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ICC Arbitration – A Suitable Choice for Construction Disputes?

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What is ICC Arbitration?

- Paris-based International Chamber of Commerce initiative in 1923
- Administered arbitration
 - 'International Court of Arbitration'
 - 'Secretariat'
- Still centred in Paris, but with Secretariat teams headed by Counsel elsewhere
 - Hong Kong
 - Singapore
 - New York
 - Sao Paulo
 - Abu Dhabi

What is ICC Arbitration?

- Court /Secretariat role purely administrative
 - Case management from filing of Request for Arbitration
 - Verification of jurisdiction
 - Arbitrator appointments/challenges
 - Decisions on joinder/consolidation
 - Financial management – arbitrator fees and expenses
 - Review of Terms of Reference and draft Award
- Arbitration Rules – latest edition 2017
 - Complemented by a wide range of notes/guidelines for parties and arbitrators
 - ‘Secretariat Guide to ICC Arbitration’ (500 pages)
 - ‘Effective Management of Arbitration’
 - ‘Controlling Time and Costs in Arbitration’

ICC Arbitration – A Success Story

- More than 25,000 cases registered since 1923
- 851 in 2019 (HKIAC = 265; SIAC = 375)
- 40% of cases involve APAC parties
- 1484 arbitrator appointments (18.4% women) (2018)
- Average length of an ICC case : 2.35 years
- ‘Most preferred arbitration institution’ – 77% in recent survey

What about Construction Arbitration?

- ICC arbitration rules are general in nature
 - Adapted recently only to allow for 'Expedited Procedures' (Article 30) where amount in dispute does not exceed 2m USD or parties opt in
 - No specific sector-focused rules whether for construction or other types of disputes
 - Preference for guidance – 'Construction Industry Arbitrations: Recommended tools and Techniques for Effective Management' (2001/2019) ICC Arbitration Commission Report
- Anyway, no widely applied arbitration rules for international construction disputes

ICC Arbitration a Favoured Choice

- Record level of construction/engineering sector cases registered with ICC in 2018 – 27%
 - Despite competition from other thriving institutions – HKIA, SIAC, LCIA
- Key factors
 - Increasing domination of FIDIC – based contracts for public and internationally funded projects, as FIDIC have specified ICC arbitration since first edition in 1957
 - Preference of Civil Law parties for ICC arbitration over other Rules/Institutions perceived to be more Common Law - based

Advantages of ICC Rules

- A flexible general framework that the parties and arbitrators can adapt to the specific needs of the case
 - IBA Rules on the Taking of Evidence in International Arbitration (2010)
- Joinder of additional parties / consolidation of arbitrations
 - Needs of multi-party / multi-contract nature of international projects met to a large extent by recent provisions in ICC Rules
 - Similar/more detailed provisions also in HKIAC and SIAC Rules
- Welcome focus in recent editions of ICC Rules on efficient case management to minimise time/cost of cases

‘Tant vaut l’arbitre, tant vaut l’arbitrage’

- Generally speaking, the quality of an arbitral process will depend on the ability and diligence of the arbitrators
- In construction arbitration – ICC or otherwise – the quality of the process is reliant upon
 - Ability of the arbitrators to get to grips with the issues and work with parties to get them to deal with the issues in a timely and cost-efficient manner
- Calls for arbitrators who do not need to read the ICC’s Construction Industry Arbitration report!
- BUT – no ICC lists of construction (or other) arbitrators
- Neither does FIDIC Propose a list

Conclusion

- Yes – the ICC Rules are a suitable choice
 - But the HKIAC and SIAC alternatives are also good!
- The advantage of the ICC Rules – a flexible general framework for an arbitral procedure – may also be their downfall, if the procedure is not in the hands of arbitrators able and willing to use the Rules as a platform to provide the parties with a reasonably rapid and cost-efficient process
- The ICC Court and Secretariat have important roles to play in the administration of the proceeding – but the quality of the proceeding is generally down to the arbitrators at the end of the day
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440

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