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New Int'l Arbitration Study Offers Construction Dispute Insight

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On Nov. 21, the Queen Mary University of London School of International Arbitration, in partnership with the U.K.-based law firm Pinsent Masons LLP, released its ninth annual international arbitration survey focused on international construction disputes.

As a nod to the significance the construction industry plays in the field of international arbitration, the 2019 Queen Mary University survey marks the largest industry-specific survey its School of International Arbitration has ever conducted and offers insights that will undoubtedly be used for years to come.

While the survey data and accompanying report provide a granular level of analysis concerning a wide variety of topics, below are some of the key takeaways of interest to U.S. practitioners.

Survey, Methodology, Data and Respondents

The 2019 Queen Mary University survey is the product of an empirical study conducted during the course of 2019 that used a combination of 646 responses to a 52-question online questionnaire and 66 respondent interviews. The top five types of respondents were (1) counsel/private practitioners, (2) arbitrators/counsel, (3) sole arbitrators, (4) expert witnesses and (5) in-house counsel.

Of those respondents, 42% came from civil law legal traditions, while 40% were from common law legal systems. Further, respondents were spread around the globe, with 33% from Europe, 26% from the Middle East, 13% from the Asia-Pacific region, 9% from North America, 8% from Latin America, 4% from Sub-Saharan Africa and 1% from Oceania. As discussed below, the prominence of non-U.S.-based respondents is key to interpreting the survey results.

Arbitration is the principal dispute resolution method for international construction disputes.

While not earth-shattering, the 2019 Queen Mary University survey underscores that arbitration, whether international (71%) or domestic (39%), remains the most frequently used dispute resolution procedure for international construction disputes among respondents. While we expect the prominence of international and domestic arbitration to be, in part, the result of potential selection bias, the results emphasis that individuals operating within the international construction sector view arbitration, and in particular international arbitration, as the principal dispute resolution method above other forms of alternative dispute resolution, such as negotiation/senior representative, mediation, litigation and dispute adjudication/avoidance boards.

Consistent with preferences in the previous nonconstruction-specific arbitration surveys, the International Chamber of Commerce (71%) and the London Court of International Arbitration (32%) were the most preferred arbitral institutions. We expect that the ICC plays an outsized role in international construction arbitration given that many standard form construction agreements, such as the Federation of Consulting Engineers, utilize the ICC rules as the default arbitration rules.

Similarly, much like the nonconstruction-specific arbitration surveys, seats such as London, Paris and Singapore were among the most commonly preferred seats. However, Dubai also registered as a commonly selected seat of arbitration among 26% of respondents — likely a product of the increase in construction projects (and disputes) in the Middle East region.

We emphasize, however, that the survey results concerning the most common institutional rules and arbitral seats appear to have been skewed by the fact that only 9% of respondents were from North America. Indeed, U.S.-based institutions like the American Arbitration Association/ International Centre for Dispute Resolution maintain a significant caseload of international construction cases every year.

Further, it is noteworthy that New York — among the most common arbitral seats — as well as other U.S. cities, such as Houston and Miami, did not register a significant response in the survey despite regularly serving as seats for international construction arbitrations.

Administrative costs and delays associated with international arbitrations create barriers to entry.

A key theme to the 2019 Queen Mary survey is that, despite the prominence of international arbitration in the international construction disputes sectors, international arbitration continues to retain significant inefficiencies that limit the ability/willingness of parties to use the dispute resolution mechanism.

When asked what the minimum amount in dispute should be for international arbitration to be commercially sensible, 42% selected between $1 million and $10 million. Notably, of in-house counsel respondents, 43% indicated that the appropriate threshold would have to be between $11 million and $25 million.

The results highlight a perceived difficulty associated with international arbitration — if the parties select international arbitration as their contractual dispute resolution method, the transaction costs associated with the prosecution of low-value claims limit the ability of parties to utilize international arbitration to resolve these disputes on a cost-effective basis. As a result, parties are commonly left to utilize other forms of ADR, such as dispute boards, mediation and expert determinations, to resolve law value disputes; however, respondents expressed varied confidence in these other forms of ADR.

Further, respondents repeatedly emphasized a broad concern over the time required to secure an arbitration award. This is particularly significant in construction cases, where the inability to quickly and efficiently resolve disputes can result in significant cash flow issues for contractors and may jeopardize the viability of a project.

When asked whether compliance with pre-arbitral decisions (e.g., decisions by dispute boards) should be mandatory, 67% of respondents said “yes.” Relatedly, when asked to identify the most critical characteristics of an efficient construction arbitrator, the top choice among 70% of respondents was “Issues award within a reasonable period of time.”

Respondents also emphasized that among the most significant features of an efficient arbitral institution was the institution’s willingness/ability to set “rime limits for the tribunal to submit an award after final procedural step” — a feature that many arbitral institutions have sought to improve in recent years.

Proactive case management practices by arbitrators are viewed as critical to improving arbitral efficiency.

The survey results also reveal that ongoing concerns over the “due process paranoia” problem remain prominent — i.e., the inability/unwillingness of arbitrators to make decisive/proactive decisions for fear of violating a party’s due process rights and jeopardizing the ultimate award. Indeed, when asked what makes or can make international construction arbitration inefficient, the top two responses were party tactics (53%) and poor case management by arbitrators (51%).

Survey results also indicated a number of noteworthy preferences for combating inefficiencies created by the “due process paranoia” problem. For example, when asked to identify arbitral procedures that offer the greatest potential to improve efficiency, the most often selected procedure was “summary disposal of unmeritorious claims or defenses at an early stage.”

In fact, when asked how unmeritorious claims should be addressed, respondents emphasized the need for arbitrators to act decisively, with 59% agreeing that parties should encourage arbitrators to dismiss unmeritorious claims and defenses summarily, as opposed to 45% who believed that arbitrators should encourage parties to apply to strike unmeritorious claims.

Perhaps most interestingly, a significant number of respondents agreed that cost orders should be used to combat inefficiencies caused by factors such as party tactics (the most often cited cause of inefficiencies in international arbitration by respondents), with 49% stating that tribunals should inform parties early on that costs will be used to encourage efficient behavior.

Notably, there was very little support (15%) for the American rule where each party would be expected to bear its own costs — indicating that the American approach to costs tends to be an outlier in international arbitration (though again we emphasize that the lack of North American respondents could have skewed this result).

Conclusion

Undoubtedly, much more can and will be said about the 2019 Queen Mary University survey, as it represents an incredibly valuable resource for the construction industry. In fact, we will provide a much more detailed analysis of the results in due course. The 2019 Queen Mary survey provides important information to enable institutions, arbitrators and parties to refine the procedures and mechanisms used in international arbitration that best address the unique demands of international construction disputes.