



AMERICAN ARBITRATION ASSOCIATION®

**2017 AAA®  
CONSTRUCTION CONFERENCE**

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**NAVIGATING**  **THE UNIQUE ASPECTS OF**   
**CONSTRUCTION ARBITRATION**

New York, NY | Thursday, June 22, 2017 | 8:00 AM – 5:00 PM





AMERICAN ARBITRATION ASSOCIATION®

## Global Construction Disputes – Don't Get Left Behind

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# GLOBAL CONSTRUCTION DISPUTES – DON'T GET LEFT BEHIND

- ▶ Why International Arbitration?
- ▶ What are the Rules?
- ▶ Unique Aspects of Construction Arbitration in Latin America
- ▶ Arbitration is Complete, Award in Hand – What's Next?

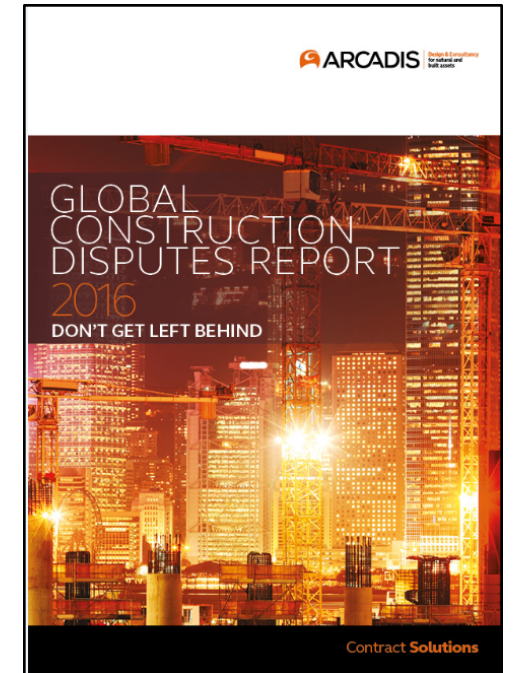


# GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

## The Global Construction Disputes Report

For the seventh year, Arcadis has taken an in-depth, data-driven review of disputes globally in 2016 and focused on five key areas:

- ▶ common causes;
- ▶ average value;
- ▶ typical length of dispute;
- ▶ most popular resolution methods; and
- ▶ regional nuances.



Those findings are summarized in Arcadis' **Global Construction Disputes Report**.



# GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

## Overall Results of the Global Construction Disputes Report

- ▶ The global average value of disputes was \$46 million.
- ▶ The global average length of disputes decreased from last year from was 15.5 months to 1 year and 2.3 months.

REGION	DISPUTE VALUES (US\$ MILLIONS)						LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
Middle East	112.5	65	40.9	76.7	82	56	9	14.6	13.9	15.1	15.2	13.7
Asia	53.1	39.7	41.9	85.6	67	84	12.4	14.3	14	12	19.5	14.6
North America	10.5	9	34.3	29.6	25	21	14.4	11.9	13.7	16.2	13.5	15.6
UK	10.2	27	27.9	27	25	34	8.7	12.9	7.9	10	10.7	12
Continental Europe	35.1	25	27.5	38.3	25	19	11.7	6	6.5	18	18.5	14.1
GLOBAL AVERAGE	32.2	31.7	32.1	51	46	46	10.6	12.8	11.8	13.2	15.5	14.3



# GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

Poor Contract Administration remains the #1 Cause of Disputes!

- ▶ Failure to properly administer the contract remained at the top reason for construction disputes.
- ▶ Moving up this year in the rankings was the issue of the employer, contractor, or subcontractor failing to understand and/or to comply with contractual obligations.

2016 RANK	CAUSE	2015 RANK
1	Failure to properly administer the contract	1
2	Poorly drafted or incomplete and unsubstantiated claims	2
3	Employer/contractor/subcontractor failing to understand and/or comply with its contractual obligations	5
4	Errors and/or omissions in the Contract Document	3
5	Incomplete design information or employer requirements (for Design and Build and D&C)	4



# GLOBAL CONSTRUCTION DISPUTES – THE 2016 TRENDS

## North American Results

- ▶ The value of disputes in North America dropped slightly in 2016. The time taken to resolve these disputes in the region increased by over 2 months in 2016.

	DISPUTE VALUES (US\$ MILLIONS)						LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
North America	10.5	9	34.3	29.6	25	21	14.4	11.9	13.7	16.2	13.5	15.6

- ▶ For the third year running, the most common cause for disputes in North America during 2016 was errors and/or omissions in the contract documentation.

2016 RANK	CAUSE	2015 RANK
1	Errors and/or omissions in the contract document	1
2	Poorly drafted or incomplete/unsubstantiated claims	New
3	Failure to properly administer the contract	2



# **AAA MODEL RULES FOR INTERNATIONAL DISPUTE RESOLUTION PROCEDURES**

**VS.**

## **NEW ICC RULES EFFECTIVE MARCH 1, 2017**

David McPherson, *Managing Partner, Watt Tieder*





# INTERNATIONAL CONSTRUCTION DISPUTES PRIMARILY ARBITRATED

International Centre for Dispute Resolution (ICDR)

- ▶ International Dispute Resolution Procedures  
*Effective July 1, 2016*

International Chamber of Commerce (ICC)

- ▶ Arbitration Rules of the Arbitration Court  
*Effective March 1, 2017*



## COMMONALITIES BETWEEN ICDR AND ICC RULES

- ▶ Agreement to Arbitrate
- ▶ Request or Demand for Arbitration
- ▶ Request and/or Counterclaim
- ▶ Reply to Counterclaim
- ▶ Appointment of Arbitral Tribunal
- ▶ Preparing Case and Submission of Evidence
- ▶ Post-Hearing Submissions
- ▶ Issuance of Award
- ▶ Occasional Request for Corrections/Modifications to Award



## THE DIFFERENCES – INITIATING THE ARBITRATION

### ICDR

- ▶ Written Notice Or Online ([www.icdr.org](http://www.icdr.org))
- ▶ Arbitration Commenced When Administrator Receives Notice of Arbitration
- ▶ 30 Day Response Time (Art. 3)

### ICC

- ▶ File At ICC Offices (1 Of 3) (Art 4.2)
- ▶ Arbitration Commenced When Received By The ICC Secretariat
- ▶ Tribunal Often Appointed And Confirmed Prior To Filing All Initial Pleadings
- ▶ 30 Days Response Time



## THE DIFFERENCES – MEDIATION

### ICDR

- ▶ Following Submission Of An Answer, Administrator May Invite Parties To Mediate (Art. 5)
- ▶ ICDR Has International Mediation Rules
- ▶ Parties May Agree To Mediate At Any Time

### ICC

- ▶ No Mention Of Mediation



## THE DIFFERENCES – JOINDER

### ICDR

- ▶ Joinder Allowed after Appointment of any Arbitrator if agreed to by all Parties and Arbitrator (Art. 7.1)

### ICC

- ▶ No Joinder after Appointment of any Arbitrator (Art 7.1)



## THE DIFFERENCES – AMENDING OR SUPPLEMENTING CLAIMS

### ICDR

- ▶ Any Party may Amend a Claim or Defense unless Tribunal Finds Such Amendment Inappropriate (Art. 9)
  - Prejudice to other Party
  - Timing?

### ICC

- ▶ Not Allowed (Very Difficult) after Terms of Reference



# THE DIFFERENCES – ESTABLISHMENT OF THE TRIBUNAL

## ICDR

- ▶ Absent Agreement on Procedure, “*ICDR List Method*” Used (Art 12.6)
- ▶ 45 Days after Commencement → Procedure to Select or Selection (Art. 12.3)
  - Administrator May Appoint
- ▶ Absent Agreement on Number Of Arbitrators, Administrator Has Discretion to require 1 or 3 Arbitrators (Art. 11)

## ICC

- ▶ No List of Qualified Construction Arbitrators
- ▶ Common → Each Side Appoints 1 Panelist and they select 3<sup>rd</sup> (Art. 12.5)
  - 30 Days To Challenge (Art. 14.2)
  - Reasoned Decision Allowed (NEW – Art. 11.4)
- ▶ Failure To Agree On Panel Selection Procedure: Court Appoints
- ▶ President Of Tribunal Different Nationality (Art. 13.5)



## THE DIFFERENCES – ICC TERMS OF REFERENCE

- ▶ Unique To ICC
- ▶ Must Identify All Claims and Counterclaims and List of Issues to be decided (Art. 23.1 (c) & (d))
- ▶ Must be Concluded within 30 Days from Filing Case with Tribunal (Art 23.2)
  - Prior to March 2017 Amendment = 60 Days
- ▶ No New Claim made without Tribunal approval
  - Amending Terms requires Agreement of Parties = Difficult/Impossible
- ▶ Tribunal to Issue Award within 6 Months
  - Regularly Extended
  
- ▶ Criticized = Defining issues at very start of process





# THE DIFFERENCES – DISCOVERY

## ICDR

- ▶ Tribunal Has Final Authority (Art. 21.2)
- ▶ Tribunal Manages Discovery with Following Objectives:
  - Maintain Efficiency and Economy;
  - Avoid Unnecessary Delay/Expense;
  - Avoid Surprise;
  - Assure Equality of Treatment; and
  - Safeguard Opportunity to Present Claims/Defenses Fairly (Art. 21.1)
- ▶ Exchange all Documents that will be used at trial (Art. 21.3)
- ▶ eDiscovery = Produce in Most Convenient/Economical (Art 21.6)
  - Parties may apply for native format
  - Searched must be “*As Economical As Possible*”
  - Testing is mentioned to focus and limit eDiscovery
  - Depositions/Written Discovery “*Generally Not Appropriate*” (Art 21.10)



## THE DIFFERENCES – DISCOVERY

### ICC

- ▶ Rules do not provide for Discovery
  
- ▶ Parties may apply for “Additional Evidence” (Art 25.5)
  - Interpreted to require Parties to provide Documents in Possession
  - Parties typically required to:
    - Identify Documents to Review;
    - Why Documents cannot be accessed from other sources; and
    - Why Documents are needed
  
- ▶ No Rules to control expense and process



# THE DIFFERENCES – WITNESSES AT THE HEARING

## ICDR

- ▶ Tribunal determines manner in which witnesses are examined and who shall be present during Examination (Art 23.3)
- ▶ “*Evidence May Be Presented In The Form Of Written Statements*” (Art 23.4)
  - Option for Direct Examination?

## ICC

- ▶ All Direct Testimony submitted prior to Hearing
- ▶ Statement of Claim and Statement of Defense
  - Detailed Submission with Factual and Legal Argument
  - Supported by Witness Statements and Expert Reports
  - Scott Schedule for Construction Cases
- ▶ Cross-Examine Witnesses and Provide Oral Argument



## THE DIFFERENCES – EXPERTS AT THE HEARING

### ICDR

- ▶ Tribunal “*May Appoint One or More Independent Experts*” (Art 25.1)
- ▶ Parties May Respond to Report In Writing
- ▶ Parties May Cross-Examine Independent and Present Their Own Expert

### ICC

- ▶ Tribunal Is Free To Appoint Its Own Expert, But It Is Rare
- ▶ Expert Reports Are Submitted With Party’s Case
- ▶ Common For Tribunal To Require “Hot-Tubbing”
  - Sometimes Joint Report Prepared By Experts Prior to Hot-Tubbing



## THE DIFFERENCES – ICC EXPEDITED PROCEDURE

### ICC

- ▶ Brand New Concept
- ▶ Arbitration Agreements after March 1, 2017
- ▶ Amount in Dispute less than \$2,000,000 or by Agreement
- ▶ Court Has Discretion to Appoint Sole Arbitrator With/Without Input
- ▶ No Terms of Reference
- ▶ CMC Within 15 Days and Award Within 6 Months Of CMC
- ▶ Tribunal Has Discretion to Prohibit Discovery, Limiting Witnesses and Other Actions to Assure Expedited Award



## THE DIFFERENCES – AWARD

### ICDR

- ▶ 60 Days Following Closing of Hearing (Art 30.1)
  - Further Submissions Allowed (Art 27.1)
    - As a Matter of Course?
- ▶ Reasoned Award (Art 30.1)

### ICC

- ▶ 6 Months from Terms of Reference (Art 31.1)
  - Often Extended
- ▶ Usually Quite Detailed



# UNIQUE ASPECTS OF CONSTRUCTION ARBITRATION IN LATIN AMERICA

Luis Enrique Graham, *Partner, Hogan Lovells*

June 2017



1. Arbitration in the Construction Industry
2. Who are the parties to Construction Arbitration Procedures?
3. Distinctive Features in Latin America
4. Enforcement Issues: Awards contrary to public policy
5. Judicial Assistance in Latin America
6. Conclusions





# ARBITRATION IN THE CONSTRUCTION INDUSTRY



# ARBITRATION IN THE CONSTRUCTION INDUSTRY

- ▶ Latin America:  
Construction arbitration is focused on infrastructure projects
- ▶ United States and Europe:  
Construction arbitration is focused on both, private and private projects.



# WHO ARE THE PARTIES TO A CONSTRUCTION ARBITRATION PROCEEDING?



# WHO ARE THE PARTIES TO A CONSTRUCTION ARBITRATION PROCEDURE?



A. State v. Private disputes

B. Disputes derived from EPC Contracts



# **DISTINCTIVE FEATURES OF CONSTRUCTION ARBITRATION IN LATIN AMERICA**



# DISTINCTIVE FEATURES OF CONSTRUCTION ARBITRATION IN LATIN AMERICA

1. Massive Amounts of Data
2. Critical use of experts
  - Experts often define the outcome of the case
3. Use of a special arbitration clause
  - Technical issue: expert opinion
  - Legal issue: arbitration



# DISTINCTIVE FEATURES OF CONSTRUCTION ARBITRATION IN LATIN AMERICA

4. Lack of Regulation and Case Law
5. Use of Foreign Contract Templates
  - Use of foreign agreements and concepts not contemplated by the applicable law
  - E.g. *best efforts, consequential losses, punitive damages, etc.*
6. Diverse Arbitral Tribunals
7. Always Institutional Arbitrations



# **ENFORCEMENT ISSUES: AWARDS CONTRARY TO PUBLIC POLICY**





## ENFORCEMENT ISSUES: AWARDS CONTRARY TO PUBLIC POLICY

The Mexican Supreme Court established that awards are contrary to public policy when:

They incur in severe deviations from fundamental notions of procedural justice

The issues placed before a court are beyond the limits of that policy.



## ENFORCEMENT ISSUES: AWARDS CONTRARY TO PUBLIC POLICY

In addition, the award can be set aside if the arbitrator's interpretation of the law is *manifestly unfair or incorrect*.

- ▶ This unfair or incorrect interpretation would be contrary to public policy.
- ▶ Resembles the “manifest disregard of the law” doctrine in the US.



# JUDICIAL ASSISTANCE IN LATIN AMERICA



### Arbitral Letter:

- ▶ Aimed to facilitate the communication between arbitrators and courts
- ▶ Allows the tribunal to turn to a court to carry out the enforcement



### Challenge of the Award:

- ▶ The final award may be reviewed by national courts.
- ▶ The parties cannot waive their right to challenge an award contrary to law.



# TAKE-AWAYS



1. Construction arbitration in Latin America is mainly focused on infrastructure projects

2. Disputes usually arise between State and private actors

3. There is a tendency to use a special arbitration clause that differentiates technical from legal issues

4. The use of experts is often critical in defining the case

5. The use of foreign legal concepts is a common complication for the decision of the case

6. There are particular enforcement issues when the award is analyzed under the public policy concept



# SO YOU WON – NOW WHAT?

Charles N. Juliana, *VP and General Counsel,*  
*IPS-Integrated Project Services, LLC*  
June 2017



# GLOBAL CONSTRUCTION DISPUTES – DON'T GET LEFT BEHIND

Arbitration is Complete  
CHECK



Award in Hand  
CHECK

Now What?





# GLOBAL CONSTRUCTION DISPUTES – DON'T GET LEFT BEHIND

## The New York Convention

- ▶ Provides an international framework for the enforcement of both the arbitration agreement and the resulting award
  
- ▶ Provides arbitral awards are unenforceable if:
  - Illegal underlying agreement or process infirmities
  - The scope of the arbitration submission was exceeded
  - The subject matter of the dispute is not capable of settlement by arbitration under the law of the country
  - Enforcement would violate public policy



# THE 1958 UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ("THE NEW YORK CONVENTION")

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.

UN Convention, Article III



## INTERESTING DEVELOPMENTS

### China

- ▶ Chinese Court Enforces a Foreign Judgment For The First Time on the Basis of Reciprocity

### India

- ▶ Enforceability of Foreign Arbitration Awards in India: Diminishing The Gap Between Pre BALCO and Post BALCO Regime?

### Others

- ▶ What Might Changes to the UAE Penal Code Mean for Arbitrators and Expert Witnesses?





AMERICAN ARBITRATION ASSOCIATION®

*Questions?*

