[5] and a recommendation that the tribunal warns the parties that in its decision under Article 38 of the Rules (allocation of costs) it will take account of costs wasted by witnesses having to attend unnecessarily.

7. Site Visits are not an opportunity for advocacy

The 2019 report repeats much of the guidance in the 2001 report regarding Site Visits, but provides a reminder that site visits *"must not be used as an opportunity for the parties to indulge in uncontrolled advocacy"*. A detailed protocol should ordinarily be drawn up prior to the visit and the tribunal should ensure that the site visit is not dominated by the owner (since the owner controls the site), but instead that the tribunal sees whatever the contractor wishes it to see.

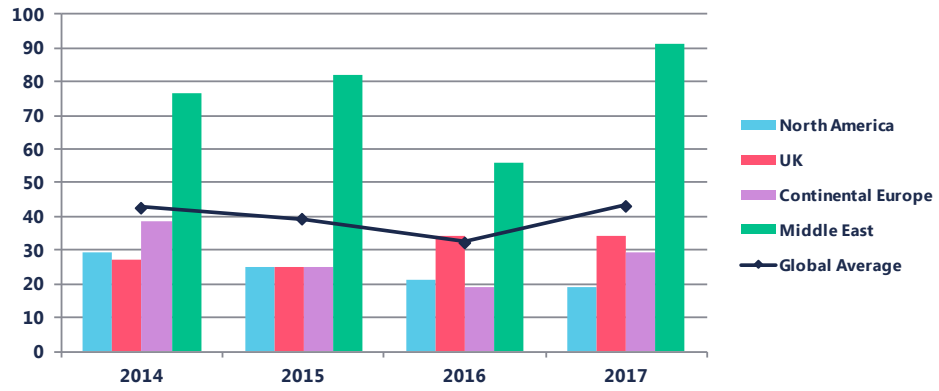
8. Further Guidance on Programmes and Critical Path Networks

The 2019 report suggests that at an early stage of proceedings, the tribunal should invite the party claiming an extension of time to specify the method it has adopted or proposes to adopt in order to determine the causes of the delay or disruption. The UK's Society of Construction Law's Delay and Disruption Protocol (2nd edition)[6] is identified as a helpful guide to parties and arbitrators dealing with delay claims, as are other guides.

9. The Merits of Splitting a Case should be considered

The 2019 report recognises that bifurcating proceedings or rendering one or more partial awards on key issues might result in a more efficient and cost-effective resolution of a case. For example, the case could be split between jurisdiction, liability and quantum and/or between issues common to all parties and issues affecting only some parties. Core legal or factual issues might be examined separately and preliminarily by the tribunal. The 2019 report also provides expanded guidance on the matters which should be considered by a tribunal when deciding whether to split a case.

Average Dispute Value (US$ million)



(Source: Global Construction Disputes Report 2018 'Does the Construction Industry learn from its mistakes?', Arcadis.)

"Both the time it takes to resolve disputes and the value of these disputes increased in 2017, but the volume of disputes stayed consistent with 2016 figures. This illustrates the trend of larger and more complex disputes than in prior years.

(Source: Global Construction Disputes Report 2018, Arcadis)

[5] Paragraph 9.3 of the 2019 report and paragraphs 120-121 of "ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, dated 1 January 2019. See: https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration

[6] The Society of Construction Law Delay and Disruption Protocol, 2nd edition. See: https://www.scl.org.uk/sites/default/files/SCL_Delay_Protocol_2nd_Edition_Final.pdf

10. Document management and disclosure needs careful consideration

As one would expect, the 2019 report highlights the need for consideration of access to documents electronically and access to databases. It provides helpful recommendations regarding disclosure and production of documents, including a recommended direction for a tribunal to provide to parties in its first procedural order. The recommendation provides that parties should be directed to:

- produce the documents on which they rely with their submissions;
- avoid any requests for document production in order to control time and cost, when appropriate;
- in cases where requests for document production are considered appropriate, limit such requests to documents or categories of documents that are relevant and material to the outcome of the case;
- adhere to all deadlines in relation to the production of documents; and
- use a document production schedule in order to facilitate the resolution of issues.

Consideration should be given to applying the ICC Report on Managing E-Document Production[7] and the CIArb Protocol for E-Disclosure in Arbitration.[8] Helpful guidance on requests for additional documents can be found in The IBA Rules on the Taking of Evidence in International Arbitration ("the IBA Rules").[9] The 2019 report contains new guidance regarding management of documents at hearings, recommending that prior to the hearing, tribunals should remind parties to try to agree on *"the use of online platforms for the storage and exchange of documents, and access and demonstration of documents at the hearing. Pre-hearing submissions, witness statements and any reports from experts should be hyperlinked to the documents."*

"Although, very few are still in favour of the wholesale and indiscriminate production of documents by means of the common law process of discovery, such a process must be justified if it is to be applied to an international arbitration. Otherwise, it has no place in ICC arbitrations.

(Source: Paragraph 16.3 of the 2019 report)

11. Clarity is needed regarding the role to be played by witnesses and experts

As to witnesses of fact, the 2019 report suggests that it is usually sensible to allow for supplementary or additional statements of evidence of fact to be submitted within a brief period following the principal statements. It also suggests useful proactive case management techniques e.g. (i) achieving consensus on the role and content of witness statements; (ii) defining the numbers of rounds and timing of witness statements, and (iii) maintaining only relevant witness testimonials and statements.

In order to maximise the efficiency of the allocated hearing time, for example where the availability of witnesses is limited, some tribunals may require each party to notify the other beforehand of the scope of proposed questions. However the report acknowledges that such an approach may result in witnesses also becoming privy to the questions.

As to experts, the 2019 report identifies situations in which it might be useful for the tribunal to consider appointing its own expert, and reminds us that *"no administrative charges are levied for the proposal of experts by the ICC to ICC arbitral tribunals, which is a unique service offered free of charge in all cases administered by the ICC International Court of Arbitration"*. In the case of party-appointed experts, the 2019 suggests that tribunals should ascertain the names of the parties' proposed experts and include, in the first procedural order, a requirement that each expert includes in his/her report a declaration of independence. The 2019 report, like the 2001

[7] Paragraph 16.5 of the 2019 report and https://iccwbo.org/publication/icc-arbitration-commission-report-on-managing-e-document-production/

[8] Paragraph 16.5 of the 2019 report and the CIArb Protocol for E-Disclosure in Arbitration. See: https://www.ciarb.org/media/1272/e-iscolusureinarbitration.pdf

[9] Paragraph 16.7 of the 2019 report and The IBA Rules on the Taking of Evidence in International Arbitration (2010). See: https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC

report, notes the desirability of meetings between experts before preparation of their reports, but the 2019 report provides more guidance as to matters which ought to be considered and agreed before expert meetings e.g. whether agreements between the experts bind the parties and what the procedure is for the joint meetings and for production of joint reports.

In respect of both witnesses and experts, consideration should be given to simultaneous questioning. The 2019 report refers to the use of "witness panels" (whereby witnesses can be questioned on the same topic at the same time) and expert conferencing (often referred to as "hottubbing"). Both witness panels and expert conferencing can be particularly beneficial in complex construction arbitrations. Typically there will be many witnesses of fact and experts, and examining them concurrently can allow the tribunal to maintain momentum, establish the most accurate position and deal with the case more efficiently when compared with questioning witnesses and experts in turn. The report also recommends an examination of the guidance found in Article 8.3(f) of the IBA Rules.

12. The 'chess clock' method might be a suitable way of dealing with the allocation of time available for the merits hearing

As to the use of time at the hearing, the 2019 report refers to the 'chess clock' method, whereby *"the entire hearing time, exclusive of recesses and breaks for lunches, administrative time and time for tribunal's purposes, is determined in terms of a number of hours, which are then split in accordance with the overall allocation agreed or decided. Then, during the time that a party is presenting evidence, or testimony (whether direct or cross-examination) or argument, that party's 'chess clock' would tick off the hours and minutes down to the allocated limit."*

13. Parties should not overlook available Interim Measures

The 2019 report contains a new section addressing the fact that Article 28 of the Rules authorises the Tribunal to order interim or conservatory measures unless the parties agree otherwise.[10] Examples of interim measures foreseen by the report include the tribunal:

- providing a respondent with security for its costs in the event that a claimant is insolvent or in financial distress;
- ordering compliance with (or relief from) the decision of a dispute adjudication board;
- preventing the removal of materials/parts from a site where they may be required during any defects liability period; and
- ensuring that parties comply with their contractual obligations, e.g. obliging an owner to observe the contract in relation to the appointment of an engineer/other representative.

The report suggests that when a tribunal is exercising its discretion on whether to order any interim measure, it must be convinced that there is good reason for doing so, including the risk of an applicant suffering irreparable harm unless it is granted.

The 2019 report also reminds us that in a case where the parties have not agreed to any pre-arbitral procedures that provide for the granting of conservatory or interim measures, an emergency arbitrator may intervene offering an important new alternative to state courts for the granting of urgent relief (Article 29 of the ICC Rules). That said, the 2019 report notes that under Article 15 of the 2015 ICC Dispute Board Rules and the FIDIC forms of contract, Dispute Board members are empowered to grant provisional relief in the form of interim or conservatory measures. This added power enhances the efficiency of Dispute Board procedures, particularly in circumstances

[10] Paragraph 80 of the 2019 report and The Secretariat's Guide to ICC Arbitration, 2012, paragraphs 3-1032 to 3-1045

where measures are required on an urgent basis (which is often the case in construction projects). Parties should keep in mind however that such power will prevent access to ICC emergency arbitration[11] notwithstanding the potential enforcement limitations of interim or conservatory measures issued by a DB as compared to those issued by a national court or an arbitral tribunal.

14. Parties are free to settle and should consider Sealed Offers

Also new in 2019 is a section addressing settlement, noting that the tribunal should consider reminding the parties that they are free to settle all or part of their dispute at any time during the ongoing arbitration. Suggestions include that mediation proceedings might be conducted under the ICC Mediation Rules and that the tribunal could, e.g. at the first CMC, consult the parties and invite them to agree on a procedure for the possible use of sealed offer(s) in the arbitration.

A sealed offer is the term attributed to information and correspondence regarding unaccepted settlement offers or counter-offers. These can be provided to the Secretariat at any time after it has transmitted the Request for Arbitration and should be marked "without prejudice save as to costs". Once the tribunal has reached its conclusions in relation to liability and quantum, it will determine the basis upon which costs will be allocated pursuant to Article 38 of the Rules. Should the tribunal agree to receive sealed offers, it has discretion to decide what, if any, weight is given to any sealed offers for the purposes of apportioning costs. For example, upon review of the sealed offers, a tribunal may allocate a larger proportion of costs to a losing party that has unreasonably rejected a prior settlement offer.

The 2019 report reminds us that sealed offers can be an important tool in a construction arbitration, because (i) construction claims are often inflated and (ii) under the Rules, as often "costs follow the event", the successful party may be able to recover all or a large portion of its costs, including, but not limited to, its legal fees and expenses. Guidance is provided as to the assistance which might be provided by the Secretariat in this regard. As to closing proceedings, the 2019 report provides new guidance on sealed offers, explaining that if the tribunal accepts sealed offers, it should refrain from closing the proceedings pursuant to Article 27 to the extent necessary to allow the parties to make further submissions on costs.

[11] Paragraph 1.6 of the 2019 report and Article 29.6(c) of the ICC Rules.

Jane Jenkins
Partner
T +44 20 7832 7280
E jane.jenkins@freshfields.com

Erin Miller Rankin
Partner
T +971 4 5099 100
E erin.millerrankin@freshfields.com