

ICC Report on Construction Industry Arbitrations

By Judge Humphrey Lloyd QC



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Judge Humphrey Lloyd QC, who is an honorary member of the BDPS, was a joint leader of the panel which last year produced a report on construction industry arbitrations for the Commission on Arbitration of the International Chamber of Commerce (ICC). Judge Lloyd has kindly provided a copy of the report to *BDPS News*.

The International Court of Arbitration of the International Chamber of Commerce (ICC) has kindly consented to *BDPS News* publishing a summary version of the report. The summary sets out the background to the report and lists the report's main recommendations and conclusions. It is published with the kind permission of the ICC International Court of Arbitration and is subject to the copyright of that organisation. In this regard the assistance of M. Emmanuel Jolivet, General Counsel to the International Court of Arbitration, is gratefully acknowledged.

The full report was published in the Fall 2001 issue of the *ICC International Court of Arbitration Bulletin* (Vol. 12/No. 2). That publication can be obtained from the ICC International Court of Arbitration, 38 Cours Albert 1^{er}, 75008 Paris, France; fax +33 1 49 53 29 29; www.iccarbitration.org.

Preliminary Remarks

1. This report is the result of a study commissioned by the ICC Commission on International Arbitration. It was produced by the Construction Arbitration Section of the Commission's Forum on Arbitration and New Fields, under the joint leadership of Dr Nael G. Bunni and Judge Humphrey Lloyd QC, assisted by Mr Michael E. Schneider,¹ Mr William Laurence Craig, Dr Aktham El Kholi, Dr jur. Joachim E. Goedel, Mrs Vera van Houtte, Mr Sigvard Jarvin and Dr Igor Leto.
2. The Construction Arbitration Section was given the following remit:

Construction arbitrations need careful handling. Some arbitrators and others may not be fully aware of how best to use the powers conferred by the 1998 ICC Rules to secure cost-effective arbitrations. The Construction Arbitration Section will first find out what techniques have been used successfully to control construction arbitrations. It will then produce guidance for arbitrators, perhaps in the form of a handbook, which might contain sample procedures (under Article 15), directions and forms.

The Section will take account of the effect on arbitrations of the introduction into contracts of new and evolving forms of dispute resolution which are intended to reduce the disputes that require to be arbitrated, e.g. Dispute Review Experts or Boards or Adjudicators. It is hoped that in this way it will be possible to demonstrate that arbitration under the ICC Rules, if properly directed by the arbitral tribunal, is at least as good as arbitration under other rules or at other centres.

We understood the term "construction arbitrations" to mean arbitrations

that concern all kinds of disputes arising out of projects for construction work, but mainly those relating to the execution of the services (e.g. engineering services) and work necessary for the implementation of the project.

3. Views were sought throughout the world from nearly 40 arbitrators with proven experience of construction arbitrations, as well as from other practitioners. Although the legal and cultural backgrounds of the respondents varied widely there was a striking degree of unanimity on many points.
4. Drawing on the replies and our own experience we issued a first report in March 2000. It was intended as a document for discussion rather than one which contained settled views. The report was placed on the ICC International Court of Arbitration's website. The comments that we received on that report gave us confidence that our original proposals were generally correct. Indeed we have been informed by a number of respondents that our suggestions have not only already been put to good use in construction cases but are relevant to other types of disputes, especially where there are complex issues. In November 2000 we presented a revised version of our first report. Further comments were received which led us to amplify and clarify certain parts. However, our conclusions and recommendations remain essentially the same.
5. The responses showed that, whilst the ICC Rules of Arbitration provide a good framework for construction arbitrations, there is still a need to understand what is required for the efficient management of large and complex commercial arbitrations. There appears to be a remarkable lack of knowledge of current practice adopted by other arbitrators or by the legal representatives who appear

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- before them. This could be due to the appointment by parties of arbitrators or legal representatives unfamiliar with international arbitrations, but it could also be that there is a lack of practical guidance about the management of arbitrations.
6. Thus a number of those who contributed believed (as we do) that this report should be the first stage of a continuing process by which the ICC Commission on International Arbitration, through its Forum on Arbitration and New Fields, would monitor and report on developments that could help all those concerned with construction arbitrations.²
 7. A summary of our main recommendations and suggestions [follows]. Some of our suggestions necessarily go beyond management techniques. For example, we thought it desirable to outline the particular qualities now required of an arbitrator in an international construction arbitration and also to touch on some common points that are really about the admissibility of evidence but which arise in the context of the management of an arbitration.
 8. In order to avoid misunderstanding it is also desirable at the outset to emphasize the following general points:
 - 8.1 The report is intended primarily for arbitrators who do not have much experience of construction arbitrations conducted under the ICC Rules or who wish to be reminded of the options available or of the practice of others. Since some arbitrators are appointed who do not have much knowledge of construction arbitrations (indeed, regrettably, some nominated by parties have no previous knowledge whatsoever), it is important that this report should be seen by them to be reasonably authoritative. For that reason alone the guidance given in this report is not hedged with qualifications. Some of the proposals also concern the parties.
 - 8.2 However, it should not be thought that we consider there is any single “right” way in which a construction arbitration should be conducted. The report sets out certain commendable courses and the factors that arbitrators and parties may bear in mind when considering them. It is therefore unnecessary to repeat throughout the report that any recommendation is general or usual. Every case is different (although many construction arbitrations have familiar patterns) and anybody should pause and consider whether a standard or common technique is appropriate.
 - 8.3 Our proposals are thus not intended to be used to override the wishes of the parties. Party autonomy is the kernel of international commercial arbitrations. Nothing in this report is intended to suggest that arbitrators should decline to follow the joint wishes or agreements of the parties (even if they could do so), especially perhaps if both are represented by lawyers familiar with ICC arbitrations. Nevertheless, from time to time parties may not have appreciated all the courses open to them or the position of the tribunal, so arbitrators are not only entitled but bound to inform the parties if they consider that a proposed course is not the best and to propose an alternative or alternatives. Depending on the nature of the case and bearing in mind the sensitivity of the subject, arbitrators should take account of the financial position of each party and the resources likely to be available to them.
 - 8.4 In our recommendations we have tried to accommodate the approaches of various national jurisdictions. Although many of those who specialise in construction arbitrations come from common law backgrounds (as was reflected in those from whom we received comments), we have tried to adopt a balanced course. The report does not therefore attempt to provide fixed solutions of universal application. That so many of the responses we received had much in common suggests that harmonization is achievable provided that attention is directed to substance and not to the form of procedures and techniques. Most of our suggestions should therefore be capable of being understood and implemented either by direct action on the part of the tribunal or by the parties acting upon the tribunal’s direction.
 - 8.5 Above all we consider that the procedures in construction arbitrations must be cost-effective. For example, some (especially common lawyers) contend that traditional common law procedures, if correctly employed, usually result in a high degree of precision in fact finding and, arguably, may enable a tribunal to arrive at decisions in which it has greater confidence. However, such procedures are costly and time-consuming. Others argue, with justification, that other systems and the practice of civil law proceedings in litigation and arbitration can lead to comparable degrees of precision in fact finding and confidence in the result, and that they can do so at lower cost and in a shorter time. We firmly believe that arbitrators in ICC arbitrations should themselves decide on the procedures appropriate to the dispute in question which will enable them to discharge their duties without unnecessary delay or expense.
 - 8.6 Although the report specifically covers construction arbitrations, we think that it may also help arbitrators in other complex commercial cases.
 9. Rules already exist for construction arbitrations, such as the Construction Industry Model Arbitration Rules (“CIMAR”) which are used in the United Kingdom or those published by the American Arbitration Association. We have not drawn on them (nor did any of our respondents suggest that we should) as they are essentially for domestic use, although to the extent that they converge they evidence a degree of harmonization. Nor have we used the UNCITRAL Notes on Organizing Arbitral Proceedings or the International Bar Association’s latest Rules of Evidence,³ although our conclusions are very comparable in many respects.

SUMMARY OF MAIN RECOMMENDATIONS AND SUGGESTIONS

Composition of Tribunal

1. The tribunal should comprise people with proven experience in seeing how an international arbitration about a construction dispute is carried through from start to finish.
2. Sole arbitrators or chairmen should know how to write awards and should be able to construct an effective management framework for the arbitration.
3. Some familiarity with computers is a distinct advantage, if not a necessity, and basic word-processing skills are now virtually indispensable.
4. At the tender stage of projects whose value is not more than, say, 20 million US dollars,⁵ the parties should consider whether their interests would be best served by the appointment of a sole arbitrator. They should also consider appointing a sole arbitrator if the value of the claim is not large.

Steps Available Prior to Terms of Reference

5. The tribunal should obtain a chronology of events from each party, especially if there are claims for delay or disruption. On the basis of the material provided by the parties, it should itself prepare a composite chronology which it should send to the parties. Any discrepancies should be taken up with them. The tribunal should thereafter maintain the chronology, amending it as the case develops, circulating revisions, and asking the parties to resolve any gaps in it.
6. The tribunal should not hesitate to seek information to enable it to create organizational charts, layouts and glossaries, or to obtain other clarification for the purpose of defining a claim or an issue.
7. Amplification of submissions may be needed where, for example, a party has not anticipated a point raised by the other party or which the tribunal sees as likely to arise, concerning for example:
 - 7.1 the jurisdiction of the tribunal, e.g. the identification of a contracting party;
 - 7.2 whether or not notice of intention to claim has been given, if required by the contract;

- 7.3 whether or not a claim or defence is barred in law, e.g. by prescription or limitation;
- 7.4 whether or not a claim has been referred to, considered or decided by an engineer, DAB or DRB, or whether notice of dissatisfaction has been given (e.g. under the FIDIC conditions);
- 7.5 amount of the claim, where unclear.

However, a tribunal is under no obligation to seek clarification for the purpose of drawing up the terms of reference. There may in some cases be points which should be left until later. In particular, a tribunal should be wary of asking a party to clarify the legal basis of a claim or defence, as this may be a matter for the tribunal to determine or for the other party to refute.

Terms of Reference

8. A list of issues will be needed in all but the simplest cases, not least because without such a list it will be impossible to decide on the future course of the arbitration.
9. To define issues in broad terms may help neither the parties nor the tribunal in construction arbitrations, where clear guidance is needed on the issues for which proof or argument is required. Extracting those issues at an early stage is the primary task of the tribunal. For these reasons it is sensible for the tribunal to invite each party to set out its own list of issues before drafting the terms of reference. A very lengthy list would be counterproductive, however, so a working summary should be set out in the terms of reference and refined at the subsequent procedural or organizational meeting. That list should be revised and reissued by the tribunal in consultation with the parties as the case proceeds, e.g. at any further procedural meeting.
10. Unless the parties have already agreed on specific procedural rules, no attempt should be made to do more than describe the rules in the usual general terms. They should be left to be worked out at the procedural meeting.

Hearing Date and Timetable

11. The tribunal should inform the parties of the likely hearing date when

the draft terms of reference are circulated, so as to facilitate agreement on the date proposed. If a series of hearings are planned, the likely date of the opening hearing should be proposed.

12. If a date cannot be agreed upon and has to be decided by the tribunal, then it should be the earliest date practicable for the parties. Although in most typical construction arbitrations it may well be difficult or impossible to devise a timetable that meets the six-month time limit set in Article 24(1) of the ICC Rules of Arbitration, that period should not be ignored. Where contractual dispute resolution mechanisms have already come into play and settlement discussions taken place, the points at issue may have been refined, leaving the award as the sole remaining matter. In such instances, unless the dispute is of above-average complexity or requires more than one award, the likelihood of abiding by the six-month time limit will be greater. In settling a date (and also the procedure), the tribunal should take into account the financial position of each party (or those financially supporting it), insofar as this is known or can be inferred, and the resources likely to be available to it.
13. When scheduling dates, whether for the hearing or any other part of the provisional timetable, the tribunal should ensure that the parties have opportunities to take stock and negotiate and that there is leeway in case of slippage.
14. Time must also be set aside for the tribunal to be able to read all relevant material before the hearing (or any subsequent procedural meeting).

Splitting the Case

15. 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.
16. Before a decision is made about splitting a case, the claimant's case on both causation and quantification should be known, so that it is clear how the costs and losses are said to have arisen. The tribunal should be sure that a decision favourable to the claimant on liability and causation will have significant financial

quises. If it is not, then it should not split a case, as one of the key reasons for a split is that a partial award is likely to lead to agreement on the remaining issues. Equally, a tribunal must be satisfied that, if a decision were taken to examine the apparent basis of a claim in fact or law and if that basis were rejected, the claimant would not be able to present an alternative fallback case.

Procedure after the Terms of Reference

17. The meeting at which the terms of reference are drawn up and signed should not be combined with the first procedural meeting, since discussions about procedure and in particular the timetable can impede the establishment of the terms of reference. It is recommended, however, that the first procedural meeting take place on the same occasion and follow immediately afterwards.
18. In complex cases it will be sensible to hold at least one further procedural meeting at which the timetable will be reviewed and difficulties discussed and the list of issues reconsidered.
19. In cases where there have already been prior discussions, serious consideration should be given to proceeding directly to proof by requiring the parties to present submissions accompanied by the evidence that each considers necessary to establish its case in the light of what is then known about the opposing case. Evidence may be both documentary and in the form of attested statements from witnesses. Unless the arbitration is “fast-track”, these submissions should not be submitted simultaneously but consecutively, with the claimant presenting its case first so that the respondent can reply to it. The tribunal will therefore need to fix a timetable, and possibly allow the parties to submit further submissions or evidence either of their own volition or in response to the tribunal’s requests or directions. Once this stage is complete the tribunal will be better able to draw up a list of the issues as they appear to it and to guide the parties as to what is then required.

Further Working Documents and Schedules

20. Some specialists favour the creation of a working document briefly recording the essential elements of each party’s case, established from exchanges between them. These “schedules” are best used for typical claims for changes, for disputes about the value of work and for claims for work done improperly or not at all. They have the advantage of being able to be created by computer and conveyed on disk or by e-mail, which makes for ease of handling. If fully and properly completed, schedules identify points that are not in dispute or irrelevant and thus expose those that have to be decided. Schedules may also be used to extract the parties’ cases on claims for delay (prolongation) and disruption, but they require special care to be effective. Schedules are of particular value where claims are of a “global” nature.
21. Even if not immediately used, it may be helpful for a schedule to be prepared (by the parties or the tribunal, or both) after the first submission of evidence or before the hearing takes place, so as to identify what then needs investigation and decision.

Tests

22. Where a complaint is about the unsuitability or malfunction of a plant, equipment or work, the tribunal will need to ascertain what tests have already been carried out and whether the results are agreed or sufficient for the purposes of the arbitration.
23. The tribunal should sanction tests that have not already been carried out, but must be sure of the time needed for them. Although in most cases a tribunal will seek to persuade a party of the value of a test, any test required by it must be non-destructive if made without the consent of the party whose property is affected. The tribunal cannot and should not order any other tests of its own volition. Tests which the tribunal considers necessary and which are not permitted by the party that owns the property will have to be conducted by or for the tribunal elsewhere (assuming they will still be practicable and of value if carried out

off-site), either as part of the tribunal’s obligation to ascertain the facts (Article 20(1), ICC Rules of Arbitration) or by an expert appointed by it pursuant to Article 20(4). These recommendations apply whether the tests are carried out by an expert appointed by the tribunal or by a party. Once an arbitration has started, tests performed by an independent expert appointed by a party should be carried out jointly with any other expert and under the tribunal’s direction. Similar constraints apply to site inspections.

Visits

24. It can be very helpful to combine joint tests with a visit to the plant by the tribunal, provided there have been no material alterations since completion and that the operating conditions are representative of those contemplated when the contract was made.
25. Visits can be expensive and difficult to arrange at a time convenient to the parties or their representatives, especially if the tribunal comprises three people. All visits, like tests, must be able to be justified by their benefits and cost-savings.

Programs and Critical Path Networks

26. Claims for delay and disruption require careful handling. It is important that the causative events are clearly identified and that any events which did not delay progress are isolated. The use of Critical Path Network (CPN) techniques generally facilitates this process and should be required by the tribunal provided they have already been used in the management of the project. To construct a CPN retrospectively, if it has not been used previously in the project, is an expensive exercise and can produce unhelpful or misleading results. Care must therefore be taken and the processes must be fully transparent. The parties and the tribunal must be informed of the logic at the basis of the CPN, the assumptions made and the data entered. A further requirement is that they all have access to the software used for the preparation of the CPN and its application.

Computation and Quantification of Claims

27. If no evidence has already been provided in the statement of case (or prior to the proceedings) to justify the amount of a claim, a claimant ought to be required to produce the primary documents in support of the amounts claimed, cross-referenced to the statement of case, and in a form that will readily enable the respondent to know where the amounts come from and why they were incurred. The respondent will then have no excuse for not stating the reasons why liability does not exist or, if it does, why the amounts claimed are nevertheless not due, e.g. because they were not caused by the events, were not incurred or not reasonably incurred. In each case reasons should be given.

Documents and Document Control

28. The common law process of discovery as practised in domestic fora has to be justified if it is to apply to an international arbitration. Otherwise it has no place in ICC arbitrations.
29. Documents produced by a party should be directly relevant to the issues as defined by the tribunal and should be confined to those which a party considers necessary to prove its case or dispose of that of the other party, or which help to make the principal documents comprehensible.
30. When producing a document (and if not then, certainly in any pre-hearing submissions), the parties should be instructed to state what it is intended to prove, given the general agreement that the parties are first required to produce all the documents needed to prove the points at issue.
31. The tribunal may obviously call for further documents at any time in order to fulfil its duty to ascertain the facts. The procedural rules ought also to allow a party to request additional documents from another party and, if these are not provided, to seek an order from the tribunal, which will consider the legitimacy or reasonableness of the request and the refusal.
32. The tribunal should set a deadline after which no further documents may be produced by any party, unless

required by the tribunal, or permitted by it in exceptional circumstances following a reasoned justification for late submission.

Document Management

33. Material such as pleadings, submissions, extracts from the key primary documentation, witness statements and reports from experts should be loaded on a CD-ROM.
34. The tribunal should in any event require the parties to organize documents so as to avoid duplication and to facilitate access to them. Such a procedural direction will need to be clear and precise as this useful practice is not yet widely recognized. For example, whether photocopied or on disk, inter-party correspondence (including instructions, requests for instructions and the like), the agreed records of meetings, programs, agreed summaries of measurements, agreed summaries of valuations, drawings and other technical documents ought to be contained in separate indexed files with the pages individually numbered so that additions can be made simply.

Witnesses

35. Subject to legal requirements and the wishes of the parties, evidence that is not contained in a document and which is necessary in order to prove or disprove a point at issue must be presented by means of a written statement from the witness, in that witness's own words (unless the witness is incapable of this), verified and signed by that witness. An accredited translation must be provided if the evidence is not in the language of the arbitration.
36. It is usually sensible to allow for supplementary or additional statements of evidence to be exchanged shortly after the principal statements, in light of evidence intended to be given, so that all the evidence is in writing.
37. All witness statements should be exchanged in good time before the preparation of any pre-hearing submissions.

Experts

38. Where one or more members of the tribunal have been nominated or appointed for their expertise, there

should normally be no need for the tribunal to duplicate that expertise by appointing its own expert, unless the assessment of part of the case might take a considerable time. Given the important implications such a decision is likely to have, it should normally be discussed with the parties.

39. It is always prudent to clarify whether or not expertise is required, why it is required, by whom it will be provided and when.
40. The tribunal should appoint its own expert only if there is a real need for one, as the costs of such an expert are borne by the parties. In many cases, however, it will be cost-effective to do so, for the opinion of that expert might render unnecessary any further expertise or may identify the points upon which evidence or reports from witnesses or other experts may be required.
41. The tribunal ought to decide whether it will appoint its own expert before it issues the provisional timetable under Article 18(4) of the ICC Rules of Arbitration, since the timetable will be affected by the work of the expert.
42. The tribunal may need to differentiate between truly independent experts and consultants retained by the parties to assist in the preparation of their claims. Such consultants may produce reports and give evidence in the arbitration, so the tribunal will need to make sure that any information they obtain from a party and use in their evidence and opinions has been communicated to the other party and to the tribunal.
43. The tribunal ought either to draw up the terms of reference of the parties' experts (on the basis of the issues known to it) or require the parties to agree a statement of the issues and facts (both agreed and assumed, e.g. as set out in the witness statements) upon which expert evidence is required. If the tribunal does not take this course, it should be provided with the terms of reference or instructions the experts have received from their clients (subject to privilege), so as to check they have been given proper directions and explanations and that their opinions will be reliable.
44. If the experts are independent of the

parties, they should ideally discuss their views with each other before preparing their reports, as most independent experts eventually see eye to eye. This could be done at a meeting possibly chaired by the tribunal or, if the parties agree, a designated member.

45. It must be made clear whether or not agreements between experts bind the parties. If the tribunal were to chair discussions between experts, it might be difficult for a party to question any such agreements. Reports must be confined to questions or issues on which there is a lack of agreement.

General

46. Whenever appropriate, all applications about procedural matters which do not raise questions of substance should be made and decided by correspondence or telephone without a hearing.
47. A party's submissions should be numbered or arranged so as to match those of the other party.
48. All submissions prior to a hearing should be in writing.
49. All submissions should be full but concise, and should be delivered at the earliest possible opportunity.

Hearing

50. The tribunal should either require the parties to decide how the time

available during the hearing should be allocated (in which case the parties will be held to their decision), or the tribunal should itself draw up and abide by a strict timetable, unless to do so would be unjust. Each party must be treated fairly, but this does not mean that the tribunal necessarily has to accord them equal witness time, as it is required to do for statements or submissions.

51. Prior to the hearing the parties should be required to agree which documents will be needed at the hearing and which (if not already conveniently available) should be put on CD-ROM or assembled in the form of files. Pre-hearing submissions, witness statements and any reports from experts should be cross-referenced to the documents.
52. Either minimal time should be allowed at the hearing for oral opening statements, or no opening statements should be made at all.
53. Factual witnesses should be heard before the experts' reports are considered, since the questioning of a factual witness may require an expert to modify or withdraw an opinion or provisional conclusion.
54. Time available at a hearing need not be used for closing submissions, which are often best presented in writing shortly after the conclusion of the hearing. The time within which

written closing submissions are to be delivered should be set by the tribunal well before the hearing (e.g. in the provisional timetable) and certainly in good time prior to its conclusion. No further submissions will be considered once the time limit has expired.

55. The tribunal should make it clear that no new facts or opinions will be admitted after the hearing has taken place, unless specifically requested by it.

Notes:

1. Leader of the Forum on Arbitration and New Fields.
2. It would assist participants in this process if the ICC International Court of Arbitration were able to designate a member of the Secretariat to provide information about construction arbitrations and to act as a link.
3. See, for example, the excellent commentary published in [2000] *Business Law International* 14.
4. Cross-references are given to the principal paragraphs of the report.
5. Approximately 23 million euros.

New Legislation to Protect Sub-contractors

In a recent announcement, the Planning Minister Mr Thwaites, advised of the State Government's intention to introduce new laws in the autumn session of parliament designed to protect contractors and sub-contractors from the effects of big companies failing to pay for work done.

Very little detail was provided other than it was the intention that the laws would close a loophole currently allowing unscrupulous companies to avoid payment obligations in certain circumstances. Part-payments for contractors as work progresses were proposed to be introduced, with contractors

having the right to suspend work if payments were not made.

Of particular interest to BDPS members was reference to the proposed provision in the legislation for the appointment of independent adjudicators to resolve disputes between parties with the apparent benefit of avoiding lengthy and expensive court action. (BDPS members are referred to the article entitled "Adjudication" by Humphrey Lloyd QC which was published recently in *BDPS News*.)

The new legislation is awaited with great interest.