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HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

UNIVERSITY OF LAW HO CHI MINH CITY INTERNATIONAL LAW FACULTY

SUPPORTING ORGANIZATIONS/ ĐƠN VỊ HỖ TRỢ

KỈ YẾU HỘI THẢO

CONFERENCE PROCEEDINGS

HICAC 2023

HOCHIMINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Complex Construction Arbitration

HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

Hồ Chí Minh, ngày 17 tháng 4 năm 2023
Ho Chi Minh City, April 17, 2023

HICAC 2023

HOCHIMINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Complex Construction Arbitration

HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

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SPEAKERS
DIỄN GIẢ


Prof/Giáo sư.
Douglas Jones AO


Ms/Bà.
Trinh Nguyen
Nguyễn Thị Phương Trinh


Ms/Bà.
Amanda Lees


Mr/Ông.
Peter Scott Caldwell


Mr/Ông.
Tan Cheng Hye Johnny


Mr/Ông.
Abhinav Bhushan


Mr/Ông.
Simon Elliot


Mr/Ông.
Suraj Sajnani


Mr/Ông.
David Lockwood


Mr/Ông.
Kelvin Aw


Mr/Ông.
Tony
Nguyễn Trung Nam


Mr/Ông.
Matthew Wills


Mr/PGS.TS.
Viet Dzung Tran
Trần Việt Dũng


Mr/Ông.
Paul Menzies


Mr/Ông.
Maximilian Benz


Ms/Bà.
Nguyen Thi Lan Huong
Nguyễn Thị Lan Hương


Ms/Bà.
Heather Yee Jing Wah


Ms/Bà.
Duong Hoang
Hoàng Trần Thùy Dương


Ms/Bà.
Anita Natalia


Mr/Ông.
Pardeep Khosa


Ms/Bà.
SeungMin Lee


Mr/Ông.
K. Luan Tran
Trần Kinh Luân


Mr/Ông.
Paul Sandosham


Mr/Ông.
Tejus Chauhan


Mr/Ông.
Nguyen Manh Dzung
Nguyễn Mạnh Dũng


Ms/Bà.
Lynette Chew


Mr/Ông.
Minh Le
Lê Công Minh


Mr/Ông.
Devathas Satianathan


Mr/Ông.
Risheq Hamzah


Ms/Bà.
Earl Rivera-Dolera


Mr/Ông.
Tom Taylor


Dr/TS.
Nguyen Thi Hoa/Nguyễn Thị Hoa


Ms/Bà.
Nhu-Hoang Tran Thang
Trần Thăng Như Hoàng


Mr/Ông.
Daniel Waldek


Ms/Bà.
Minh Nguyen/Nguyễn Thị Thanh Minh


Mr/Ông.
Nguyen Do
Khôi Nguyên


Mr/Ông.
Sangyub (Sean) Lee


Ms/Bà.
Hang Vu Thi
Vũ Thị Hằng


Ms/Bà.
Fanita Math


Mr/Ông.
Albert Zaw Min

Mr/Ông.
Net Le/Lê Nết

Mr/Ông.
Logan Leung

AGENDA

HICAC 2023

MORNING — General Session (Ballroom) — 8:00 am -12:00 am

08:00-08:30 — Opening speeches

08:30-09:00 — Keynote speech

Prof. Douglas Jones AO
Independent International Arbitrator

09:00-10:30 — Panel 1: Complex construction arbitration - stories from senior arbitrators

Moderator:
Ms. Trinh Nguyen
Founding partner of TNP Law
Vice chairperson of SCLVN

Ms. Amanda Lees
International Arbitration Partner at
King & Wood Mallesons

Mr. Peter Scott Caldwell
Director of Caldwell Ltd

Mr. Tan Cheng Hye Johnny
Independent Arbitrator
SIMI & SMC Accredited Mediator
Adjudicator

10:50-12:00 — Panel 2: ICC Arbitration and ADR Commission Report on Construction Industry Arbitrations

Moderator:
Mr. Abhinav Bhushan
International Arbitrator
Member & Chief Executive for
Asia at 39 Essex Chambers
former Director for South Asia
at ICC International Court of Arbitration

Mr. Nguyen Manh Dzung
ISenior Partner
at Dzungsrt & Associates LLC

Ms. Lynette Chew
Partner and Co-Head of Infrastructure
Construction and Energy Disputes
CMS Singapore

Mr. Devathas Satianathan
Partner at Rajah & Tann Singapore LLP

AFTERNOON — Ballroom 1

Section A : Expert Witness In Construction Arbitration

13:30-15:00 — Panel A1: Role of Expert Witness in Construction Arbitration

Moderator:
Mr. Minh Le
Associate Director of J.S. Held LLC

Mr. Risheq Hamzah
Senior Director of Kroll

Mr. Simon Elliot
Partner at Three Crowns LLP

Mr. Suraj Sajnani
Senior Associate, King & Wood Mallesons

15:30-17:00 — Panel A2: Effective working with Expert Witness in Construction Arbitration

Moderator:
Mr. David Lockwood
Managing Director - South-East Asia
at Hanscomb Intercontinental

Mr. Kelvin Aw
Partner and Co-Head of Infrastructure
Construction and Energy Disputes
CMS Singapore

Mr. Nguyen Trung Nam (Tony)
Founder, Sr. Partner of EPLegal

Mr. Matthew Wills
Senior Managing Director APAC
J.S. Held LLC

Mr. Tom Taylor
Managing Director of Expert Services
at Socotec

AFTERNOON — Ballroom 2

Section B: Digital Technology In International Construction Arbitration

13:30-15:00 — Panel B1: Technology supporting Parties and Arbitrators in Construction Arbitration

Moderator:
Dr. Nguyen Thi Hoa
University Lecturer at
International Law Faculty, HCMUL

Ms. Nhu-Hoang Tran Thang
Counsel at Peter & Kim

Mr. Daniel Waldek
Partner at Herbert Smith
Freehills Singapore

Ms. Minh Nguyen
Special Counsel and Head of
Dispute Resolution Practice of
ACSV Legal

15:30-17:00 — Panel B2: Integrating BIM, Laser Scanning and other ICT tools in prevention and settlement of construction disputes

Moderator:
Assoc. Prof. Viet Dzung Tran
Dean, International Law Faculty
HCMUL

Mr. Paul Menzies
General Director of GeoInstinct
Vietnam Co. Ltd.

Mr. Maximilian Benz
Associate Director at HKA

Ms. Nguyen Thi Lan Huong
Deputy Head of the Department of
International Trade Law
Faculty of International Law
Ho Chi Minh City University of Law

HICAC 2023

AFTERNOON At Room Tan Thuan - Hiep Phuoc

Section C : Arbitration Rules Of Regional Institutions And Complex Arbitration In Construction Industry

13:30-15:00

Panel C1: Complex multi-party multi-contract construction arbitration and Arbitration Rules

Moderator:
Ms. Amanda Lees
International Arbitration Partner
at King & Wood Mallesons

Ms. Heather Yee Jing Wah
Assistant Director of the
Asian International Arbitration Centre
(AIAC, Malaysia)

Ms. Duong Hoang
Deputy Counsel at Singapore
International Arbitration Centre (SIAC)

Mr. Sangyub (Sean) Lee
Case Counsel
KCAB International

15:30-17:00

Panel C2: Experiences from Secretariat of regional institutions in dealing with complex construction arbitration

Moderator:
Mr. Tan Cheng Hye Johnny
Independent Arbitrator
SIMI & SMC Accredited Mediator
Adjudicator

Ms. Hang Vu Thi
Deputy Director of the Secretariat cum
Head of International Cooperation
Vietnam International
Arbitration Centre (VIAC)

Ms. Fanita Math
Secretary General of National
Commercial Arbitration Centre
(NCAC, Kingdom of Cambodia)

Mr. Albert Zaw Min (TBC)
President of Myanmar International
Arbitration Centre (MIAC)

AFTERNOON At Room Khanh Hoi - Nha Rong

Section D : Conduct Of Proceedings And Case Management For Complex Construction Arbitration

13:30-15:00

Panel D1: Case strategy in construction arbitration for claimants and respondents

Moderator:
Mr. Net Le
Partner at LNT & Partners

Ms. Anita Natalia
Senior Associate at Herbert
Smith Freehills

Mr. Pardeep Khosa
Partner at Morgan, Lewis & Bockius LLP

Ms. SeungMin Lee
Partner at Peter & Kim

Mr. K. Luan Tran
Partner at King & Spalding LLP

15:30-17:00

Panel D2: Controlling time and costs in construction arbitration

Moderator:
Mr. Paul Sandosham
Partner, Clifford Chance Asia

Mr. Tejus Chauhan
Director, South Asia
ICC Arbitration & ADR
ICC International Court of Arbitration

Ms. Earl Rivera-Dolera
Head of International Arbitration
Frasers Law Company

Mr. Nguyen Do
Partner at YKVN

Mr. Logan Leung
Deputy Managing Partner at
Rajan & Tann LCT Lawyers

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NỘI DUNG HỘI THẢO HICAC 2023

BUỔI SÁNG — PHIÊN CHUNG — 8:00 - 12:00

08:00-08:30 — Phát biểu khai mạc

08:30-09:00 — Bài thuyết trình chính

Giáo sư Douglas Jones AO
Trọng tài viên quốc tế độc lập

09:00-10:30 — Phiên 1: Những vụ trọng tài xây dựng phức tạp - Câu chuyện của các trọng tài viên giàu kinh nghiệm

Điều phối viên:
Bà. Nguyễn Thị Phương Trinh
Thành viên sáng lập Công ty luật TNP
Phó chủ tịch SCLVN

Bà. Amanda Lees
Trọng tài Quốc tế
Luật sư thành viên tại
King & Wood Mallesons

Ông. Peter Scott Caldwell
Giám đốc Caldwell
Nguyên Tổng thư ký HKIAC
Nguyên Chủ tịch Hội Pháp luật Xây dựng Hồng Kông

Ông. Tan Cheng Hye Johnny
Trọng tài viên độc lập
Nguyên Phó Chủ tịch Viện Kiến trúc Singapore
Nguyên Chủ tịch Viện Trọng tài Singapore

10:50-12:00 — Phiên 2: Báo cáo về trọng tài trong lĩnh vực xây dựng của Ủy ban ICC về Trọng tài và các phương thức giải quyết tranh chấp thay thế

Điều phối viên:
Ông. Abhinav Bhushan
Trọng tài viên Quốc tế
Thành viên & Giám đốc điều hành khu vực Châu Á tại 39 Essex Chambers
Nguyên Giám đốc khu vực Nam Á của Tòa Trọng tài Quốc tế ICC

Ông. Nguyễn Mạnh Dũng
Luật sư cấp cao
Công ty Luật TNHH Tư vấn Độc Lập (Dzungsrt & Associates LLC)

Bà. Lynette Chew
Thành viên và Đồng trưởng bộ phận Xây dựng cơ sở hạ tầng và Tranh chấp năng lượng CMS Singapore

Ông. Devathas Satianathan
Luật sư thành viên Rajah & Tann Singapore LLP

BUỔI CHIỀU — KHÁN PHÒNG 1

Phần A: Nhân chứng Chuyên gia trong Trọng tài Xây dựng

13:30-15:00 — Phiên A1: Vai trò của Nhân chứng chuyên gia trong Trọng tài Xây dựng

Điều phối viên:
Ông. Lê Công Minh
Phó Trưởng Bộ phận dịch vụ Tư vấn Xây dựng
Công ty TNHH J.S. Held

Ông. Risheq Hamzah
Giám đốc cấp cao tại Kroll

Ông. Simon Elliot
Luật sư thành viên tại
Three Crowns

Ông. Suraj Sajnani
Luật sư cộng sự cấp cao
tại King & Wood Mallesons

15:30-17:00 — Phiên A2: Làm việc hiệu quả với Nhân chứng Chuyên gia trong Trọng tài Xây dựng

Điều phối viên:
Ông. David Lockwood
Giám đốc điều hành
chi nhánh Đông Nam Á
tại Hanscomb Intercontinental

Ông. Kelvin Aw
Thành viên và Đồng trưởng bộ phận Xây dựng cơ sở hạ tầng và Tranh chấp năng lượng, CMS Singapore

Ông. Nguyen Trung Nam
Người sáng lập
Thành viên cấp cao tại
Công ty Luật EPLegal

Ông. Matthew Wills
Giám đốc điều hành cấp cao khu vực châu Á- Thái Bình Dương tại J.S Held

Ông. Tom Taylor
Giám đốc điều hành
Dịch vụ nhân chứng chuyên gia
Công ty Socotec

BUỔI CHIỀU — KHÁN PHÒNG 2

Phần B: Công nghệ hỗ trợ các Bên và Trọng tài viên trong Trọng tài Xây dựng

13:30-15:00 — Phiên B1: Công nghệ hỗ trợ các Bên và Trọng tài viên trong Trọng tài Xây dựng

Điều phối viên:
TS. Nguyễn Thị Hoa
Giảng viên tại Khoa Luật Quốc tế
Trường Đại học Luật Tp. Hồ Chí Minh

Bà. Trần Thắng Như Hoàng
Luật sư tại Peter & Kim

Ông. Daniel Waldek
Luật sư thành viên tại
Herbert Smith Freehills Singapore

Bà. Nguyễn Thị Thanh Minh
Cố vấn cấp cao
Trưởng bộ phận Giải quyết tranh chấp của ACSV Legal Việt Nam

15:30-17:00 — Phiên B2: Tích hợp BIM, Laser Scanning và các công cụ ICT khác trong ngăn chặn và giải quyết tranh chấp xây dựng

Điều phối viên:
PGS.TS. Trần Việt Dũng
Trưởng Khoa Luật Quốc tế
Trường Đại học Luật Tp. Hồ Chí Minh

Ông. Paul Menzies
Tổng Giám đốc tại
GeoInstinct Việt Nam

Ông. Maximilian Benz
Phó giám đốc HKA

Bà. Nguyễn Thị Lan Hương
Phó Trưởng Bộ môn Luật Thương mại Quốc tế
Khoa Luật Quốc tế
Đại học Luật TP. Hồ Chí Minh

BUỔI CHIỀU TẠI PHÒNG TÂN THUẬN - HIỆP PHƯỚC

Phần C: Các quy tắc trọng tài trong khu vực và việc áp dụng vào các vụ trọng tài xây dựng phức tạp

13:30-15:00

Phiên C1: Các Quy tắc trọng tài khu vực áp dụng trong các Tranh chấp Xây dựng nhiều bên nhiều hợp đồng

Điều phối viên:
Bà. Amanda Lees
Trọng tài Quốc tế
Luật sư thành viên tại
King & Wood Mallesons

Bà. Heather Yee Jing Wah
Trợ lý điều hành
Trung tâm Trọng tài Quốc tế Châu Á (AIAC, Malaysia)

Bà. Hoàng Trần Thùy Dương
Thành viên Ban Thư ký
Trung tâm Trọng tài Quốc tế Singapore (SIAC)

Ông. Sangyub (Sean) Lee
Phó Giám đốc KCAB International
Bộ phận quốc tế thuộc Trung tâm Trọng tài Thương mại Hàn Quốc (KCAB)

15:30-17:00

Phiên C2: Kinh nghiệm từ Ban Thư ký của các trung tâm trọng tài trong khu vực khi giải quyết các vụ việc trọng tài phức tạp về xây dựng

Điều phối viên:
Ông. Tan Cheng Hye Johnny
Trọng tài viên độc lập
Nguyên Phó Chủ tịch Viện Kiến trúc Singapore
Nguyên Chủ tịch Viện Trọng tài Singapore

Bà. Vũ Thị Hằng
Phó Trưởng Ban Thư ký
kiêm Trưởng phòng Hợp tác quốc tế,
Trung tâm Trọng tài Quốc tế Việt Nam (VIAC)

Bà. Fanita Math
Tổng Thư ký của Trung tâm Trọng tài Thương mại Quốc gia (NCAC, Vương quốc Campuchia)

Ông. Albert Zaw Min
Chủ tịch Trung tâm Trọng tài Quốc tế Myanmar (MIAC)

BUỔI CHIỀU TẠI PHÒNG KHÁNH HỘI - NHÀ RỒNG

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13:30-15:00

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Điều phối viên:
Ông. Lê Nết
Luật sư Thành viên của
LNT & Partners

Bà. Anita Natalia
Luật sư Cộng sự Cấp cao
của Herbert Smith Freehills

Ông. Pardeep Khosa
Luật sư Thành viên của Morgan Lewis & Bockius LLP

Bà. SeungMin Lee
Luật sư Thành viên của Peter & Kim

Ông. Trần Kinh Luân
Luật sư Thành viên
King & Spalding LLP

15:30-17:00

Phiên D2: Điều tiết thời gian và chi phí trong trọng tài về xây dựng

Điều phối viên:
Ông. Paul Sandosham
Luật sư Điều hành của
Clifford Chance Asia

Ông. Tejus Chauhan
Giám đốc khu vực Nam Á của
Tòa Trọng tài Quốc tế ICC

Bà. Earl Rivera-Dolera
Trưởng ban Trọng tài Quốc tế
của Công ty Frasers Law

Ông. Khôi Nguyên
Luật sư Thành viên của YKVN

Ông. Logan Leung
Luật sư thành viên
Phó trưởng điều hành của
Rajan & Tann LCT Lawyers

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PHIÊN TOÀN THỂ (HỘI TRƯỜNG)
GENERAL SESSION (BALLROOM)

BÀI THUYẾT TRÌNH CHÍNH
KEYNOTE SPEECH

COMPLEX CONSTRUCTION ARBITRATION

Prof. Douglas Jones AO

Independent International Arbitrator

Doug Jones AO is a leading independent international commercial and investor-state arbitrator with over 40 years' prior experience as an international transactional and disputes project lawyer. Doug was appointed as an International Judge of Singapore International Commercial Court in 2019.

He has been involved in over 150 arbitrations which include construction, infrastructure, energy, commodities, intellectual property, joint venture, and investor-state disputes spanning over 30 jurisdictions around the world. He has extensive experience as arbitrator under the ICC, LCIA, AAA, ICDR, KLRCA, SIAC, DIAC, ACICA, Resolution Institute, AMINZ, European Development Fund Arbitration and Conciliation Rules, as well as the ICSID and UNCITRAL Rules, in disputes of values exceeding some billions $US.

Doug has extensive experience as a construction and major projects lawyer, acting for owners (both government and private sector), financiers, contractors, consultants and subcontractors, Doug has advised extensively on project structuring and financing, contract drafting and advice during project implementation and dispute resolution for major infrastructure matters, including Department of Defence facilities and equipment acquisitions, airports, ports, roads and rail projects throughout Australia, New Zealand, Europe, Asia, the Middle East and USA.

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Introduction

To mention construction arbitration is to immediately invoke the complexity which comes with construction disputes. They come in many forms from claims for additional payment by contractors on varying bases, to claims by owners and others in respect of defective performance by contractors and consultants of construction and design work. But whatever might be the character of the claim made, it will inevitably have degrees of complexity about it that exceed those aspects of difficulty often encountered in other types of arbitration. Indeed, it is fair to say that a significant number of my colleagues who act as arbitrators in international arbitration are profoundly disinterested in adjudicating construction disputes because of their perceived complexity. As a construction lawyer, involved in both the transactional and dispute side of construction activity for many years, that complexity, to me, has been a challenge and an opportunity, rather than a characteristic which would discourage involvement as an arbitrator in these disputes. It is probably fair to say that when I first became interested in practicing as counsel in international construction disputes, it was not a terribly popular area of legal practice. And although its unpopularity continues in some quarters, it is now a thriving area of legal activity in which many seek to participate. The key to embracing the complexity of any construction dispute is to break it down into the component parts which can be used to manage and handle that complexity.

This conference examines a number of areas in which tools are deployed to make the construction dispute process manageable. Thus an overview of techniques which the author has deployed as an arbitrator in international construction disputes may serve to frame the following sessions.

Firstly though, let us identify why it is that construction disputes are complex. The first characteristic which does not always accompany other types of international disputes is the degree of documentation, all now largely electronic, which goes to contribute to the successful design, planning and delivery of a construction project. Mastering the electronic exchanges that occur between the parties to a construction process is a key aspect of managing this aspect of complexity.

Secondly, another area of significant complexity are technical issues associated with many of the disputes. They are claims for delay, disruption, additional payment for varied work, the losses arising from defective design and work and delayed provision of construction services. Dealing with those issues involves an interaction with the arbitral panel, the parties and experts who can be of critical assistance in managing the process. Let us look at some aspects of these issues.

The first and key overriding issue is the need, in order to manage any particular construction dispute, to be proactive in designing the process of the arbitration and dealing with the parties throughout the leadup to the inevitable evidentiary hearing. The ICC and ADR commission report on managing construction disputes provides a useful summary of the sort of issues that need to be dealt, but inevitably, the devil is in the detail, and discussing some particular aspects of the issues identified in that report will be useful to assist with a discussion of the issues, the subject of this conference.

Nature of Complex Construction Disputes and Multi-Party Proceedings

There has been a clear transition away from simple construction contracts,[1] involving two parties, due to the birth of specialisation, with owners relying on numerous specialists to oversee individual components of a broader project, in lieu of one master builder. This underlines the new breed of modern construction projects, commonly associated with a complex entanglement of contracts and subcontracts. As contractors are often unable to themselves undertake the entirety of the project, subcontractors are increasingly relied upon to carry out specific tasks. Furthermore, volatile economic, political and climatic conditions exacerbate the levels of risk associated with construction disputes, thereby necessitating the employment of insurers and external financiers.

In totality, a standard construction project unsurprisingly involves numerous participants, ranging from subcontractors, financiers and insurers, to suppliers, architects, engineers, alongside the employer and contractor. The ICC estimated that close to 50% of new cases involve three or more parties, with over 20% involving over five parties.[2] Consequently, construction disputes stemming from interrelated contracts become more challenging to resolve.

An associated phenomenon is the 'megaproject', referring to large-scale, costly, and complex infrastructure projects, involving multiple private and public stakeholders.[3] As a result, construction projects will likely increase in complexity, whilst simultaneously incorporating new technologies in project planning and management.

Indeed, this has reinforced the requirement for effective document management within construction disputes. Construction and infrastructure disputes are commonly faced with the key issue of navigating technically complex facts of considerable volume. The sheer magnitude of construction disputes, coupled with the inherently intricate and specialised factual matrices, distinguish construction disputes from all other matters. Efficiently managing the evidence associated with these technical issues presents a significant challenge for those involved in complex construction arbitration. The sheer volume of documentary evidence tied to this industry brings a certain level of notoriety. Construction disputes have previously involved mountains (now terabytes) of material, especially when large-scale projects span across years from their conception to completion.

Consequently, incurring substantially costs is unavoidable for parties, who must wade through the data relevant to the dispute, consisting of material accumulated across the life span of a project. This underlines the challenge related to managing the necessary data to fully understand the *relevant* facts of a construction dispute. In an arbitration over which the author presided, involving the construction of an oil and gas platform, the claimant filed 126 document requests, with the majority of documents sought exceeding 1,000 pages in length. This experience in dealing with this volume of

[1] Aisha Nadar, "The Contract: The Foundation of Construction Projects", in *Global Arbitration Review: The Guide to Construction Arbitration*, ed. Stavros and Brekoulakis and David Brynmor (London: Law Business Research, 2017) 7.
[2] "Full 2016 ICC Dispute Resolution Statistics published in Court Bulletin", International Chamber of Commerce, accessed 3 January 2019, https://iccwbo.org/media-wall/news-speeches/full-2016-icc-dispute-resolution-statistics-published-court-bulletin.
[3] Bent Flyvbjerg, "What You Should Know about Megaprojects and Why: An Overview", *Project Management Journal*, vol. 45, no. 2 (April – May 2014) 6-19.

documents is not unique, as arbitral tribunals may commonly receive "thousands, hundreds of thousands and sometimes millions of pages of documents".[4]

The factual matrix of each matter is rarely a simple affair, usually needing to be illuminated with the assistance of expert evidence. This has fuelled the characterisation of expert evidence as an indispensable cog within the inner workings of complex construction disputes. Relevant and trustworthy expert testimony offers useful insight which may support a party's case, whilst simultaneously deciphering and decoding technical evidence for the tribunal. However, this reliance upon expert evidence has created substantial issues surrounding credibility and delay and increased expense of proceedings, as will be further discussed below.

Document Disclosure in Complex Construction Arbitration

Complex construction arbitration inevitably presents the issue of document disclosure, which has proved to be an ongoing challenge. Whilst disclosure is practically limited in domestic civil law systems, the common law pre-trial process, places importance on disclosure (with North American domestic arbitrations typically including depositions, uncommon in international construction arbitration). In response, the international arbitral community has created a balance between the civil law and common law domestic disclosure traditions. The IBA Rules,[5] a frequent source of reference, has established an approach to disclosure which seeks to strike a balance between the common and civil law perspectives.

The common law notion of disclosure has been openly and proactively embraced by civil lawyers in international commercial arbitration. However, this enthusiasm does not help decide how to efficiently manage the disclosure process. Redfern Schedules are considered useful in refining disputes over disclosure, as it compels parties to clarify what they are seeking and why. However, multiple arbitrators and junior lawyers previously familiar with this approach to dealing with disputed disclosure issues, consider it a nightmare. Tribunals frequently have inadequate information to make informed rulings when requests are made. At this stage, the tribunal's knowledge is usually confined to contentions raised in the parties' statements or in the Redfern Schedule, though this may be more formulaic than useful. Often this does not assist in understanding a disputed disclosure's materiality and relevance, which is paramount to applying the test under the IBA Rules.

Of assistance can be short, focused hearings or teleconferences, where counsel may explain key issues of principle underlying their disputed requests. Lead counsel may further elaborate upon these requests, including the reasons underpinning the parties' dispute as to their production. This assists in clarifying issues, eliminating irrelevant requests and highlights methods to address concerns relating to production. This allows the tribunal to rule on issues of principle, subsequently minimising large areas of disputed requests. The presence of experts during this hearing may assist further, as many requests for disclosure are driven by them. The presence of experts

[4] Michael Schneider, "The Paper Tsunami in International Arbitration Problems, Risks for the Arbitrators' Decision Making and Possible Solutions", in *Written Evidence and Discovery in International Arbitration, ed.* Teresa Giovannini and Alexis Mourre, ICC Institute of World Business Law 6 (2009).
[5] International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (London: IBA, 2010) [IBA Rules].

assists by them explaining their needs for production in a more proportionate and focused manner than would otherwise be the case.

Therefore, the tribunal must actively engage with document production, particularly in complex construction arbitrations, and parties must be responsible in limiting document requests to necessary information, objectives which may only be effectively reached through procedural clarity and proactive case management.

Witness Statements

Complex construction arbitral matters incorporate witness statements as a fundamental component of arbitral procedure. Broadly, witness statements form a cornerstone of international commercial arbitration. Previously used by common law practitioners in domestic commercial courts, these statements have become common procedure. Sadly, they have evolved from a brief recount of a factual witness' memory of the events, into a combination of legal submissions, comments upon documents that speak for themselves (even those not previously seen by the witness prior to arbitral proceedings), and speculation across many things, including the overarching merits of a dispute.

A 'witness' is an individual providing evidence to an arbitral tribunal to assist the tribunal in finding the necessary information to render an award. Ordinarily, witnesses of fact are differentiated from expert witnesses. Under common law doctrines, this distinction is reliant upon the rule against opinion evidence, or evidence of an opinion that is inadmissible, unless provided by one qualified by experience or training to give that opinion, considered an expert witness.[6] Conversely, lay witnesses traditionally provide evidence on what they perceived, either through sight, hearing or touch. This form of evidence may extend further to describe events or circumstances based upon what has been told by others. The comments which follow focus upon lay witnesses (hereinafter, 'witness').

A witness statement is the document used as a vehicle for the witness' provision of evidence-in-chief regarding the factual issues disputed in an arbitration. Opposing parties may (but need not necessarily) cross-examine witnesses called by the other party. The cross-examination does not need to be restricted to the matters outlined in the witness statement. Instead, other concerns in the arbitration not addressed in the witness statement may be opened up during cross-examination. If cross-examination occurs, the party calling the witness may re-examine the witness. However, where cross examination does not transpire, the whole evidence of the witness will be contained in the witness statement alongside any responsive witness statement.

A witness statement should be an account of a witness' recollection of events, as the witness remembers them. The statement should be written primarily in the witness' own words, despite the assistance of lawyers in preparing the statement.

Next, in its entirety, the witness statements must fill gaps in factual evidence created by the documents. In the context of modern disputes, this will mainly be documentary evidence, covering a substantial amount of the facts in dispute. Whilst this may be cumbersome given the sheer scale of documentary evidence, the facts in contention are often required to be the subject of witness evidence. This may occur as

[6] E.g. *Civil Evidence Act 1972* (UK), section 3; *Evidence Act 1995* (NSW), sections 76(1), 79.

additional commentary is needed to supplement the contents of the document, which are insufficient in conveying the entire story on its own. It may be due to no document addressing a specific issue, thereby necessitating witness evidence to resolve the issue. It may also reflect part of a case focusing upon a conversation which was not the subject of documentary record. Therefore, in summation, witness statements should contain what a perceived, no more, no less.

In addition, a witness statement is an effective means through which a party may convey their side of the story. A relatively senior director or employee will typically be chosen by the party to provide an account to the tribunal of how the party views the circumstances, being the subject matter of the dispute, along with the issues encountered creating the need for arbitration. This assists the tribunal in understanding the entirety of the surrounding circumstances, including why the parties believe the dispute has occurred. However, this purpose must not be overstated. A witness statement should avoid becoming a vehicle aiding the repetition of legal submissions, or a method for lawyers to construct the story in a manner they deem fit. Instead, it must represent the witness' own words, enabling the witness to explain, on the party's behalf, their perspective of the factual background and the consequent dispute.

Finally, witness statements can give a useful framework for expert witnesses to provide their opinions and prepare reports accordingly. The absence of a factual background from the witnesses of each party means experts may struggle in providing an opinion which facilitates the tribunal's resolution of the dispute. Without these factual foundations, the expert opinions may be characterised as general or unspecific, thereby being rendered unhelpful.

Benefits

The use of witness evidence, specifically statements, is associated with paramount objectives of arbitral efficiency and the reduction of costs and delays, factors considered significantly beneficial to the arbitral process in complex construction disputes.

First, witness statements operate to circumvent oral examination-in-chief, thereby decreasing the length of a hearing.[7] The time-consuming nature of evidence-in-chief can be attributed to non-leading (i.e. open) questions generally being asked. Witness statements assist in reducing costs incurred by parties by reducing the time spent at a hearing. This further benefits the tribunal in preparing the award, by establishing the evidence-in-chief in a coherent narrative, as opposed to relying upon a transcript containing questioning, the structure and content of which may be difficult to comprehend. This also facilitates debate and objection regarding leading questions in examination-in-chief being avoided.

Witness statements provide parties with fair and advance notice of evidence the other sides shall rely upon at the hearing and in the delivery of submissions to the tribunal. Generally, this means the written submissions in memorials, or those made immediately prior to the hearing commencing (often referred to as 'opening submissions'), can account for that evidence. This means the arguments of parties are more directed and focused, which benefits the tribunal in preparing for the hearing.[8]

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[7] Angoura, "Written Witness Statements in International Commercial Arbitration" [2017] *International Arbitration Law Review* 106, 107.
[8] Born, *International Commercial Arbitration* (3rd edition, 2020) 2425.

In addition, witness statements enable principal actors of parties to set out, in their own words, their perspective of the story to date and the matters forming the subject of the dispute.

Furthermore, these statements may advance the settlement of a dispute prior to the hearing, as parties have a more developed understanding of the evidence opposing their case. This may occur in at least two ways. The legal representatives will review the witness statements to ascertain its impacts upon their respective prospects of success, subsequently advising their clients accordingly. From the perspective of the parties, this provides the principal actors with insight into how the other side may view the dispute, and their motivations behind the case, information which may have been previously unknown. These fresh perspectives, across legal and personal spheres, may compel parties to settle, an outcome previously considered unlikely. However, it remains prudent to not overstate the function of witness statements in achieving a settlement where one was previously unreachable, though there are at least some cases where this has transpired.

Lastly, witness statements facilitate a more focused cross-examination, as the cross-examiner can engage in more specific preparation buy knowing the evidence-in-chief in advance, thereby honing onto the key points relevant for questioning. As a result, this ensures critical issues necessary for the client to prove become the subject of cross-examination.

Drawbacks

Despite the important functions of witness statements, they have been characterised by features rendering them less useful for the witness, the parties, counsel and the tribunal. In counsel's possession, witness statements have transitioned from a written account of evidence to be given by a witness in their own words under oral questioning before a tribunal, to an unhappy combination of legal submission, documentary commentary and quotation, and speculation, with some direct experiential evidence included (but not always).[9] A prototypical witness statement in a contemporary international arbitration has few similarities to what a witness would realistically say if providing evidence to the tribunal, despite this being the sole intended purpose.[10] Witness statements have thereby become mechanisms for lawyers to make legal submissions, despite having sufficient opportunity to do so through pleadings, written submissions and oral arguments before the tribunal.[11]

There are several issues with this transition.

The most critical issue resides in the capacity of witness statements to eventually cease bearing resemblance to the witness' own words. These statements have grown into a manifestation of lawyers' minds, as they mould the evidence to fit the case being advanced for their clients, rather than informing the tribunal of facts relevant to the

[9] For similar criticism, see *Mansion Place Limited v Fox Industrial Services Limited* [2021] EWHC 2747 (TCC), [37].
[10] Veeder, "Introduction" in Levy & Veeder (eds) *Arbitration and Oral Evidence* (2004), 7-9; Sanders, *Quo Vadis Arbitration?* (1999), 262; Landau QC, 5.
[11] Hirsch and Reece, "Witnesses in International Arbitration" (2017) 4 *International Business Law Journal* 315, 324; Hunter, "The procedural powers of arbitrators under the English 1996 Act" (1997) 13 *Arbitration International* 345, 353.

resolution of the dispute.[12] Consequently, witness statements become less useful as the tribunal places less emphasis and weight on them, accounting for the substantial input from lawyers which detracts from the statement representing the witness' own evidence.[13] Therefore, the significant amount of time, effort and expense dedicated towards creating these documents are ultimately of diminished utility to the tribunal and the parties. Indeed, in this form, witness statements may threaten the party's case given the minimal weight placed on them, resulting in parties having little, if any, witness evidence of substance conveying the party's story before the tribunal.

In addition, the tendency to quote from, and comment upon, contemporaneous documents has minimal benefits for the advancement of a party's case. Documents can usually be viewed independently, such that witness documentary is unlikely to facilitate the tribunal's understanding of the document's content.

Furthermore, the tribunal, alongside any witness or lawyer, may read and interpret the contents of the contemporaneous documents. A party's legal representatives may be expected to advance a document's interpretation in favour of that party through written and oral submissions. A witness' commentary on those documents, either in the words of the lawyer or witness, may provide additional weight to a party's preferred interpretation of a document, although this is rare.

Thirdly, the difficulties established above are intensified through a witness commenting upon a document initially seen when preparing their witness statement several months or years past the arbitration's commencement, and well after the date the document came into being. A witness' commentary on an email they never received, or a document previously unseen prior to the dispute, is likely to have little probative value or relevance in assisting the tribunal or parties in understanding the document's content and effect.[14]

Finally, witness statements are now regarded as an additional means of presenting legal submissions.[15] Opportunities for legal representatives to advance submissions are sufficiently woven through arbitral procedure itself. Depending on the procedure adopted, this includes pleadings, opening written submissions, oral submissions at the beginning, during and at the end of a hearing, and post-hearing written submissions. Therefore, replicating these submissions through the words of a lay witness is highly unnecessary,[16] indicating the witness' evident lack of preparation of their own statement to the tribunal, contributing towards wasted time and costs and, most significantly, diluting the value and credibility of the witness' overall evidence.

These limitations have watered down the utility of witness statements in determining international commercial disputes, substantially reflecting the fault of lawyers. The witness statement has devolved into another document to be drafted, read and digested by lawyers across all sides, necessitating the preparation of responses and

[12] *Dukeries Healthcare Ltd v Bay Trust International* [2021] WTLR 809 at [133]; HM Courts and Tribunals Service, *Factual Witness Evidence in Trials before the Business & Property Courts: Implementation Report of the Witness Evidence Working Group* (July 2020), [10].
[13] See *Exportadora De Sal SA de CV v Corretaje Maritimo Sud-Americano Inc* [2018] 1 Lloyd's Rep 399 at [24].
[14] See *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296, 3304 [39].
[15] Hunter, "The Procedural Powers of Arbitrators under the English 1996 Act" (1997) 13 *Arbitration International* 345, 353.
[16] See *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296, 3304 [39].

further consideration of the tribunal. This has actively impeded the arbitral process, obstructing the efficient disposition of cases submitted to arbitral tribunals. As a result, the tribunal must allocate time assessing witness evidence during the process of forming the award. This cumulatively heightens the effects of wasted time and costs, rendering the arbitral process as a slower and costlier framework than initially intended.

This emphasises the need for witness statements to be prepared appropriately to ensure they facilitate, rather than impedes, the resolution of arbitral disputes.

Expert Evidence in Complex Construction Arbitration

The importance of expert evidence in resolving complex construction disputes cannot be understated. In respect of infrastructural megaprojects which span multiple countries and involve multiple industry actors, each with their own contracts, it is not difficult to imagine that experts might be a valuable, indeed necessary, tool to make sense of the vast amount of financial and logistical resources that go into these projects, let alone the complex consequences of any deficiencies in the project's delivery.

However, the use of expert witnesses, and the reliance on expert evidence, can be a double-edged sword: when used and managed properly, the benefits to the course of an arbitration can be substantial; but when mismanaged, there is a very real potential for wastage of time and resources.

Kinds of Experts

It is important to be clear as to what is meant by expert evidence. Obviously, different experts are relied upon by parties in different matters in different ways, dependent upon the needs of the matter and the parties in question.

Expert Disciplines

One can generally divide the kinds of areas of expertise on which expert opinion is required into three categories: technical expertise, legal expertise, and experts brought on to analyse issues such as quantum, delay and disruption.[17]

The first category, technical expertise, is a straightforward category, in that technical experts are brought on to explain to the tribunal a particular area where technical knowledge is essential. This is not to say that the work or the calculations that such experts carry out are simple — far from it, the nature of their role is such that this work is usually extremely complicated. However, the benefit that they bring to the tribunal is quite immediate and easily understood.

Legal expert witnesses are also a fairly straightforward category, in that there is called for simply an expert opinion on a particularly contentious and important aspect of the law.[18] Areas in need of legal expertise may especially be found in international disputes, where a tribunal is required to consider legal propositions and consequences from multiple systems of law.[19] There is an obvious tension involved in posing legal

[17] Nigel Blackaby and Alex Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration' (2016) 31(3) *ICSID Review* 655, 660.

[18] See generally Brooks W Daly and Fiona Poon, 'Technical and Legal Experts in International Investment Disputes', in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill, 2014) 323, 337.

[19] Donald Francis Donovan, 'Re-examining the Legal Expert in International Arbitration', in Hong Kong International Arbitration Centre (HKIAC) (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Wolters Kluwer, 2018) 247, 253–5.

questions not to the parties or to counsel, but to a separate expert, whose opinion is then obviously subject to any cross-examination or counter-opinion from the parties.[20] For this reason, this category of expert is seldom the first choice of parties or tribunals in international arbitration. It must be said, however, that this class of expert has ancient precedent, stemming back to Roman law principles,[21] and resembles the office that is perhaps more familiar to the modern lawyer of the *amicus curiae*, which still sees use in common law jurisdictions today.[22]

The final category is certainly a somewhat looser category, and contemplates all such experts as are required not to carry out a calculation or provide a legal proposition, but to sort, analyse and evaluate what are usually vast amounts of data and evidence. Issues such as delay or quantum in construction projects require an in-depth understanding of the multiplicity of issues in construction projects — legal and otherwise — and call upon not only technical expertise, but analytical and evaluative skills on the part of the expert.[23]

Advisors vs Witnesses

Another important way of characterising experts stems from the way in which they are deployed by the parties. Often experts are called upon in the capacity of advisors or consultants to the parties, in which case they typically assist in the articulation of a party's claims, where they may be central to the formulation of a party's case.[24] Such experts, also known as 'shadow experts', are intimately and inextricably connected to the party by whom they are employed, and whose strategies and cases they have helped shape.[25]

By contrast, one has the traditional independent (or supposedly independent) expert witness. Such an expert witness may be, depending upon the set of procedural rules adopted, appointed by the parties or by the tribunal itself. In either case, this expert's primary duty is to the tribunal, which they are to assist through the impartial analysis of the facts of the case. These experts may provide their opinions in written format, such as in independent or joint expert reports, or may be called to give evidence orally in hearings. Typically they are called upon to do both.

Party and Tribunal Appointment

The author has alluded to the distinction between party-appointed and tribunal-appointed experts. This is a fundamental distinction which has serious consequences for the treatment of expert evidence and the management of expert witnesses in disputes,

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[20] Cf Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (Wolters Kluwer, 7th ed, 2023) [6.151]–[6.152].

[21] See S Chandra Mohan, 'The Amicus Curiae: Friends no More?' [2010] (December) *Singapore Journal of Legal Studies* 352, 363; Edmund Ruffin Beckwith and Rudolf Sobernheim, 'Amicus Curiae: Ministers of Justice' (1948) 17(1) *Fordham Law Review* 38, 40.

[22] See, eg, *United States Tobacco Co v Minister for Consumer Affairs* [1988] FCA 241, [68] (Einfeld J).

[23] See John A Trenor, 'Strategic Issues in Employing and Deploying Damages Experts', in John A Trenor (ed), *The GAR Guide to Damages in International Arbitration* (Law Business Research, 2nd ed, 2017) 136, 136; Edna Sussman, 'Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do about Them' (2013) 24(3) *American Review of International Arbitration* 487, 497.

[24] See London Court of International Arbitration, 'Experts in International Arbitration', *LCIA: Arbitration and ADR Worldwide* (Web Page, 17 January 2018) <https://www.lcia.org/News/experts-in-international-arbitration.aspx>.

[25] Julian Haslam-Jones, 'Are Shadow Experts Having a Positive Impact on Disputes' (2021) 22 *Driver Trett Digest* 22–3.

especially in complex and technical construction disputes which rely so heavily on experts. This distinction derives, of course, from the different practices of the two most common legal systems: common law and civil law. Common law jurisdictions rely on an adversarial model, whereby the emphasis is on party choice and party-led submissions; all before a judge who is impartial and, historically, passive to a certain extent. Parties are therefore relied upon to call their own witnesses, factual witnesses and expert witnesses, to establish the points that they wish to establish, and rebut those of their adversary.[26] By contrast, the inquisitorial role of judges in civil law jurisdictions requires them to take the initiative in fact-finding. As such, court-appointed experts are the standard in those jurisdictions.[27]

In the time before the signing of the New York Convention,[28] when international arbitration was conducted primarily in European, civil law jurisdictions, the practices of those traditions naturally prevailed. However, following the New York Convention, and the bursting onto the scene of the United Kingdom and the United States, the tide turned;[29] and although international arbitration is flexible, and indeed at its core reflects a hybrid, multijurisdictional system of dispute resolution,[30] party-appointed experts reflect by far the most common form of collecting expert evidence today, with surveys over the past decade indicating that party-appointed experts are used in over 90% of disputes.[31] The reason for this lies in the importance placed on party autonomy, viewed by many as among the most fundamental attractive features of international arbitration.[32] As part of this autonomy, the ability to choose experts and deploy their expertise in the way most suitable to the case of the party in question is fundamental.

Party-appointed Expert

A number of persistent issues plague the role of the party-appointed expert, and serve often to reduce their utility even in complex construction disputes.

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[26] See Sir Harry K Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996) [13.6].

[27] Christian Johansen, 'The Civil Law Approach: Court-Appointed Experts' (2019) 13(4) *Construction Law International* 18, 18. See also Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Wolters Kluwer, 2003) 555–7.

[28] *Convention on the Recognition and Enforcement of International Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*').

[29] Javier Rubenstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions' (2004) 5 *Chicago Journal of International Law* 303, 303.

[30] See generally Rolf Trittmann and Boris Kasolowsky, 'Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions: The Development of a European Hybrid Standard for Arbitration Proceedings' (2008) 31(1) *University of New South Wales Law Journal* 330.

[31] Ibid 335; George Burn, Claire Morel de Westgaver and Victoria Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert' (Survey, Bryan Cave Leighton Paisner, 2021) 9; Queen Mary University of London, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (Survey, 2012) 29; Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (Survey, 2021) 13. See also International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (adopted 17 December 2020) arts 5–6, making the use of party-appointed experts the default, whereas the use of tribunal-appointed experts requires first consultation with the parties.

[32] Queen Mary University of London, '2019 International Arbitration Survey: Driving Efficiency in International Construction Disputes' (Survey, 2019) 23. George Burn, Claire Morel de Westgaver and Victoria Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert' (Survey, Bryan Cave Leighton Paisner, 2021) 16.

Bias

Foremost amongst these issues is the concern that party-appointed experts are *essentially* partisan, and act rather in the capacity of 'hired guns' in the interest of the parties than as neutral providers of expert opinions to the tribunal. There need not be anything sinister — simply having a closer personal and professional relationship with the counsel and clients of one side as opposed to those of the side may be enough to sway the expert's mindset, or motivate the expert to be more favourable and less antagonistic to one side during, for example, direct and cross-examination. Such bias may be conscious or subconscious — for example, the fact that experts are remunerated by the party that appoints them may create a subconscious desire in the expert's mind to tailor their findings to the needs of that party, or may incentivise the expert actively to do so in the interests of repeat business.[33] Repeat business is itself a large and recurrent issue for experts, just as it is for arbitrators.[34] Obviously, repeat appointments of experts by the same party in respect of complex, technical disputes may simply be due to the small pool of specialised individuals available. However, serious concerns may arise insofar as the expert begins to view their livelihood as tied with keeping one particular party satisfied and financially afloat. Experts in such situations may also struggle to confine their analysis or findings to the matter before them, and may instead allow themselves to be influenced by what other knowledge they have of the party or its dealings based on previous appointments.

As stated, there is a distinction between expert advisors, who are used by parties in a very partisan way to formulate their case, and independent experts, who are required to be impartial. Naturally, this issue of bias, conscious or unconscious, rears its head when an expert acts *both* in an advisory capacity to a party, and in the role of expert witness who advises the tribunal.[35]

These biases need not manifest themselves consciously in the mind of an expert — subconscious biases are just as problematic, and indeed more insidious. These biases need not even manifest themselves at all. Even the perception that such biases exist in an expert or their work can jeopardise the confidence of the parties in the arbitral procedure. This can lead to a lack of engagement and, in extreme cases, a final award being subject to challenges. It can also lead to inefficiency, in that concerns over the accuracy of expert evidence can complicate and delay proceedings, and even, ironically, require the tribunal to appoint its own expert to sort through the evidence provided by both parties. Clearly, that outcome, which is not unheard of in common law litigation,[36] would waste the time and resources of the parties. For a tribunal to be this suspicious of an expert's evidence is also an example of expert evidence undermining a party's case, rather than enhancing it.

This is, in many ways, the foremost concern regarding part-appointed experts. However, as it involves subconscious biases, it is difficult to regulate against. Institutional rules typically provide only for basic powers of the tribunal, such as requiring expert witnesses to appear in evidentiary hearings, and are usually designed to

[33] See *Abinger v Ashton* (1873) LR 17 Eq 358, 374 (Jessel MR).
[34] Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (Survey, 2018) 32–3.
[35] International Chamber of Commerce Commission on Arbitration and ADR, *Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management* (Report, February 2019) 22 [18.3].
[36] See, eg, *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166, [22].

promote party autonomy, rather than prescribe rigid guidelines.[37] Important efforts have been made to place proscriptions on the activities of experts, such as by mandating open and transparent communication by experts with the tribunal and all parties. Common also are legal declarations by experts, for example in their expert reports, that they are acting independently and primarily for the benefit of the tribunal.[38] However, the extent to which these words are effective and not simply hollow and therefore incapable of addressing the primary problems is of course debatable.[39]

Any radical changes to the status quo seem unlikely, and would in any case bring problems of their own, as will be discussed later in this paper. What is ultimately proposed is that an active, indeed proactive, tribunal is the only way for these issues, among others, to be managed, recognising that they cannot ever be 'solved' in an entirely satisfying manner.

Use of Evidence

Whereas 'bias' is the more immediate concern when one thinks of party-appointed experts, in practice the more pressing concern is the risk that the experts will fail to cooperate or engage properly with their peers appointed by the opposing party.[40] It is an unfortunate but common phenomenon where experts from opposing sides do not consider various alternative operating methodologies, including that favoured by the opposing expert, to enable the tribunal to compare the outcomes under all of these methodologies and factual assumptions. Too often, experts rely only on those facts which they personally, or the party which appointed them, believe to be true. This is especially problematic in fields such as disruption and delay, where there are multiple, equally valid and accepted methodologies.

An ironic, practical problem is the overuse of expert evidence.[41] Parties often presume that more experts will lead to a stronger argument, even in issues which are clearly not worth the wasted time or expenditure. The inefficiency this causes is especially obvious when there is an asymmetry in the reliance on expert evidence between the two parties, with one party effectively running its case and making legal propositions by puppeteering its experts, and the other simply glossing over those issues.

Expert witness conferencing, or 'hot-tubbing', is a common way of responding to these issues.[42] This involves convening all experts in an in-person or virtual

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[37] Klaus Sacs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times* (Wolters Kluwer, ICCA Congress Series No 15, 2011) 135, 137. See, eg, International Chamber of Commerce, *ICC Arbitration Rules* (adopted 1 January 2021) art 25; London Court of International Arbitration, *LCIA Arbitration Rules* (adopted 1 October 2020) arts 20–1.

[38] See International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (adopted 17 December 2020) art 5(2)(c); Chartered Institute of Arbitrators, *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (September 2007) arts 4.5(n), 8.1.

[39] See Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration: Can One be Found?' (2013) 26(3) *Arbitration International* 323, 329; See generally Brooks W Daly and Fiona Poon, 'Technical and Legal Experts in International Investment Disputes', in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill, 2014) 323, 350.

[40] Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (Survey, 2018) 33.

[41] See Brooks W Daly and Fiona Poon, 'Technical and Legal Experts in International Investment Disputes', in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill, 2014) 323, 338.

[42] The practice was pioneered by Australian courts: Megan A Yarnall, 'Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?' (2009) 88 *Oregon Law Review* 311, 312.

conference and encouraging an open, forum-like discussion on the most important issues of contention, well prior to the hearing. Placing all experts together is valuable. It sorts out at least some of the confusion created by a linear string of expert reports, often months apart and which often do not respond properly to one another.[43] This forum also makes experts accountable — they are less likely to use flawed methodologies or raise peripheral issues if they can be challenged on the spot by their peers. Pre-hearing CMCs and hot-tubbing as part of the evidentiary hearing can yield benefits, such as the narrowing of issues for treatment in the main hearing, or even the resolution and settlement of those disputes. These discussions are best led by the tribunal — even though surveys indicate mixed feelings for the utility of hot-tubbing in general,[44] respondents to such surveys almost universally favour such conferences when they are led proactively by the tribunal.[45] The tribunal should encourage open communication on the part of the experts. Notably, the parties and counsel take a back seat, by contrast to in cross-examination.

Tribunal-appointed Experts

Clearly, many of these problems stem from the nature of party-appointed experts. One might therefore consider tribunal-appointed experts to be the obvious means of countering these difficulties.

Naturally, allowing experts to be appointed by the tribunal effectively neuters most concerns regarding bias. Whereas some models, such as the Sachs Protocol, named for Dr Klaus Sachs, do involve a certain level of party-participation in the nomination of potential experts, having experts be appointed by the tribunal removes most sources of potential bias, such as the source of remuneration.[46] However, the concerns of bias on the part of experts should not be overstated — recent surveys suggest that parties are generally satisfied with the ability of tribunals to curb the likelihood of expert bias through effective supervision and case management.[47]

Tribunal-appointed experts are practically easier to manage: as there is usually one per discipline, there is no risk of opposing parties' experts failing to collaborate or properly join issue. Further, just as party-appointed experts may be consciously or unconsciously predisposed to produce export reports that favour the party that appoint them, it is also generally in the expert's interest to produce reports that tribunals would prefer — in other words, succinct reports.[48]

There are, however, a number of problems associated with tribunal-appointed experts. Notably, the greatest strength of the adversarial system that is the norm in

[43] See Justice Steven Rares, 'Using the "Hot Tub": How Concurrent Expert Evidence Aids Understanding Issues' [2010–2011] (Summer) *Bar News* 64.
[44] See generally Queen Mary University of London, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (Survey, 2012) 28.
[45] George Burn, Claire Morel de Westgaver and Victoria Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert' (Survey, Bryan Cave Leighton Paisner, 2021) 20. See also Institute of Chartered Accountants in England and Wales, 'Concurrent Expert Evidence: Hot Tubbing' (Practical Guidance, 2021) 2.
[46] See Klaus Sachs, 'Experts: Neutrals or Advocates' (Conference Paper, ICCA Congress, 2010) 13–15.
[47] George Burn, Claire Morel de Westgaver and Victoria Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert' (Survey, Bryan Cave Leighton Paisner, 2021) 14.
[48] John H Langbein, 'The German Advantage in Civil Procedure' (1985) 52(4) *University of Chicago Law Review* 823, 838.

international construction arbitration is the ability of a tribunal to assess competing perspectives.[49] Difficult as that task may be, it is seldom worth abandoning. As stated above, the use of expert evidence is especially important in complex disputes, where cases may be won or lost based on the manner in which expert evidence is presented.[50] A party to such disputes may view it as fundamental to its right to present its case that it be able to present expert evidence in the manner that it wishes.[51] Of course, a party who is dissatisfied with a tribunal-appointed expert will need to expend further resources to refute that expert, leading to greater inefficiency.[52] Moreover, a tribunal is unlikely to be able to predict precisely what kind of expert evidence will be required at the early stage of proceedings.[53]

Perhaps the greatest concern is that a tribunal will, without the ability to hear conflicting expert perspectives, simply accept the expert's opinion at face value, leading to the concern that experts become the 'fourth arbitrator' and ultimately decide large portions of the dispute without the parties' approval.[54] That lack of party approval is especially problematic if one party does not think that an area of the dispute calls for expert evidence, but is nonetheless forced to pay the costs of that expert if it loses the dispute.[55] Indeed, in civil law courts, judges have been found rarely to disagree with experts that they have appointed, as it is difficult for legally-trained judicial officers to produce reasoned counterarguments themselves to expert opinions.[56]

In any case, regardless of what one concludes regarding the viability of tribunal-appointed experts as a counterpoint to party-appointed experts, no great change in the status quo seems likely; the trends in international arbitration lean almost universally towards improving party autonomy, and the relaxing of constraints imposed by state courts and arbitral tribunals.[57] While tribunal-appointed experts of course retain a place in international procedures and practice, they seem unlikely to *replace* the status quo as a feasible alternative.

Managing Expert Evidence Effectively

The flexibility of international arbitration is one of its most attractive features. However, in terms of managing expert evidence, the lack of rigid procedural guidelines

[49] See Sir Harry K Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996) [13.6].
[50] Klaus Sacs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times* (Wolters Kluwer, ICCA Congress Series No 15, 2011) 135, 141.
[51] 84% of respondents to a recent survey held this opinion: George Burn, Claire Morel de Westgaver and Victoria Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert' (Survey, Bryan Cave Leighton Paisner, 2021) 17.
[52] Sven Timmerbeil, 'The Role of the Expert Witness in German and US Civil Litigation' (2003) 9(1) *Annual Survey of International & Comparative Law* 163, 175, 177–8.
[53] See Brooks W Daly and Fiona Poon, 'Technical and Legal Experts in International Investment Disputes', in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill, 2014) 323, 339; George Burn, Claire Morel de Westgaver and Victoria Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert' (Survey, Bryan Cave Leighton Paisner, 2021) 17.
[54] Queen Mary University of London, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (Survey, 2012) 14.
[55] Lisa M Richman, 'Hearings, Witnesses and Experts', in Lisa M Richman, Maxi Scherer and Rémy Gerbay (eds), *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Wolters Kluwer, 2021) 257, 275.
[56] Sven Timmerbeil, 'The Role of the Expert Witness in German and US Civil Litigation' (2003) 9(1) *Annual Survey of International & Comparative Law* 163, 175–6.
[57] Cf Annett Rombach and Hanna Shalbanava, 'The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?' (2019) 17(2) *German Arbitration Journal* 53, 59–60.

can be a hindrance. Strong-willed parties may overshadow the tribunal's authority if given free rein to lead their expert evidence as they wish. As stated previously, the imposition of mandatory institutional or legal constraints will not solve the problem. Instead, it is necessary for arbitrators generally to ensure that expert evidence is handled in an appropriate manner, by confronting the potential challenges proactively.

Early-stage Proactivity

The author's proposal for the effective management of expert evidence relies on proactivity at the *early* stages of the arbitration, and the enshrining of distinct expert-related procedural steps in early procedural orders.[58] Whereas expert witness conferencing is clearly in the spirit of this kind of tribunal proactivity, it often amounts to 'too little too late' when it is left until just before an evidentiary hearing. An early step that is essential is the identification of experts and of the disciplines that are thought needing of expert opinion. Forcing the parties to make this identification requires them to consider critically whether the issue in question in fact requires expert evidence (which is a presumption that is often made too soon).[59] If this identification is made in a proper and considered manner, experts may be split into their appropriate disciplines and given directions at an early stage, and any conflict or competency challenges made early, before they have the opportunity seriously to disrupt the flow of proceedings. This is not an entirely unprecedented proposal, and has even been enshrined in certain institutional rules and guidelines, such as those of the Singapore International Commercial Court,[60] and in the commonly used IBA and CIArb Guidelines on expert evidence.[61]

Secondly, there should be prepared a draft list of questions which the experts in each discipline will seek, through their analysis and investigations, to answer. These questions should be formulated by the experts, with the tribunal's assistance as to which answers it will likely be interested in. Importantly, they should not be formulated primarily by the parties, who are more likely to pose antagonistic questions, which they perceive to aid their arguments, but which ultimately do little to benefit the tribunal. The involvement of the tribunal is important to ensure that no substantive issues have been missed: one cannot always rely entirely on the parties to hit upon every important issue. Obviously, such a list will not be final at the early stage of the proceedings, but will at least provide a starting point for the experts to proceed.

Thirdly, expert reports should be handled in a way that ensures that experts from opposing parties collaborate and either agree or meaningfully join issue. Rather than immediately drafting submission-like expert reports, which in practice advocate for the party that appointed them, experts should first be directed to draft *joint* expert reports, prepared by way of informal discussion with the opposing experts and the exchange of 'without prejudice' drafts. At these preliminary stages, it is crucial that experts be given

[58] For further reading on the author's proposed procedural guidelines for the management of expert evidence, see Doug Jones AO, 'Methods for Presenting Expert Evidence', in *The GAR Guide to Evidence in International Arbitration* (Law Business Research, 1st ed, 2021) 154, 162–4.

[59] See further International Chamber of Commerce Commission on Arbitration and ADR, *ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration* (Report, 2018) 13 [62].

[60] Singapore International Commercial Court, *Practice Directions* (adopted 1 April 2022) paras 157–9.

[61] See International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (adopted 17 December 2020) art 2; Chartered Institute of Arbitrators, *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (September 2007) arts 6–7. See also Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration* (April 2019) 16–23.

the opportunity to test methodologies on a preliminary basis, before diving into a methodology which, while it may appear to assist their party, is in practice unworkable. It is also crucial that experts' agreements and disagreements be put on record, so that the issues are narrowed and so that experts may be held accountable to their previous statements. The preparation of these reports should *only* occur after all factual evidence (factual exhibits and witness statements) is disclosed and on the record, so that all experts can work from a shared data set, rather than rely on the skewed perspective that looking only at one side's evidence may cause, or relying on the laborious process of disclosure in a drip-feed fashion.

Only at this stage should experts be directed to prepare individual expert reports, and then again only on those topics about which there was disagreement in the joint expert reports. Experts should also be able to reply to their counterparts' individual reports. These reply reports should be strictly confined to offering the expert's views on the outcome *if the other expert's methodologies and assumptions of fact are accepted*. The tribunal's task is often to choose between a set of factual scenarios; if it chooses one set of facts over the other, it will be greatly benefited by knowing what each expert has to say based on that set of facts. Naturally, one expects there to be areas of disagreement in complex disputes with multiple valid analytical methodologies. However, waiting until this stage to produce these reports requires experts to think critically about the topics on which they disagree, and removes some of the psychological barriers between experts on opposing sides.

A tribunal should be honest with the parties that the management of expert evidence is difficult — international arbitration involves many moving parts, and usually has relatively short hearings that need to be arranged well in advance. However, there are a number of methods which demand persistence and proactivity from a tribunal and which may be useful in overcoming some of these variables.

The author's experience in a recent construction arbitration involving multiple expert disciplines provides an example of the benefits of this method. The parties to this arbitration had originally wished to bifurcate proceedings, such that issues of liability would first be heard and determined in full, before only then turning to issues of quantum, and beginning the inevitable compilation of expert evidence in respect of those issues. That is a proposal which risked causing substantial delay to the final resolution of the dispute. Instead, by implementing the method described in this section, and demanding collaboration from the party's quantum experts, the parties were able to come to an agreement on the majority of issues on quantum. They came to this agreement in the middle of the evidentiary hearing, which meant that the hearing was concluded days earlier than originally planned, saving all parties time and money. Had the management of the expert witnesses commenced any later than at the very beginning of the arbitration, it is doubtful whether this outcome would still have been possible.

Tribunal Access to Experts Post-Hearing

A relatively niche example of innovation in the use and management of expert evidence involves allowing the tribunal to receive the benefit of expert witness assistance in the *post*-hearing phase of proceedings.

Models which allow for this require the signing of an Expert Access Protocol — an agreement between the tribunal, parties and relevant experts (usually quantum experts) setting out how and when the tribunal is to make use of the experts. Typically,

the tribunal will be permitted to communicate with the experts *without* involving the parties, but will only be able to do so for assistance in making calculations, rather than for receiving evaluative opinions. This is especially useful when there is a complex factual matrix which the tribunal will be called to decide, where particular factual findings may reverberate and impact on a number of complex quantitative calculations. Where these variables are complex and numerous, it is often not feasible to require experts to prepare models in advance, which anticipate every possible factual outcome. Rather, the experts will be best able to assist once they know precisely which factual scenario they should proceed from. This is also far preferable to giving the parties access to a draft final award and inviting their assistance to the making of final calculations, which may jeopardise the ability of the successful party effectively to enforce the award in future.

While this method appears, on its face, controversial, it has in practice caused almost no problems and received almost universal support. Although this method is clearly suited only to certain forms of expertise, it reflects the kind of innovation which prioritises the independence of the expert and the proactive role of the tribunal which it is necessary to bring to the entire process of managing expert evidence.

The Effects of Chess Clock Procedure upon Arbitral Hearings

Background

Construction lawyers are familiar with the complexity of construction disputes leading to increasingly long and expensive oral hearings, with much of the hearing dedicated to the cross-examination of witnesses and experts. This lies in tension with one of the key objectives of arbitration of ensuring efficiency in the proceedings, and it is therefore crucial that arbitrators make appropriate use of strategies to manage the efficiency of hearings. The 'chess clock' procedure is one such method that arbitrators use to ensure that the length of hearings remains in check, resulting in significant time and cost savings.

What is it?

The 'chess clock' procedure is a time management method involving the prior agreement of the parties and tribunal to allocate a specific amount of time to each party for the oral hearing.[62] The time is typically divided equally between the parties for them to use as they see fit, though in some cases the tribunal may prescribe time limits for specific steps in the proceedings (e.g. for opening submissions, evidence-in-chief, cross-examination or closing submissions). Time is also allocated for the tribunal to question parties and witnesses, along with administrative matters. Once a party's time limit has elapsed, no further oral submissions or evidence is permitted except by agreement between the parties, and the consent of the tribunal. Such an extension may be required in exceptional circumstances, such as fraudulent concealment of a relevant matter by a party.[63]

The time allocations and rules should be discussed at a pre-hearing conference between the tribunal and the parties. The parties should also agree on when certain

[62] Mark E Appel, 'The Chess Clock: A Time Management Technique for Complex Cases' (2006) 61(2) *Dispute Resolution Journal* 82, 84.
[63] Albert A Monichino, 'Stop Clock Hearing Procedures in Arbitration' (2009) 11(3) *Asian Dispute Review* 76, 81.

activities should be debited against their time allocations, for example, late arrivals, setting up of equipment, unjustified objections, or where a witness engages in time-wasting behaviour. The parties and tribunal should also decide on administrative matters such as the method of time-keeping throughout the proceedings (e.g. by the tribunal secretary, or by representatives of each party). Finally, it is critical in chess clock proceedings, especially those making use of extensive witness evidence, to include a procedural direction that a failure to cross-examine a witness on a particular matter does not constitute acceptance of their evidence,[64] given the time constraints on cross-examination.

There is no one-size-fits-all procedure, and the tribunal should develop a procedure which is tailored to the parties and the specific dispute. Relevant considerations include the number and type of witnesses, as well as the method of taking evidence (e.g. witness conferencing). Furthermore, though the division of time between parties is usually equal, the tribunal may assign different time limits, for example, where the parties must cross-examine different numbers of witnesses, or more extensive cross-examination of some witnesses is required.[65]

Benefits

In my view, the chess clock procedure is a powerful tool to manage the conduct of hearings which should be deployed more often in the resolution of construction disputes. Though it is not a perfect solution, for the most part, its benefits greatly outweigh the possible disadvantages of its use.

First of all, the chess clock procedure fundamentally changes the nature of proceedings, by directing the parties, including in their examination of witnesses and experts, to focus on the key issues in dispute in the limited time available to them. Chess clock hearings require thorough prior preparation by the parties, both in terms of anticipating the time necessary for certain elements of the hearing, and in the lead-up to the hearing itself, to ensure to maximise the use of the allocated hearing time. This has the effect of reducing the length and costs of oral hearings, in addition to creating certainty for the arbitrators and parties, through an accurate and early estimate of the time required for the hearing.[66]

In addition to providing parties with greater control over the conduct of hearings, the chess clock procedure also shares the onus of efficiency more equally between the tribunal and the parties, as parties bear the burden of effective time allocation, both in terms of developing coherent arguments at the written phase, and persuading the tribunal through examination and cross-examination on the most pertinent issues in dispute.[67] The parties place greater focus on comprehensive but concise written submissions which sets out the key issues and arguments prior to the hearing, which the arbitrators are expected to have read and synthesised prior to the hearing. Additionally, counsel must make calculated decisions as to the breakdown of time between factual and expert

[64] Charlie Caher and John McMillan, 'The Evaluation of Witness Evidence in Time Limited Arbitral Proceedings: The Chess Clock and the Rule in *Browne v Dunn*' (2017) 24 *Young Arbitration Review* 32, 35.
[65] Harvey J Kirsh, 'The Use of a Chess Clock in Construction Arbitration Proceedings' (2020) 36(5) *Construction Law Letter* 1, 3.
[66] Keith Steele and Leah Ratcliff, 'Procedural Flexibility and Economic Efficiency – Litigation and Arbitration Compared' (2008) 119 *Australian Construction Law Newsletter* 7, 11.
[67] Jan Paulsson, 'The Timely Arbitrator: Reflections on the Böckstiegel Method' (2006) 22(1) *Arbitration International* 19, 22.

witnesses, which witnesses are to be or not to be cross-examined, the time allocated to cross-examining each witness, which issues the witness is to be cross-examined on, and the key documents to be presented to that witness. Rather than using the oral hearing as an opportunity to present all relevant evidence, it becomes an opportunity to test the credibility of opposing witnesses, and to highlight key arguments and flaws in the opposing side's case.[68] Counsel must also be extremely organised as time is usually deducted for delays in arrival and searching for relevant documents.

This, however, does not mean that tribunals allow the entire responsibility of time management to fall onto the parties. The tribunal plays an important role in controlling the evidence of witnesses and dismissing strategic or dilatory objections by counsel. For example, the tribunal should encourage efficient behaviour in counsel and witnesses (e.g. reminding rambling witnesses to answer questions directly) and by themselves avoiding unnecessary questions to stay within the allocated time for questioning.[69]

Criticisms

The key criticism of the chess clock procedure is that it may undermine due process: one or both of the parties may be denied a sufficient opportunity to present their case, including the opportunity to present all relevant evidence to the tribunal; one party is a more complex case may be disadvantaged by being confined to the same time limit as the opposing side; or the respondent in the arbitration may be disadvantaged by not having had the same time as the claimant to consider the case before the notice of arbitration was issued.[70]

However, there is in every case a tension between the need to ensure due process, and the arbitrator's duty to ensure an efficient and expeditious proceeding, and the arbitrator retains a wide discretion as to management of the proceedings. Where the chess clock procedure is used, the parties will have agreed in advance on the procedure and time allocations, and these risks can be managed by ensuring adequate opportunity for the parties to prepare for the hearing.[71]

Other criticisms which are more difficult to counter are the points that efficiency throughout the proceedings does not mean that preparation is efficient, as parties may expend exorbitant legal fees on comprehensive written submissions and trial preparation, and that parties should not be punished for the mismanagement of disorganised counsel.[72]

The tribunal should manage such criticism to the best of their ability, by cooperating with counsel and listening carefully to each party's time needs and guide the parties both to a suitable agreement and throughout the proceeding. Tribunals should remain full up to date as to the relevant issues and take a proactive approach to rambling witnesses to ensure the proceeding remains on track.

Additionally, chess clock procedure need not be adopted in every case. Where the parties are staunchly opposed to the procedure, it should not be forced on them.

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[68] Steele and Ratcliff (n 23) 11.
[69] Appel (n 629) 84–85.
[70] See Paulsson (n 24) 23–26.
[71] Steele and Ratcliff (n 23) 12.
[72] Rajendra Navaratnam, 'Practical Guidelines on the Reception of Evidence in Arbitration', *Institution of Engineers Malaysia* (Web Page) <https://www.myiem.org.my/assets/download/Lec4_EngrRajendra_12Sept06.pdf>.

Additionally, in some cases, parties may not be able to accurately estimate how much time will be required during the hearing, such as where one party is unfamiliar with the arbitration.[73]

Pleadings and Memorial Approaches

A key point of ongoing discourse within the arbitral community is whether complex construction arbitral matters should use traditional common law pleadings, or should they alternatively adopt a memorial approach.

As identified earlier, witness statements are fundamentally plagued by several limitations such as: (i) over-lawyering, (ii) extensive commentary and quotation from documents, (iii) legal submissions, and (iv) speculation. Indeed, this issues may be addressed through the adoption of a memorial approach, thus rejecting the more traditional common law pleading approach.

The process of material preparation for a final hearing before an international arbitral tribunal is typically conducted through either the memorial or pleading approach. Whilst these are not diametrically opposing approaches, the innate flexibility of international arbitration enables the tribunal and parties to design a procedure incorporating elements of both to best resolve the specific dispute in an efficient and just manner.

The memorial approach originates from civil law tradition, where all documentary and witness evidence, alongside legal submissions, are presented to the tribunal and opponents in a single submission. The pleading approach is underpinned by common law tradition, where parties establish their factual standpoint in written pleadings, sequentially followed by discovery/disclosure, witness statements, expert reports (if necessary), and written opening submissions before the oral hearing.

The key benefit of the memorial approach is demonstrated through the ability of each witness statement and legal submission to cross-reference the contemporaneous documents relied upon by the parties. This ensures witnesses can avoid quoting from the contemporaneous documentary record, allowing the tribunal to thereby examine the relevant documents in the round, as opposed to on a selective basis as chose by the witnesses (or parties' lawyers). Therefore, a memorial approach better assists parties in achieving an efficient presentation of their cases and assists the tribunal in reviewing documents in preparation for a hearing, in comparison with the pleadings approach.[74] Consequently, a memorial approach will make witness statements more useful to the tribunal.

The memorial approach provides another benefit of compelling parties to focus on their case at an early stage and the issues in contention. A pleading approach assists parties in advancing factual cases, without comprehensively reviewing the documents or obtaining proofs of evidence from witnesses. Consequently, the case established in the pleadings may be altered to suit the contemporaneous documents once reviewed, or the witness statements, once prepared. A memorial approach also forces parties to construct their case based upon their own contemporaneous documents which they possess, instead of hoping their case may be further developed through documents disclosed by the other side.

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[73] Steele and Ratcliff (n 23) 12.
[74] Cavan and Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edition, 2013) 494.

However, a limitation of the memorial approach resides in the potential for witness statements to engage with uncontested matters of fact. Under a memorial approach, factual issues in disputes remain ambiguous until the first memorial is filed by the respondent. As a result, the claimant's witnesses risk preparing long statements in support of allegations outlined in the legal submissions, only for certain allegations to be accepted by the respondent, leaving the claimant's witness statements are unnecessarily lengthy.

Overall, tribunals and parties should mirror the memorial approach, or an imitation of it, where parties either simultaneously or sequentially exchange memorials containing: lay witness statements; documents being relied upon; and any legal submissions. Those legal submissions may loosely resemble a common law pleading by setting out the factual and legal matters the party is alleging in the dispute, but instead extend further by advancing a legal argument with reference to cases and legal authorities, as well as facts extracted from the documents and witness statements. This should be succeeded by the exchanges of responsive memorials, containing the same types of documents. The nature of the dispute itself will determine whether a further reply round of memorials is required, although this third round may frequently be avoided.

It is also helpful to include a chronology (which can be cross-referenced to contemporaneous documents) and a *dramatis personae* in the memorial. A consolidated single version of each document should be produced by the parties in a cooperative manner, indicating, if required, any points of divergence between them. Provided these documents remain solely factual, not perceived as a mechanism for parties to further their respective cases, it assists the tribunal and parties in understanding the factual matrix of the dispute.

A procedure for document disclosure, where parties identify relevant documents to the dispute and subsequently disclose those to the other parties (whether helpful or adverse to their case), may be incorporated. The disclosure of documents does not necessarily need to form part of the memorial or the documentary record, as the parties may deploy disclosed documents in support of their case.

It must be noted that expert evidence will be omitted from memorials. Prior to experts providing their opinion to assist the tribunal's resolution of the dispute, the factual substrate must be broadly stated. It is therefore suggested that, in the majority of circumstances, expert evidence be delayed until the first exchange of memorials have occurred, at the minimum, ensuring experts understand the factual issues in contention and can provide their opinion accordingly.

Singapore International Commercial Court

The intersection of innovation and international arbitral practice is exemplified through the advent of international commercial courts. These courts, a hybrid between litigation and arbitration, create an additional avenue for resolving cross-border infrastructure disputes, especially construction claims of a complex nature. This concept has been established across jurisdictions, evidenced through the English Commercial Court, Dubai International Financial Centre Courts ("DIFC"); Qatar International Court and the Singapore International Commercial Court ("SICC").

The function of these courts as either a companion or competitor to international commercial arbitration has been debated extensively.[75] The establishment of these courts emphasises the need for arbitration to remain agile and fulfil the expectations of parties, as commercial courts offer benefits that arbitration may not. Indeed, many of these courts, including the SICC, provide parties with wider opportunities regarding ease of joinder and consolidation.

International commercial courts promote transparency through proceedings occurring in open court. This is exemplified through the DIFC even recording proceedings to be made available online, thereby aligning with principles of open justice. These judgements may also be made available online in more than one language, with the Qatar International Court uploading judgments in both Arabic and English. This broadens public access to judicial reasoning from leading international judges. Despite this, users are typically given a choice between proceedings being conducted in open or closed court.

It may be argued international commercial courts are faced with innate limitations concerning enforceability. A party looking to enforce a court judgement in another nation may face difficulties where there are no reciprocal enforcement agreements established between the two countries. Contrastingly, arbitration offers parties unparalleled enforcement prospects under the New York Convention, with 172 nations being parties to the instrument as of 2023.[76] However, the judgements of international commercial courts are becoming increasingly enforceable, as The Hague Convention on Choice of Court Agreements continues to be adopted by states.[77] The instrument facilitates enhanced enforcement and greater certainty to international litigants, now ratified by the EU, Mexico and Singapore.[78] Therefore, whilst arbitration may be considered superior in this aspect, the perceived limitation of commercial courts will likely dissolve over time.

Ultimately, flexibility remains the key differentiating factor separating arbitration, which may be effectively leveraged with the cooperation of legal counsel and proactive tribunals. Whilst courts operate within the frameworks of established rules, despite innovation becoming increasingly prevalent, arbitration is inherently a product of party autonomy. To maintain its long-standing success, protecting the inherent flexibility of arbitration remains pivotal.

Conclusion

The complexity inherent to construction disputes can materialize in several forms. This is demonstrated through the nature of multi-party proceedings within complex construction disputes, the volumes of documentary evidence associated with large-scale construction projects, and the lengthy nature of hearings consequential to construction disputes. Nevertheless, the complexity of construction arbitrations may be successfully managed through arbitral tribunals establishing a renewed focus upon

[75] Chief Justice Tom Bathurst, 'Benefits of Courts such as the Singapore International Commercial Court (SICC)' (Speech delivered at Sydney Arbitration Week, Sydney, 1 November 2016) 3.
[76] United Nations Commission on International Trade Law, *Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (2023).
[77] *Convention on 30 June 2005 on Choice of Court Agreements*, concluded 30 June 2005 (entered into force 1 October 2015).
[78] Parliamentary Joint Standing Committee on Treaties, Parliament of Australia, *Choice of Court Agreements – Accession* (2016) Parliament of Australia 1.

principles of efficiency and flexibility, demonstrated through the appropriate use of expert evidence and witness statements, coupled with effective document management, to mitigate risks of delayed proceedings and exceedingly high costs.

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Complex Construction Arbitration

Professor Douglas Jones AO

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KEY ISSUES

1. Document Management in Multi-Party Proceedings
2. Witness Statements
3. Expert Evidence
4. Chess Clock Procedure
5. Innovation in Arbitration

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Multi-Party Construction

- Numerous participants in all modern construction projects – from traditional to the 'megaproject'
- High volume of data
- Requires effective data management

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Document Disclosure

- Continuing challenge in complex construction arbitration
- Multiple disputed requests for document disclosure by parties
- Proactive case management and requests limited to necessary information to achieve procedural clarity

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Witness Statements

- Facilitates a more focused cross-examination and promotes arbitral efficiency, reducing costs and delays
- Have become an additional form of legal submissions
- Needs to be evidence

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KEY ISSUES

1. Document Management in Multi-Party Proceedings
2. Witness Statements
3. **Expert Evidence**
4. Chess Clock Procedure
5. Innovation in Arbitration

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Expert Evidence

- Party-appointed experts – challenges of bias
- Tribunal-appointed experts – issues surrounding lack of party approval
- Expert evidence may be effectively managed through early-stage proactivity

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4. **Chess Clock Procedure**
5. Innovation in Arbitration

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Chess Clock Procedure

- Time management procedure to contain the length of hearings
- Creates a more focused examination of key issues and emphasizes efficiency
- Needs to recognize needs of due process

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1. Document Management in Multi-Party Proceedings
2. Witness Statements
3. Expert Evidence
4. Chess Clock Procedure
5. **Innovation in Arbitration**

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Innovation in Arbitration

- Advent of international commercial courts to resolve cross-border infrastructure disputes
- Promotes transparency through open court proceedings
- Greater capacity for joinder
- However, flexibility and party autonomy continue to distinguish arbitration

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Professor Doug Jones AO
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PHIÊN 1: NHỮNG VỤ TRỌNG TÀI XÂY DỰNG PHỨC TẠP - CÂU CHUYỆN CỦA CÁC TRỌNG TÀI VIÊN GIÀU KINH NGHIỆM

PANEL 1: COMPLEX CONSTRUCTION ARBITRATION - STORIES FROM SENIOR ARBITRATORS

Moderator

Trinh Nguyen
Founding partner of TNP Law
Vice chairperson of SCL Vietnam

Trinh Nguyen is one of few lawyers with dual qualification in Australia and Vietnam. Over the past 20 years, Trinh worked at international law firms prior to being a partner at a large national firm. In 2007, Trinh set up TNP focusing on Infrastructure projects, land-based and sea-based construction contract advisory. She also acts as lead counsel in international arbitration with respect to multi-million dollars disputes arisen from sea-based construction projects and complex cross-border investment disputes issues.

Trinh has served two terms as a Vice Chair of Cross-Border Investment Committee under IPBA and has contributed Vietnam Chapter Kluwer Law for Commercial Litigation Publication. Trinh is the first female Fellow of Vietnam in the Chartered Institutes of Arbitrators and Accredited mediator at VMC. Trinh currently serves as the first Chairperson of Vietnam Chapter of CIArb and is listed on the 'panel of arbitrator at KCAB INTERNATIONAL and THAC.

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Speaker: Amanda Lees

International Arbitration Partner at King & Wood Mallesons

Speaker: Peter Scott Caldwell

Chartered Arbitrator
Mediator
Dispute Board Member

Speaker: Tan Cheng Hye Johnny

Independent Arbitrator / SIMI & SMC Accredited Mediator / Adjudicator

Moderator: Trinh Nguyen

TNP Law- Partner
SCL Vietnam,
Vice chairperson

Complex construction arbitration - stories from senior arbitrators

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KEY DISCUSSION POINTS

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SIX TOPICS FOR DISCUSSION

- Tribunal composition
- Case management – control of the arbitral procedure
- Case management – control of the document disclosure process
- Tribunal management of expert evidence
- Factual witnesses
- Identifying the essential issues

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Tribunal composition

In complex construction disputes the issues in dispute are likely to be both legal and technical.

- **Should all the arbitrators be legally qualified?**
- **How should parties and institutions achieve greater diversity in tribunal composition?**

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Case management by the tribunal - the arbitral procedure

- How do arbitrators strike the balance between being proactive and respecting party autonomy?

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Case management by the tribunal – document disclosure process

In complex construction disputes there is a large volume of documents accumulated over the life span of the project.

- How can the tribunal better manage the requests for disclosure of documents?

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Tribunal management of expert evidence

Expert evidence is critical in complex construction disputes.

- **Is expert evidence helpful to arbitrators and how should it be managed?**

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Tribunal management of expert evidence

The most common form of expert evidence is through party-appointed experts.

- **How can the tribunal mitigate the advocacy of party appointed experts?**

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Factual witnesses

Often witness statements are used to make additional submissions rather than an account of what the witness saw, heard or did.

- **What do tribunals expect from witness statements and witnesses?**

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Identifying the essential issues in the arbitration

There are multiple cases statements and witness statements in a construction arbitration.

- **How should the tribunal ensure that the parties identify the essential issues in complex constructions disputes for resolution in the award?**

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Amanda Lees

International Arbitration Partner at King & Wood Mallesons

Amanda leads the South-East Asia Disputes team of King & Wood Mallesons. Having been based in Singapore for 11 years and with more than 22 years' experience in dispute resolution in the region, Amanda is an expert in international commercial and investment treaty arbitration in the Asia Pacific region. She also acts as international counsel in complex cross border litigation including instructing on proceedings in the Singapore International Commercial Court appealed to the Court of Appeal.

Amanda acts as counsel in large complex disputes across a range of industries, with a particular focus on construction, infrastructure, energy and resources and technology disputes.

Amanda represented the Republic of Indonesia as advocate in its successful defence of a US$580 million claim under the India-Indonesia BIT, which was arbitrated under the UNCITRAL Rules and administered by the PCA.

Amanda sits as an arbitrator regularly (including on a number of Vietnamese disputes) and has had 22 appointments as arbitrator by SIAC, ICC and LCIA, including as emergency arbitrator, expedited arbitrator and presiding arbitrator. Amanda is listed on the panels of SIAC, HKIAC, ICDR (AAA) and JCAA.

Amanda is a Fellow and Director of the Chartered Institute of Arbitrators in Singapore and Fellow of the Singapore Institute of Arbitrators. As part of the CIARB Faculty, Amanda has taught international arbitration to hundreds of lawyers and other professionals throughout Asia.

She is a regular speaker at international conferences, has published widely on international arbitration and is ranked as a leading individual for international arbitration by Legal 500 and 'most in-demand arbitrator' in Chambers Global.

COMPLEX CONSTRUCTION ARBITRATION – 6 TOPICS FOR DISCUSSION

Peter Scott Caldwell

Director of Caldwell Ltd

Peter Scott Caldwell is regularly appointed as arbitrator, mediator, dispute board member and adjudicator on a wide variety of disputes or projects in various Asian jurisdictions involving parties from around the world.

Peter is a Chartered Engineer with many years' experience in managing major civil engineering works. He is also a Chartered Arbitrator and accredited mediator.

Peter was a member of the working party which drafted the first edition of the IBA Rules for the Taking of Evidence in International Commercial Arbitration.

He is a board member of the Dispute Resolution Board Foundation Region 2 and of the Scottish Arbitration Centre, an Arbitrator Member of the Society of Construction Arbitrators and a member of the ICC Commission on Arbitration and ADR.

He is a former Secretary-General of Hong Kong International Arbitration Centre and a founder member and past chair of the Society of Construction Law Hong Kong.

NOTES BY PETER SCOTT CALDWELL ON THE SIX TOPICS FOR DISCUSSION

1 Tribunal composition

2 Case management – control of the arbitral procedure

3 Case management – control of the document disclosure process

4 Tribunal management of expert evidence

5 Factual witnesses

6 Identifying the essential issues

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1 Tribunal composition.

- **Should all arbitrators be legally qualified?**
- **Should all arbitrators be construction professionals?**
  - Few construction cases where cause of dispute is legal interpretation.
  - Legal issues must be interpreted under applicable law & only lawyers qualified in applicable law qualified to interpret.
  - Most arbitrations arise from events on or off site that impact progress & increase cost.
  - Disputes often described as technical disputes, but academic knowledge of engineering / architecture unlikely to assist in understanding complex factual matrix.
  - Understanding requires experience - not technical qualifications.
  - Many construction lawyers after many years involved with construction industry more easily understand issues than fresh engineering graduates.
  - Dual qualifications engineering / law: No guarantee of having required skillset to arbitrate complex construction disputes.
  - Experienced engineer / architect sitting as arbitrator may have gained experience of the law in variety of jurisdictions.
  - Concern: Some lawyers, with no construction background, accept appointments as construction arbitrators but may not understand the evidence. Does this serve the construction industry's needs?

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2 Case management – control of the arbitral procedure

- **How do arbitrators strike balance between being proactive & respecting party autonomy?**
- **What is party autonomy?**
  - Parties choose arbitration over court. Most arbitration laws respect parties' right to craft arbitration procedure suited to their requirements. Often called 'party autonomy'.

- Party autonomy extends beyond arbitration agreement to agreeing procedure after arbitrators are appointed.
- Once tribunal empanelled, arbitrators typically have a duty to ensure cost-effective & timely completion of the arbitration.
- Time & cost duty arises from applicable arbitration law or relevant arbitration rules to which parties have agreed.
- Tension may arise between arbitrators respecting parties' autonomy & exercising their duty under the law or rules to avoid unnecessary delay or expense.
- Tribunal must be sensitive to conflicting needs & interests of each party & not seek to impose unduly demanding requirements while ensuring that process does not fall into delay or waste money.
- A party that does not want the arbitration to reach an award may indulge in irresponsible or unethical means to achieve delay. "G*uerrilla tactics".*
- A party using guerrilla tactics may push the tribunal into overreacting. A tribunal which overreacts may make itself vulnerable to challenge on grounds of bias.
- It is often suggested that some arbitrators are so timid about controlling arbitral process for fear of being removed or their awards being challenged that they allow a party wishing to delay or disrupt the arbitration free rein to delay the process. *"Due process paranoia".*
- "G*uerrilla tactics" & "due process paranoia"* are opposite sides of the same coin.
- Arbitrators must balance need for speed & economical process against legitimate interests of the parties to respond to problems that arise along the way.
- Parties must be given the opportunity to present their respective cases. What is reasonable & what is unreasonable is a matter of arbitral judgement.
- There is a danger that inexperienced arbitrators having read about avoiding "g*uerrilla tactics" & "due process paranoia"* will feel that every application for a change to the arbitration timetable is an example of guerrilla tactics & to grant any request is to succumb to due process paranoia.
- Emphasis is on the tribunal being proactive in setting procedures which are suitable for the particular case & fixing a timetable which is realistic but not unreasonably short.
- By taking a proactive approach, arbitrators usually can tease out compromises acceptable to all parties.
- It is usually easy to arrange a video meeting to discuss procedure rather than by exchange of correspondence. By video much more about the parties actual concerns can be understood.

3 Case management – control of the document disclosure process

- Common law systems generally require each party to produce all documents which are relevant to the case whether they help the party holding the document or are damaging to its case.
- Under most civil law systems there is no obligation on a party to voluntarily disclose all relevant documents. Parties can select the documents which support their case.
- In international arbitration the tribunal may commonly order a party to disclose a document requested by another party
- Redfern schedule used to tabulate request for documents disclosure. Requesting party must show both materiality and weight of requested document.
- Too often, disclosure requests are used as a delaying tool by a respondent that has no interest in completing the arbitration.
- Conversely, legitimate requests for documents may be resisted because the holder of the documents is unwilling to produce documents which are prejudicial to its case.
- Parties seldom refuse to produce an ordered document. Commonplace for excuses to be made, such as the document cannot be found or the document never existed.
- Arbitrators can take an adverse inference when a document is not disclosed. What does that mean? Does it mean that an arbitrator can assume that the document did exist and would have supported the case of the party that wanted the disclosure?
- Should an award be influenced by conjecture about the contents of a document the tribunal had not seen?

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4 Tribunal management of expert evidence

➢ Is expert evidence helpful to arbitrators and how should it be managed?

- Consequential changes in construction arbitration which has accompanied the decline in the number of construction professionals as arbitrators is the rise in the use of expert evidence.
- In the past it was assumed that a construction professional sitting as an arbitrator could generally understand the evidence and did not need the assistance of experts.
- Two drawbacks:
  - greatly increases the cost of arbitration;
  - encourages lawyers, with little construction experience, to believe that, with the experts' assistance, they will be able to understand the evidence.
- Although overused in construction arbitration, expert evidence is very helpful:

- in analysing data which I could not be easily analysed by the tribunal; and
- in giving a spectrum of views which allows the tribunal to arrive at a balanced view.

- A tribunal with no knowledge of the expert area, almost inevitably, will adopt the evidence of the expert who better presented the expert evidence.

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5 Factual witnesses

- In traditional inquisitorial civil law courts, witness evidence in construction matters has been considered secondary to documentary evidence.
- Common law courts relied on witnesses giving their evidence orally in an adversarial procedure.
  - Firstly: Witness would be asked questions by the advocate for the party that had called the witness. (Evidence-in–chief.) Questions were not allowed to lead the witness towards an answer to the question.
  - The opposing party's advocate would then cross-examine the witness seeking to demonstrate flaws in the witness's testimony.
  - Finally the original advocate could re-examine the witness on points that had arisen during cross-examination.
  - In complex construction cases this usually was a lengthy procedure.
- Factual witnesses are required to say what they remember happened in relation to the events which have given rise to a dispute.
- Factual witnesses to give their opinion of what the contract states.
- Factual witnesses are not advocates for the party that has called them as witnesses.
- To save time in a hearing, the use of witness statements was introduced where the witness was required to tell the tribunal, in writing, what they would have said if they were giving evidence-in-chief orally.
- Written witness statements are now normal practice in international construction arbitration
- Written witness statements, resulted in hearings being much shorter than they were in the past where common law procedures were adopted.
- Witness statements are usually exchanged well in advance of an evidentiary hearing allowing the parties to plan their respective cases based on the witness statements reducing the element of surprise when a witness said something unexpected whilst giving evidence-in chief.
- These are the obvious advantages of witness statements. However, as Professor Doug Jones says in his written paper:

  "Sadly, they have evolved from a brief recount of a factual witness'

memory of the events, into a combination of legal submissions, comments upon documents that speak for themselves (even those not previously seen by the witness prior to arbitral proceedings), and speculation across many things, including the overarching merits of a dispute."

- Witness statements, almost invariably, are written by the legal team of the party calling the witness. Many practitioners feel that the witness statement train has gone off the rails. The problem is how to get it back on the track.
- Factual witnesses often only asked to give evidence once in lifetime.
  - Many witnesses from the construction industry have little experience of writing succinct reports.
  - Frequently, the language of the arbitration is not their mother tongue but they may be sufficiently fluent in the language of the arbitration to feel they can give evidence in the language of the arbitration.
  - In everyone's interest that such witnesses should be assisted in writing brief statements of what they remember.

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6 Identifying the essential issues

➢ How should the tribunal ensure that the parties identify the essential issues in complex constructions disputes for resolution in the award?

- International Chamber of Commerce rules generally require the parties and the tribunal to agree a list of issues to be determined by the Tribunal within 30 days of the file being received by the arbitrators.
- Some commentators consider this to be too early to agree a list of issues.
- Early agreement of issues is particularly useful if the parties' representatives are not experienced construction lawyers.
- Agreeing a list of issues early allows tribunals to assist the parties to focus on the issues which divide them resulting in more focussed Statements of Case.
- Where the parties have experienced counsel, issues are usually well defined in the Statements of Case. There is no need for a list of issues to be agreed at the first case management conference.

AVOIDING AND RESOLVING COMPLEX CONSTRUCTION DISPUTES & ROLE OF CONSTRUCTION PROFESSIONALS IN COMPLEX CONSTRUCTION DISPUTES

Tan Cheng Hye Johnny

Independent Arbitrator

SIMI & SMC Accredited Mediator

Adjudicator

Johnny obtained his first degree in Architecture from the University of Western Australia. He was a founding partner of LT&T Architects where he practised for almost 30 years. Johnny practises as an independent arbitrator. He is a Past President of the Singapore Institute of Arbitrators (SIArb), having served two terms as President from 2007 to 2011.

Johnny is on the panel of several arbitration centres including SIAC, AIAC, HKIAC, DIAC, SCIA, and LCIA. He is a member of the Advisory Council to the National Commercial Arbitration Centre, Cambodia.

An accredited mediator with SIMI, Johnny is a Principal Mediator with several mediation centres including the SMC, CCPIT/CCOIC Mediation Centre, MHJMC, JIMC (Kyoto), IDDRMI, and SCMC.

An accredited adjudicator, Johnny also sits on the Construction Adjudicator Accreditation Committee (CAAC) and the Singapore Infrastructure Dispute Protocol Advisory Committee.

Johnny has held various positions in the Singapore Institute of Architects (SIA) and served as its Vice-President from 1998 to 2000.

Johnny has been appointed as arbitrator in both institutional and ad hoc arbitration cases. He has also been appointed as adjudicator as well as review adjudicator in several adjudication applications.

1. Construction projects are increasingly complex. Complex construction projects necessarily mean complex planning, voluminous documentation, and complicated overlapping multi-party execution. An oversight or lack of attention at any of these stages can lead to disputes which if not resolved early can escalate into complicated disputes, increased costs and a breakdown in the parties' communication and relationships.
2. Thus, it is to everyone's interest to the extent possible to minimise such conflicts. When they do occur to resolve them early before they escalate into large, complicated claims and counterclaims.
3. This presentation discusses complex construction disputes from three perspectives.
   a. Avoiding and minimising complex construction disputes,
   b. Resolving complex construction disputes, and
   c. Role of construction professionals in complex construction disputes.

Avoiding and minimising complex construction disputes

4. Large construction projects normally involve numerous parties, with thousands of linked activities each dependent on the other, with voluminous documents and a multitude of contractual and technical issues.
5. Any breach of a term of contract by any party to a contract or sub-contract can have ripple effects on the other parties with implications to the completion of the entire project within time and budget leading to conflicts.
6. Unresolved conflicts generally result in complex litigation or arbitration.
7. Parties prefer to avoid conflicts. One could think of several reasons why conflicts should be avoided in construction projects: complex or otherwise. One obvious reason is that future work may depend on present and past relationships. Especially for large complex projects where the contracting parties are likely to be limited to those with the capabilities, experience, and financial resources to undertake such projects. Another is the complexity of technical and financial matters associated with large construction projects. Hence, parties generally seek to avoid construction disputes because it can reduce project profits, damage existing and future relationships with owners, contractors, sub-contractors, suppliers, consultants, and other participants of construction projects.
8. It may be argued that the seeds for construction disputes are sowed long before the parties even enter the contract.

Competitive Nature of Construction Procurement

9. In many large construction projects, the favoured procurement method is competitive in nature. Regardless of whether it is the traditional tender and build, design and build, design build operate and transfer, or public private partnership procurement system, they are all essentially competitive in nature with the best offer being awarded the project.
10. This may lead to an "over promise under delivery" outcome. This is because in

the eagerness to secure the project, bidding parties may under price and over promise the project delivery. Owners and employers on the other hand want to get the best deal they can for their project.

11. As both parties' objective is to maximise profit at the most competitive price, there exists an expectation gap from the inception of the project. Unless this expectation gap is managed realistically, there will be potentials for claims and crossclaims in the course of the project.

Adequate Time for Design and Contract Documentation

12. Next, it cannot be overstated the importance of allowing adequate time for the parties to conduct thorough feasibility studies, explore design options, develop design concepts and preparation of tender documents.

13. Inadequate time during this preparation phase, may eventually result in problems downstream. Faced with time pressure, construction professionals may overlook errors in designs and tender documents. Erroneous design assumptions and details may not be spotted resulting in design changes during construction. This may lead to claims for additional costs. Design and documentation oversights may also cause delays to the construction works. Design errors if not addressed may result in costly rectification works with considerable delays to project delivery. In some instances, they may have serious safety implications.

14. In many instances, where design professionals are faced with inadequate time, they tend to leave the design of construction details to be developed during the construction phase. This can potentially create ambiguities in what the contractors are expected to deliver since the details will not be known until the work is in progress. This can lead to disputes on whether the detailed design constitutes additional works or works that is within the original scope and the detailed design is nothing more than providing additional information to aid the contractor in execution of the works.

15. Further, if these detail design developments are not issued timely, it would also have an impact on the progress of the works with consequential impact on its completion and thereby giving rise to claims for delays and extensions of time, prolongation, and acceleration.

16. Hence, it is essential that sufficient time should be allowed at the pre-contract phase for professionals and builders to thoroughly investigate and explore design options, develop preliminary design concepts into well documented construction drawings that are buildable and cost-effective

Setting Realistic Contract Period

17. Another potential area for dispute is when the contract period is unrealistic.

18. Longer construction time means higher financing cost to a developer. For the contractor, it means higher on-site overheads, preliminary and staff costs. They affect the profit margins. When the completion date is passed, there will be claims and crossclaims for delays, prolongation, and acceleration. Such claims are complex and time-consuming. Construction professionals and their clients should consider carefully before setting the time for completion of the project.

They should consider not just the scope of the works but also the complexity of the project, the constraints the site poses and any other external factors that may have an impact on project delivery. They should also consider whether the works should be phased, and if so, how it should be phased.

19. A shorter construction time does not necessarily result in lower costs. It is a well-known fact that when the contract period is too short, contractors would build into the pricing costs for additional resources (both equipment and labour), overtime work, and in extreme cases even factor in the ascertained liquidated damages they may have to pay in the event the project is not completed on time.

Clear and Fair Allocation of Risks

20. Risk allocation is another factor that needs to be carefully considered.

21. Risk, in the context of construction project, can be defined as *'an uncertain event or set of circumstances that, should it occur, will have an effect on the achievement of one or more of the project's objectives'.*[1]

22. Risk exists as a consequence of uncertainty, and such risk must be managed.[2]

23. Many construction disputes may be avoided if there is clear, unambiguous, and fair allocation of risks. Contracting parties are only able to price in their risks where there is clear, unambiguous, and fair allocation of risks.

24. Often where there is an unequal bargaining power, the one with the greater power has more say in the allocation of risks. Those with less power will have less say in negotiating risk allocation.

25. Common risks in construction projects include weather, unexpected conditions, errors in cost estimating and/or scheduling, delays, financial support, strikes, lockouts, faulty materials, faulty workmanship, faulty designs, operational problems, inadequate plans and/or specifications, natural disasters, *force majeure* and most recently Covid-19.[3]

26. Typically, it is the employer who is in the position to determine the allocation of risks. While it is tempting for employers to allocate all the risks to the contractor, doing so may result in no bid submissions or an increase in cost that makes the project financially non-viable.

27. Generally, in allocating risks in a construction project, the parties should consider the following:[4]

    a. Which party can best control the risk and/or its associated consequences?

    b. Which party can best foresee and bear the risk?

    c. Which party ultimately most benefit or suffer when the risk happens?

---

[1] Simon, Peter, Hillson, David and Newland Ken (1997). "Project Risk Analysis and Management Guide, Association for Project Management", p. 17

[2] Norris, Catriona, Perry, John and Simon, Peter (2018). "Project Risk Analysis and Management Mini-Guide, Association for Project Management", p.4

[3] Larves, Samuel and Huges, Will (2006). "The Price of Risk in Construction Projects" p. 563

[4] Brunni, Neal, (2009) "The Four Criteria of Risk Allocation in Construction Contracts", International Construction Law Review Vol 20 Part 1 p. 6

28. Proper risk identification and equitable allocation of risk is important for the effective, timely and efficient delivery of the project.[5]

29. Standard forms of contract attempt to find a fair and balanced allocation of risks. Tempting as it may be parties are well advised to avoid re-writing the allocation of risks as these standard forms are written such as to balance the risks fairly between the employer, contractor and sub- contractors.

30. Generally, in the absence of bad faith, a contract that balances the risks fairly will lead to a reasonable price, quality performance and minimum disputes.[6]

Close Monitoring and Project Management during Construction

31. No matter how well the contract is drafted, disputes can still occur if project managers and site staff do not follow the contractually agreed protocols. For example, trouble can brew if site staff and project managers do not observe the agreed protocols for work approval, variation orders approval process etc. This means complying with notices and approval requirements and documenting additional costs accurately.

Maintaining an Accurate and Updated Schedule

32. It is almost impossible to assess and determine the impact of delay claims or variations without an accurate baseline program agreed and accepted by all parties at the start of the project.

33. A good baseline program must state not just the planned work schedule and critical paths but must also state the planned resources allocated for the planned work schedule. It serves as a tool for identifying causes of delays early and taking steps to mitigate and minimise them before they lead to potential disputes.

34. When workflow falls behind schedule, the construction program should be regularly updated with planned reallocation of resources and adjustments to the schedules.

35. This can reduce any potential dispute on the effects of Contractor Risk Events versus Employer Risk Events and the effects these have on floats.

Good Record Keeping

36. The importance of thorough documentation cannot be overstated. Taking photographs of periodic stage of work, records of dates and times of instructions, getting signatures for approval forms etc are important. It gives everyone a record of the status of works on site and reduces any "*you say, I say"* disputes.

37. Some see documentation as an ammunition for disputes. On the contrary, its goal is to have accurate contemporaneous record to avoid disputes.

Timely Payment

[5] Shapiro, Bryan KC (2010). "Transferring Risks in Construction Contracts" p.5
[6] Lane, Patrick SC (2005) "The Apportionment of Risk in Construction Contracts", International Conference on Arbitration and ADR in the Construction Industry, Dubai.

38. One of the best ways to avoid disputes is for everyone in the construction chain to make payment timely.

39. Cash flow is the lifeline of every contractor, sub-contractor, supplier, and consultant in the construction chain. Payment delays can crush a company's cash flow. In some jurisdictions, like Singapore, Australia, New Zealand and Malaysia, there is a statutory adjudication regime that ensures that parties that have carried out construction work is entitled to timely payment.

40. While there is no statistically collated data, anecdotally, it is said that statutory adjudication regime has reduced the number of disputes post contract completion.

Resolving Complex Construction Disputes

41. However, despite the best of intentions and applying all the above, complexities and uncertainties in the construction process may still lead to construction disputes. The measures above may at best mitigate and reduce disputes. The next section discusses resolving disputes when they occur.

42. There are several modes for resolution of construction disputes.

43. Most standard forms of construction contracts provide for some form of alternative dispute resolution (ADR). This may be in the form of dispute board, mediation, or arbitration or a combination of such ADR mechanisms.

44. This presentation focuses on arbitration as the alternative dispute resolution for complex international construction disputes. In particular, I will discuss three aspects of arbitration that I believe are particularly relevant to complex construction arbitrations.

Arbitration

45. Arbitration is a consensual contractual dispute resolution mechanism. It is dependent on the existence of an agreement between the parties.[7]

46. Arbitration clauses have been incorporated into standard contracts and are widely used in the construction industry today for both private and public contracts.

47. It is a process wherein opposing parties submit their dispute or conflict for a binding determination by a sole arbitrator or an arbitral tribunal. It is conducted in accordance with procedural rules set out in established arbitration centres such as ICC, SIAC, HKIAC and VIAC.

48. A key advantage in arbitration is the principle of party autonomy and flexibility.

Picking the Tribunal

49. Party autonomy allows the parties to nominate and appoint their arbitrators and if not agreed then the selected appointing body appoints.

50. Parties in a complex construction arbitration should take advantage of this and pick the right arbitrator to fit the nature of their dispute. Where the dispute involves complex legal issues, nominate a lawyer arbitrator with experience in

[7] Battelle, A. E, and Dettman, K. L. (1993). ''Alternate dispute resolution at the central artery/tunnel project.'' Construction Superconference, November 11, 1993, San Francisco.

construction disputes. Where the dispute involves complex technical issues, then parties should consider a technical arbitrator with relevant expertise, competent in arbitration procedural rules and law and construction law.

51. In arbitrations where the arbitration agreement provides for a tribunal of three, there is an even stronger case for parties to have a tribunal with mixed disciplines in construction and the law.

52. Unfortunately, invariably when one party nominates a lawyer or a KC, the other party would likewise nominate another lawyer or KC, and between them, they would nominate another lawyer or KC.

53. In my view, it cannot be overstated that parties should take advantage of the principle of party autonomy to pick the right arbitrator for the nature of dispute.

Expert Witness & Hot-tubbing

54. I now turn to the principle of flexibility in arbitration.

55. Flexibility in the hands of an experienced arbitrator would allow the arbitrator to choose procedure that is most suitable for the nature of the disputes.

56. Many construction arbitrations involved evidence from construction professionals involved in the project as well as independent experts appointed by the parties to provide expert opinions. Often tribunals would hot-tub experts to hear them simultaneously rather than sequentially to better understand the areas where they disagree and the reasons for their disagreement.

57. When hot-tubbing is coupled with industry experts on the tribunal, it allows for a more robust discussion of the technical issues in dispute. The technical professionals on the tribunal would greatly assist the tribunal to explore and discuss the views of the experts and come to a better understanding of their differing opinions.

Multi-party arbitrations

58. Another common feature of the construction industry is the existence of chain contracts between employers and contractors and contractors and sub-contractors, and sub-contractors and sub-sub-contractors and so on. In disputes that involve multiple chain contracts, to save time and costs and to avoid inconsistencies in outcome, it may be desirable for such multi-party arbitrations to be consolidated and/or joined.

59. Most major complex construction contracts would use one of the standard forms of contract which would have standard arbitration agreements incorporated into the contract. It is important that parties provide in the arbitration agreement an institutional arbitration rule that provides for multi-party arbitration. (See ICC Rules Art. 9, VIAC Rules Art. 6)

60. However, some sub-sub-contracts maybe bespoke contract, in such instances the parties drafting such bespoke contract should incorporate into the contract an arbitration agreement that is compatible with the main contract that allows for consolidation and/or joinder of multi- parties.

Roles of Construction Professionals in complex construction disputes

61. I now turn to the role that construction professionals can play in complex construction disputes. By construction professionals, I am referring not only to consultants and the parties' professional staff on the job but also third-party neutrals.

Factual Witness

62. Construction professionals and project consultants on the job are best placed to give factual accounts of events.

63. In order to do this accurately and well, the importance of thorough documentation cannot be overstated. As discussed in the previous section, an accurate record of events when they occur will reduce any "*you say, I say"* of an account of events at the arbitration hearing.

64. The goal is to have an accurate contemporaneous record to assist tribunals to make findings of facts. Where these are well documented, the documents speak for themselves and the need for oral evidence will be reduced with considerable savings in time and costs.

Expert Witness

65. Another role that construction professionals can play in complex construction disputes is to provide expert opinions on the issues in dispute.

66. Very often disputes occur because the professionals involved in the project do not share the same views on a particular technical issue or the way the contractual documents ought to be interpreted or whether the method of construction applied is the correct method. This is where the view of an independent impartial expert is helpful to the tribunal.

67. Such experts owe a duty to the tribunal to assist the tribunal to understand the issues and come to a decision. Although they are engaged and instructed by the parties and/or the counsel for the parties, their duty is to be to the tribunal and not to the party who appoints them.

68. Tribunal are more likely to give more weight to the evidence of experts who do not act as advocates for the parties who appoint them.

69. Unfortunately, in many arbitrations tribunals have to deal with experts who act as *"hired guns"* and act as advocates for the parties who appoint them. This happens when parties go *"expert shopping"* and look for experts who hold the view that supports their case.

70. Another problem that tribunals encounter is when the experts are not the authors of their own reports. A syndrome, I call the "*the singer, not the song-writer"* where the experts reports are produced by someone from their office or worse when the reports are produced by counsel after an interview with the experts.

71. Such problems may be reduced, if experts are instructed to produce a joint report stating their areas of agreement before they produce their own respective reports stating the areas where they agree and disagree and the reasons for the disagreement. This will to some extent reduce the potential for someone to produce the joint report for them. Another advantage of producing a joint report

before their individual reports is that they are more likely to agree with a fellow expert before they put in writing their own respective views. I have found that once an expert has expressed his view, he more unlikely to concede to the views of his fellow expert than if they were given an opportunity to have a joint meeting and produce a joint report before producing their respective report.

Arbitral Tribunal

72. Lastly, construction professionals with their industry expertise can add value to the arbitral process either as sole arbitrators and/or as members of an arbitral tribunal.

73. I would urge construction professionals to consider a career in arbitration. Your industry expertise will help the parties to crystalise the issues in dispute through the eyes of an independent and impartial third-party adjudicator of their disputes.

74. Having construction professionals on the tribunal will greatly assist the tribunal to separate the wheat from the chaff when reviewing the experts' reports and evidence. Experts are more likely to provide a more balanced impartial view when they know that there is another expert on the arbitral tribunal.

75. The tribunal would also be assisted by an experience construction professional during the hot- tubbing and the tribunal deliberations.

Conclusion

76. Let me conclude by sharing the results of surveys conducted by Queen Mary University of London (**"QMUL"**). In a 2019 International Survey by QMUL (in partnership with Pinsent Masons) on international construction disputes, it found that 63% of respondents stated that having technical knowledge of construction disputes is a consideration for arbitrator selection. Similarly, in the 2022 Energy Arbitration Survey by QMUL (in partnership with Pinsent Masons) 76% of respondents identified the technical expertise of the arbitrators as the most important procedural element.

77. However in a 2021 survey QMUL (in partnership with White & Case LLP) found that less than a third of respondents believed that there has been progress made in respect of diversity in the selection of arbitral panel.

78. Why has there been little progress made in appointing tribunals with diverse professional backgrounds. I offer three possible reasons:

    a. It is difficult to attract construction professionals with successful practice to move out of their comfort zone into a new area of practice where they are not sure of getting regular appointments.

    b. Most arbitration institutions require that applicants to their panels must demonstrate having written three awards. If these professionals would have to be first on a panel and be appointed as arbitrators before they can produce any award to support their applications. This is a chicken and egg problem that need to be resolved before we will see more construction professionals appointed as arbitrators.

c. Finally, parties to rely on their counsel to nominate potential arbitrators as their party nominated/appointed arbitrator. As observed earlier, there is a trend for counsel for the parties to nominate and appoint as party arbitrators, lawyers they are familiar with and such party nominated arbitrators tend to nominate and appoint another lawyer as the chair of the tribunal.

79. In conclusion, although arbitration was initially thought to be an inexpensive, efficient, prompt, private and informal process with decisions made by experienced industry professionals. Today, there is growing disagreement whether it is a speedy, economical process as once thought to be. This is particularly true for complex construction arbitrations with their high technical complexity, large amounts of evidence, multiple claims or parties and large sums in disputes.

80. There is a growing trend towards a hybrid Arb-Med-Arb procedure where arbitration is commenced, then stayed to allow the parties to resolve their disputes through mediation. If mediation results in a settlement agreement, that settlement agreement may be recorded as a consent award which is generally accepted as an arbitral award and enforceable under the New York Convention. If mediation does not result in a settlement or a partial settlement, then the remaining dispute can transition seamlessly back to arbitration.

81. An example of such a scheme can be found in the SIAC-SIMC Arb-Med-Arb Model Clause.[8] VIAC has a similar Arb-Med-Arb protocol.[9]

82. Thank you.

[8] https://siac.org.sg/the-singapore-arb-med-arb-clause
[9] https://www.viac.vn/en/arb-med-arb-protocol

PHIÊN 2: BÁO CÁO VỀ TRỌNG TÀI TRONG LĨNH VỰC XÂY DỰNG CỦA ỦY BAN ICC VỀ TRỌNG TÀI VÀ CÁC PHƯƠNG THỨC GIẢI QUYẾT TRANH CHẤP THAY THẾ

PANEL 2: ICC ARBITRATION AND ADR COMMISSION REPORT ON CONSTRUCTION INDUSTRY ARBITRATIONS

Moderator

Abhinav Bhushan
International Arbitrator,
Member & Chief Executive for Asia at 39 Essex Chambers,
former Director for South Asia at ICC International Court of Arbitration

Abhinav is the Chief Executive for Asia for 39 Essex Chambers and is based out of Singapore. He is also a Member & International Arbitrator at the Chambers. He regularly acts as an arbitrator in domestic & international arbitrations and is a member of panel of arbitrator at various international arbitration institutions (for instance, SIAC, AIAC, SHAC).

Prior to joining the Chambers, Abhinav served as Regional Director for South Asia, ICC Arbitration & ADR at the ICC International Court of Arbitration in Singapore (ICC Court). As Director, he focussed on helping companies, investors, and attorneys in the Region understand how they can efficiently resolve international commercial disputes by raising their awareness on the ICC's Dispute Resolution Services and its commitment to international arbitration, the procedure, and thought leadership. Prior to serving as Regional Director, he was also the first Indian Deputy Counsel of the ICC Court in Paris, France, where he gained first-hand experience working on arbitrations arising out of common law jurisdictions, in particular working with parties from the United Kingdom, India, Singapore and other regions of Asia.

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ADR FOR PREVENTION, MANAGEMENT AND SETTLEMENT OF DISPUTES ON CONSTRUCTION INDUSTRY IN VIETNAM

Nguyen Manh Dzung

Senior Partner at Dzungsrt & Associates LLC

Mr Nguyen is a senior partner of Dzungsrt & Associates LLC and the Director of ADR Vietnam Chambers LLC.

Mr Nguyen was an editorial member of the Drafting Committees of the Law on Commercial Arbitration in 2010, the Governmental Decree no. 22/CP on Commercial Mediation and the guiding documents, and Civil Procedure Code 2015 on recognising and enforcing foreign arbitral awards and mediated settlement agreements.

He was the co-founder and vice president of the Pacific International Arbitration Center (PIAC) and is now listed as an arbitrator of the Vietnam International Arbitration Center (VIAC), the Korean Commercial Arbitration Board (KCAB International), Hainan International Arbitration Court (HIAC), Shanghai Arbitration Committee (SHAC) and Hong Kong International Arbitration Center (HKIAC), as well as an accredited mediator on the panels of Vietnam Mediation Center (VMC), Mainland Hongkong joint mediation centre (MHJMC), Japan International Mediation Center of Japan (JIMC Kyoto) and HIAC International Mediation Center of China.

He is the first Vietnamese Member of the ICC International Court of Arbitration and ICC Task Force on ADR and Arbitration. He is a frequent speaker on arbitration and mediation for the Supreme People's Court, the Ministry of Justice and the Vietnam International Arbitration Center (VIAC). He has published many publications on arbitration in Vietnam for the ICCA, Global Arbitration Review (GAR), the World Arbitration Reporter (WAR) and the IBA, etc.

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DZUNGSRT & ASSOCIATES

ADR FOR PREVENTION, MANAGEMENT AND SETTLEMENT OF DISPUTES ON CONSTRUCTION INDUSTRY IN VIETNAM

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KEY ISSUES

01 INTRODUCTION
02 PROACTIVE CONFLICT MANAGEMENT
03 ASSISTED CONFLICT MANAGEMENT
04 FACILITATING SETTLEMENT IN ARBITRATION
05 RECOMMENDATIONS

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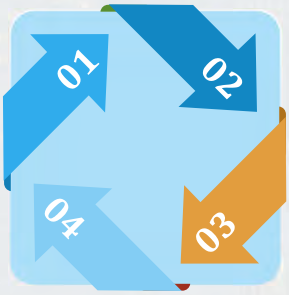
1. INTRODUCTION OF ADR IN CONSTRUCTION INDUSTRY

DISPUTE ADJUDICATION BOARD (DAB)



MEDIATION

EXPERT

COMBINED ADR: MED-ARB/ARB-MED-ARB

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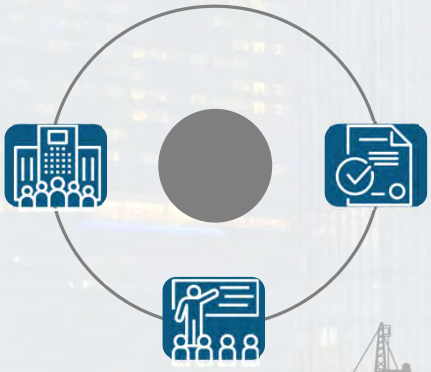
2. PROACTIVE CONFLICT MANAGEMENT

1. Internal Company policies and procedures



2. Effective dispute resolution clauses

i, effective drafting dispute resolution clause

ii, early-stage pre-action risk assessment

3. Raising awareness and training.

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3. ASSISTED CONFLICT MANAGEMENT

DISPUTE BOARDS

EXPERT PROCEEDINGS

MEDIATION

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4. ASSISTED CONFLICT MANAGEMENT

DISPUTE BOARD

- encourage the parties to overcome it on their own.
- If this is impossible, the dispute board can:

a. intervene with informal assistance to help the parties resolve the matter by agreement, or

b. determine a dispute through a recommendation or a decision issued after a procedure of formal referral.

EXPERT PROCEEDINGS

- Providing a non-binding evaluation to the parties on one or more issues in dispute
- Providing a binding expert determination on one or more issues in dispute
- Providing an expert opinion for use in arbitration or litigation

MEDIATION

- Effective tool in dispute settlement
- Recently, be included in multi-step dispute resolution clause
- Assist parties to mediate or reach a mediation agreement without arbitration and court's proceedings

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5. FACILITATING SETTLEMENT IN ARBITRATION

Case Management Techniques

- ❖ CMC is the idea time for the tribunal to include steps providing for efficient management of the proceedings as well as facilitate settlement
- ❖ Bifurcation can be used based on case-by-case basis (liability and quantum issues)

Mediation

- ❖ By the parties
  - ✓ Using a multi-tier clause.
  - ✓ Should be made at the contract drafting and negotiation
- ❖ By the arbitral tribunal
  - ✓ Is there an obligation for the tribunal to raise the possibility of a mediation option
- ❖ By the arbitral institution
  - ✓ Should offer both arbitration and mediation services in which they administer a mediation concurrently with the arbitration

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6. RECOMMENDATIONS

01

CONTRACTORS/ INVESTORS

- Involving counsels' participation in the early stage
- Apply proactive conflict management such as internal company policies, training, etc.

02

EXPERT

- Involving experts at early stage could benefit parties when they decide what approach to take to the resolution of the dispute
- Avoid the conflict of interest in the arbitration proceeding (be appointed to be an arbitrator)

03

COUNSEL

Need to improve not only skills in arbitration proceedings but also mediation skills to provide advices at different stage of proceedings

04

ARBITRATOR

Should encourage parties to use mediation in CMC

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7. REFERENCE

1. ICC Task Force "ADR and Arbitration" Commission Report (to be published by ICC Commission in May)
2. ICC Mediation Guidance Notes, https://iccwbo.org/content/uploads/sites/3/2014/12/icc-mediation-guidance-notes-english.pdf
3. Centre for Effective Dispute Resolution (CEDR), "Final Report of CEDR Commission on Settlement in International Arbitration", November 2009, p. 9 -10 accessed at https://www.cedr.com/wp-content/uploads/2021/04/Arbitration-Commission-Document-April-2021.pdf
4. ICC Note to Parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of arbitration, https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf
5. The IMI Arbitrator Techniques Report, https://imimediation.org/2021/05/04/arbitrator-techniques-and-their-direct-or-potential-effect-on-settlement/

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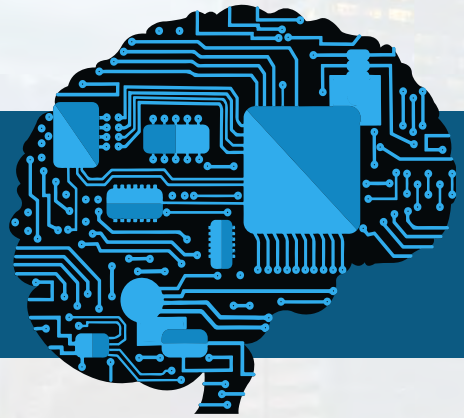

Q&A

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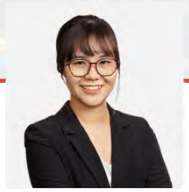

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ICC COMMISSION REPORT CONSTRUCTION INDUSTRY ARBITRATIONS RECOMMENDED TOOLS AND TECHNIQUES FOR EFFECTIVE MANAGEMENT

Lynette Chew
Partner and Co-Head of Infrastructure Construction and Energy Disputes, CMS Singapore

Lynette Chew is a Partner and a Co-Head of Infrastructure Construction and Energy Disputes practice in the CMS Singapore. Lynette's key specialisations are infrastructure, construction and energy projects, where she offers both contentious and non-contentious advice. Lynette's contentious work involves litigation, arbitration, adjudication and mediation. In almost 30 years of practice in disputes resolution, Lynette has successfully represented clients in many high-profile matters and before the Singapore High Court and the Court of Appeal, as well as in arbitrations administered by the SIAC and ICC. She provides advice throughout the project cycle, as well as on risk management in the areas of workplace safety, project insurance coverage, and claims in builders' and contractors' risk policies.

Lynette is recognised as a leading individual by Chambers and Partners Asia Pacific for Construction and by Who's Who Legal for Hospitality. She has also recently been appointed to the Panel of Arbitrator and Panel of Mediators for the Asian International Arbitration Centre (AIAC) for 2022-2025, and is the only female Senior Accredited Specialist for Building and Construction in Singapore.

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ICC COMMISSION REPORT
Construction Industry Arbitrations
Recommended Tools and Techniques for Effective Management

LYNETTE CHEW
Partner, Co-head Infrastructure Construction Energy Disputes, CMS Singapore
Senior Accredited Specialist (Building & Construction), Singapore Academy of Law

CMS law·tax·future

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KEY ISSUES/NỘI DUNG

Part 1: Composition of Arbitral Tribunal
Part 2: Terms of Reference (TOR)
Part 3: Case Management Conference
Part 4: Procedural Orders

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IMPORTANCE OF COMPOSITION OF TRIBUNAL

- Broad power to determine procedural rules of the arbitration, including the manner in which evidence is to be presented and dealt with
- Arbiter on substantive issues and the merits of the action, with limited scope of appeal, if any

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COMPOSITION OF THE ARBITRAL TRIBUNAL

- Sole arbitrator vs 3-member tribunal
- Familiarity with the industry, cultural nuances and language capabilities
- Availability of the arbitrator
- Familiarity with relevant law and/or main legal traditions
- Strong case management skills
- "Balanced" tribunal
- Diversity

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TERMS OF REFERENCE

- Should include:
  - Jurisdiction of the tribunal, arbitration agreement;
  - Full names and description of the parties and arbitrators in addition to the place of arbitration (***Article 23(1)(a), (e) & (f) ICC Rules***);
  - Summary of the parties' respective claims and defences and the relief sought (***Article 23(1)(c) ICC Rules***); and
  - List of issues to be determined by the tribunal (if possible)

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TERMS OF REFERENCE - SUMMARY OF CLAIMS/DEFENCES

- ***Article 23(1)(c) ICC Rules***: TOR to include a summary of the parties' respective claims/defences and of the relief sought by each party
- ***Article 23(4) ICC Rules***: No party may make new claims which fall outside the limits of the TOR unless authorised to do so by the tribunal
- Tribunal must strike a balance in the summary by setting out the claims/defences accurately without being too precise
- In large construction projects, a party may not be in a position to refer all its claims to arbitration at once and the same time
- In such cases, it should be acceptable to allow the party to include in the TOR a list of the claims which it would have the right to submit into the arbitration in future

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TERMS OF REFERENCE - LIST OF ISSUES

- ***Article 23(1)(d) ICC Rules***: TOR to include list of issues to be determined, unless the tribunal considers it inappropriate
- Conflicting considerations:
  - In major engineering and construction cases, the parties' positions may not be sufficiently developed at the outset to prepare a useful list of issues
  - Tribunal needs to ensure that detailed submissions are made early on to avoid the situation in which the true issues only emerge at the hearing or immediately before it
- Tribunal to strike a balance between the above two considerations

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TERMS OF REFERENCE

- Seat, language and governing law of substantive law
- Ascertain mandatory requirements of the *lex fori*
- ***Article 23(1)(g) ICC Rules***: TOR to include particulars of applicable arbitration procedural rules
- Party representation and experts

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CASE MANAGEMENT CONFERENCE

- The first CMC will result in the first procedural order and the procedural timetable
- Matters to consider at first CMC:
  - Procedure for filing of respective parties' cases accompanied by evidence
  - Need for expert evidence, whether to defer expert evidence till factual evidence is adduced;
  - Need, if any, for tests and a site visit;
  - Need, if any, to split the case and the possibility of resolving certain issues by way of partial awards or procedural decisions;
  - Document management, including translation requirements and interpretation issues;

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CASE MANAGEMENT CONFERENCE

- Practical procedural timelines and procedure/ limits on production of documents and applications before tribunal; pre-hearing documents and electronic presentation of evidence
- Incorporate guidelines or standards for taking evidence, e.g. IBA Rules on the Taking of Evidence in International Arbitration; CIArb Guidelines for Witness Conferencing in International Arbitration
- oral hearing schedule (whether virtual or in person to be determined) and transcription requirements, witness sequence, procedure & sequestration
- Restrictions on new documents and new witnesses
- Procedural Order with timetable to be drawn up separately from TOR

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ICC ARBITRATION AND COMMISSION REPORT CONSTRUCTION INDUSTRY ARBITRATIONS RECOMMENDED TOOLS AND TECHNIQUES FOR EFFECTIVE MANAGEMENT (2)

Devathas Satianathan

Partner at Rajah & Tann Singapore LLP

Devathas graduated as valedictorian of the class of 2013 at Singapore Management University and started his legal career as a Justices' Law Clerk at the Supreme Court of Singapore. He joined the arbitration and construction practice in Rajah & Tann Singapore LLP in 2016 and has acted in, and advised on, HKIAC, ICC, JCAA, LMAA, and SIAC arbitration proceedings, court-related arbitration matters, SICC proceedings and general litigation with an energy, infrastructure and construction focus. He is a CIArb fellow and was an assessor under the COVID-19 Temporary Relief legislation.

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Construction Industry Arbitrations
Recommended Tools and Techniques for Effective Management (2)

Devathas Satianathan
Partner, International Arbitration, Construction & Projects, Rajah & Tann Singapore LLP
Fellow of the Chartered Institute of Arbitrators

RAJAH & TANN

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ISSUES

Part 5: Procedural Rules and Procedures

Part 6: Splitting a case

Part 7: Documents and document control

Part 8: Fact Witnesses and Experts

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BUỔI CHIỀU - KHÁN PHÒNG 1

PHẦN A: NHÂN CHỨNG CHUYÊN GIA TRONG TRỌNG TÀI XÂY DỰNG

AFTERNOON - BALLROOM 1

SECTION A : EXPERT WITNESS IN CONSTRUCTION ARBITRATION

PHIÊN 1A: VAI TRÒ CỦA NHÂN CHỨNG CHUYÊN GIA TRONG TRỌNG TÀI XÂY DỰNG

PANEL 1A: ROLE OF EXPERT WITNESS IN CONSTRUCTION ARBITRATION

Moderator | **Minh Le**
Associate Director of J.S. Held LLC

Mr. Le Cong Minh is a senior construction delay and disruption consultant at JS Held Singapore, a company specialised in providing expert witness services. He has extensive experience in assisting clients with dispute resolution and planning matters including construction scheduling, delay, and disruption analysis under various arbitral bodies.

In Vietnam market, he was involved with the delay and disruption analysis for the international arbitrations of several major construction projects, especially in the energy sector. He also has experience working on projects located in other Southeast Asia countries, Middle East, China, Australia, Nigeria, Norway, and Poland.

Minh holds a Bachelor's Degree in Civil Engineering from Nanyang Technological University, Singapore and Master's Degree in Construction Project Management from University of New South Wales, Australia. He is also a member of SCL, CIArb, SIArb, AACE International, and Institute of Engineer.

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Roles of Expert Witness in Construction Arbitration
Vai trò của Nhân chứng Chuyên gia tại Tòa trọng tài XD


Moderator: Minh Lê


Speaker: Suraj Sajnani


Speaker: Risheq Hamzah


Speaker: Simon Elliot

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PANEL DISCUSSION / THẢO LUẬN

What is the advantage of an independent expert's evidence over those by parties' technical employees?

So sánh giữa bằng chứng chuyên gia và ý kiến của nhân viên kỹ thuật?

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VIAC
PANEL DISCUSSION / THẢO LUẬN
What are the potential risks and benefits of using joint or tribunal-appointed experts in construction arbitration cases?
Lợi ích và rủi ro của việc bổ nhiệm chuyên gia chung hoặc chuyên gia bổ nhiệm bởi HĐTT?
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PANEL DISCUSSION / THẢO LUẬN
How important is effective communication between the expert witness, the legal team, and the tribunal? and what are some strategies for achieving this?
Tầm quan trọng của việc giao tiếp hiệu quả giữa chuyên gia, luật sư, và HĐTT?
Một số phương pháp để đạt được điều này?
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PANEL DISCUSSION / THẢO LUẬN
How can parties effectively cross-examine an expert witness in international construction arbitration? and what are some common tactics used by legal teams in doing so?
Cách thức thẩm vấn chéo chuyên gia một cách hiệu quả tại phiên xử tòa TT?
Một vài phương pháp phổ biến được áp dụng bởi đội ngũ Luật sư?
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PANEL DISCUSSION / THẢO LUẬN
Is it necessary to appoint an expert for any contentious technical issue?
Có cần thiết phải bổ nhiệm chuyên gia cho mọi vấn đề kỹ thuật đang tranh chấp?
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DOS AND DON'TS AS AN EXPERT WITNESS

Risheq Hamzah

Senior Director of Kroll

Hamzah is a Senior Director within Kroll's construction expert services team and is based in Singapore. He has assessed delay and been involved with the arbitral process and worked on some of the largest offshore oil and gas and energy projects in the world.

Hamzah is ranked as a future leader construction expert by Who's Who Legal, the prominent global expert rating organisation. Hamzah is distinguished as "a smart individual who approaches tasks in a sensible and intelligent way".

Prior to starting his career in dispute resolution Hamzah acted as a senior engineer and project manager for Petrofac delivering a wide range of offshore and onshore oil & gas projects around the world, and has acquired experience in all stages of a project's life cycle, including Conceptual, FEED, Detailed Design, Construction, as well as Integrity Monitoring. He specialises in delay and disruption in technically challenging projects.

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Dos and don’ts as an Expert Witness

Hamzah Risheq

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Honour your Duty

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Van Oord v Allseas [2015] EWHC TCC

"[the expert's] abrupt departure from the witness box at a short break for the transcribers, never to return, was an indication of the stress he was under. But I regret to say that I came to the conclusion that his evidence was entirely worthless. There were twelve different reasons for that conclusion.

Firstly, I find that [the expert] repeatedly took OSR's pleased case at face value and did not check the underlying documents that supported or undermined them…

…

Seventhly, he repeatedly accepted that parts of his reports were confusing and accepted on more than one occasion that they were positively misleading."

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Write for the Reader

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1. Concise

2. Structure your report

3. Avoid using complicated words and jargon

4. Use of tables, charts and images where possible

5. Illustrate with examples.

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Focus on the Issues in Dispute

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Know your Report

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Hirtenstein v Hill Dickinson (2014) EWHC 2711

"At the end of [the Expert's] evidence, I offered him the opportunity to provide an explanation to the court before the end of the trial of how an appendix had come to be included as part of his report of which he claimed to have no knowledge. [the Expert's] did not take up that opportunity, and I can therefore only infer that there is no explanation which exonerates [the Expert's] of incompetence. On his showing in this case I do not consider that he is a fit person to act as an expert witness."

Skanska Construction UK Ltd v Egger (Barony) Ltd (2004] EWHC 1748

"[The Expert] produced a report of some hundreds of pages supported by 240 charts. It was a work of great industry ... There were times when the impression was created that [he] was not entirely familiar with the details of the report, which he signed and presented ... There were pressures of time upon him. This and the extent of reliance upon the untested judgment of others in selecting and characterising the data for input into the computer programme, however impeccable the logic of that programme, adversely affects the authority of the opinion based upon such an exercise"

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LEVERAGING THE EXPERT'S ROLE IN CROSS-EXAMINATION

Simon Elliot

Partner at Three Crowns LLP

Simon provides advice and representation in commercial and treaty proceedings conducted under the rules of the major arbitral institutions and ad hoc, and in pre-arbitration dispute resolution processes. His practice has a particular focus on disputes arising out of large infrastructure and major projects involving disputed technical, delay, and quantum-related issues.

Simon is described by The Legal 500 as a "rising star" and clients laud his "impressive ability to deep dive into highly complex, technical issues" and turn them into "elegant and powerful arguments."

Simon holds an LLB (First Class Hons) and a BA (French). He is admitted in New Zealand, England and Wales, and France.

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Leveraging the Expert's Role in Cross-Examination

SIMON ELLIOT

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KEY ISSUES

Part 1/Role
Part 2/Independence
Part 3/Qualifications
Part 4/Instructions
Part 5/Assumptions

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

ROLE

THE CHAIRMAN: So you think that there is a possibility that there was a, I suppose there is a possibility that there was another, contract entered into around the same time with the same [c]ompany?

A. Again, that's why I'm saying I need to check all the documents.

THE CHAIRMAN: Well, why haven't you done that? Because you are here to give evidence to us.

A. But not on this. This came after. It was not part of my report.

THE CHAIRMAN: You haven't seen this?

A. No, I saw later on. Very lately.

THE CHAIRMAN: But you saw it -- but did you read this before the hearing?

A. Yes, I discussed it and read it.

[...]

THE CHAIRMAN: Yes, thank you. So it is your responsibility to assist the Tribunal and if there are documents relating to -- or other materials relating to the evidence that you are going to be examined on, you should be prepared so that you can answer. From the Tribunal's perspective it is quite unsatisfactory that you say you need time now to go away and consider it again.

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INDEPENDENCE

Q. How long before your report was filed were you approached by [Company X] to work on this case?

PROFESSOR [Y]: I think I became involved in the first discussions regarding this matter perhaps 2008 or 2009 but it was a long time ago.

Q. When you first were involved in these discussions, sir, about the case, was that in the context of advice that you were giving to [Company X]?

PROFESSOR [Y]: Yes.

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Qualifications

Q. Let me ask you some questions about your experience so we can get a handle on exactly what you are bringing to bear on these problems.

[...]

Q. You have never been responsible for designing temporary drainage for a construction project before, have you?

A. No, I have not.

Q. You have been involved in handover processes at the end of refinery mechanical works; yes?

A. I have, yes.

Q. You would be well placed to enter into the substance of some of the handover problems on this job?

A. I think so, yes.

Q. Let's look at what you actually did in your analysis and see how you applied your expertise.

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Qualifications

A. ... It's completely impractical and it's not done in industry.

Q. You say that with a great deal of force --

A. I do.

Q. -- not having done this yourself?

A. Correct. I've been on construction sites.

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Qualifications

Q. How did you apply your deep expertise in refineries when you were doing your counting and presenting the statistics in the tables?

A. It's a statistical analysis. There's no refinery experience requirement. It's what was the turnover notice date, what was the PLI, what was the characterisation of the PLI, when was the PLI closed?

[...]

Q. Let me ask you: why are you -- and I'm going to say this to you, you are a man of remarkable experience in refinery operations?

A. Thank you.

Q. I acknowledge that. But what you are presenting in this report doesn't involve any substance, it's just counting and statistics, so why are you doing this?

A. I've lowered myself, I guess. I don't know.

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Instructions

Q. And then in your second report, as we saw yesterday, at page 4, you were asked -- this is again in Section 3.1 -- to write an expert witness report and a report in rebuttal to [Contractor's] statement of defence, witness statements, and expert reports. That's right?

A. Correct.

Q. I think it is fair to say that that is potentially a broad scope?

[...]

Q. So I take it that you made some choices about what you were going to address. Did you make those choices yourself?

A. I did.

[...]

Q. And then in your third report, I looked in Section 3.1, but there wasn't really much information on what you were asked to do there. Can we take it that it was just generally a broad mission of rebuttal?

A. Correct.

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Assumptions

Q. So, for the purpose of your calculation, you just took the average load density for the hospital as a whole?

A. I did.

Q. Which is 60 VA per metre squared?

A. Yes.

[...]

Q. Yes . Now, you agree that mechanical plant areas have a much lower load density than other areas of the hospital?

A. I do.

Q. So if the omitted areas were mechanical plant areas, you would want to apply a much lower load density value than 60 VA per metre squared, for example?

A. Yes , yes - - well , yes, okay, yes, much lower.

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Q&A

Xin trân trọng cám ơn Quý vị đã chú ý lắng nghe!
Thank you!

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EXPERT WITNESSES: WHO, WHAT, WHY, HOW?

Suraj Sajnani

Senior Associate, King & Wood Mallesons

Suraj is a Senior Associate in the Dispute Resolution team of King & Wood Mallesons, specialising in international arbitration and litigation. He is based in our Singapore office, working across both our Singapore and Hong Kong arbitration and litigation practices. He is dual qualified in England & Wales and Hong Kong. He is fluent in English, and speaks conversational-level Cantonese, Hindi and Sindhi.

Suraj has deep expertise in resolving construction disputes. He has acted on some of the most iconic and impactful projects across South-East Asia, and in Hong Kong and Macau. These include government infrastructure projects, airports, casinos, museums, power-plants, railways, universities and entertainment attractions. He has experience in acting for government and private-sector employers, main contractors, and sub-contractors. He has counseled clients on dispute avoidance strategies, seen matters through early successful settlements, and also through to asset enforcement. He enjoys doing his own advocacy and has appeared in international arbitration and High Court proceedings.

As a thought-leader in his practice areas, Suraj is the Editor of the firm's International Arbitration Blog. He is also a chapter author of Recognition and Enforcement of Foreign Arbitral Awards, the Encyclopedia of Forms and Precedents on Dispute Resolution, Arbitration in Hong Kong: A Practical Guide and the Annotated Arbitration Ordinance. He has contributed to over 50 publications and panels.


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Expert Witnesses: Who, What, Why, How?
Suraj Sajnani
King & Wood Mallesons, Singapore and Hong Kong
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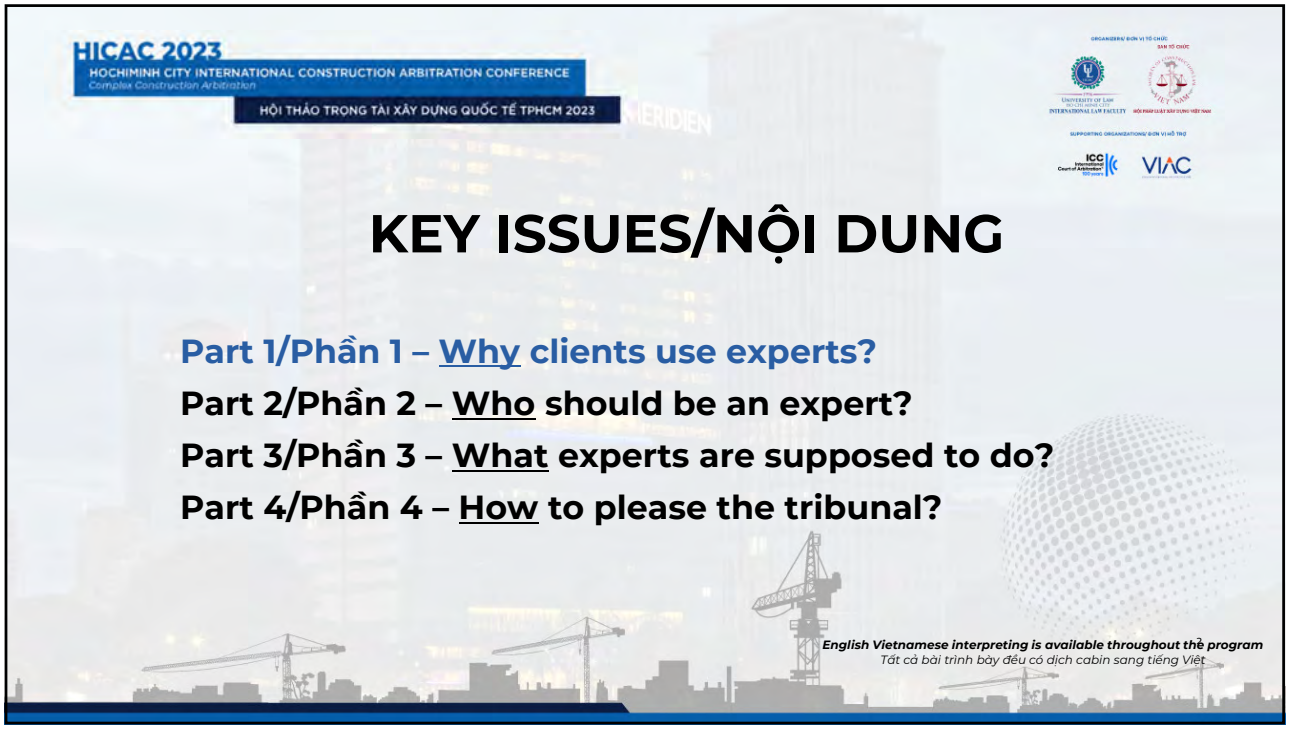
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KEY ISSUES/NỘI DUNG
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Part 2/Phần 2 – Who should be an expert?
Part 3/Phần 3 – What experts are supposed to do?
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Why Clients use Experts?

Test: Balance of Probabilities

Evidence				Argument	
Documentary	Physical	Oral Factual	Expert opinion	Facts	Law

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What is the Purpose of Expert Witnesses?
MỤC ĐÍCH CỦA NHÂN CHỨNG CHUYÊN GIA LÀ GÌ?

- Provide assistance to the Tribunal
- Independence!
- Based on expert's opinion
- Usually on a complicated technical matter
- Common experts:
  - Quantum
  - Delay / programming
  - Specific technical areas, e.g. electrical, waterproofing, tiling, steel, etc

- Hỗ trợ cho Hội đồng trọng tài
- Tính độc lập!
- Dựa trên ý kiến của chuyên gia
- Thường về một vấn đề kỹ thuật phức tạp
- Thông thường cần các chuyên gia về:
  - Định lượng
  - Tiến độ thi công
  - Các lĩnh vực kỹ thuật cụ thể, ví dụ: điện, chống thấm, ốp lát, thép, v.v.

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Who Should be an Expert?

- Relevant expertise
- Sufficient time working "in the field"
- Previous testimony / experience as an expert?

- Có kiến thức chuyên môn liên quan
- Có kinh nghiệm làm việc thực tế
- Có kinh nghiệm làm chứng đối chất tại tòa

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Types of Experts
Các loại chuyên gia

- Party-appointed experts
- Single joint expert
- Tribunal-appointed expert

- Chuyên gia do các bên chỉ định
- Chuyên gia chung duy nhất
- Chuyên gia do Hội đồng trọng tài chỉ định

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Duties to Tribunal
Các nghĩa vụ đối với tòa án

Voluntary and mandatory sources

"The experts should be instructed by the parties that their overriding duty is owed to the tribunal and not to the instructing party."

Các nguồn tự nguyện và bắt buộc

"Các bên cần cho nhân chứng chuyên gia biết rằng nghĩa vụ trên hết của họ là đối với Hội đồng trọng tài mà không phải đối với các bên đưa ra yêu cầu."

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Role of the Expert
Vai trò của chuyên gia

- Don't be a hired gun
- Don't argue the client's case
- Assist the Tribunal

- Không phải là một chuyên gia "đánh thuê"
- Không tranh luận về vụ việc của khách hàng
- Hỗ trợ Hội đồng trọng tài

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Role of the Expert
Vai trò của chuyên gia

Don't simply rely on documents / analysis provided by the client…

"The Tribunal can find no explanation of this item in Mr. [Expert's] reports and thus it is not supported by expert evidence. The claimed amounts are based on [Client's] own valuation of the claims."

Đừng chỉ dựa vào các tài liệu/phân tích do khách hàng cung cấp…

"Hội đồng trọng tài không thể tìm thấy lời giải thích nào về mục này trong các báo cáo của Ông [Chuyên gia] và do đó không được hỗ trợ bởi bằng chứng chuyên gia. Số tiền được yêu cầu dựa trên định giá của chính [Khách hàng] đối với các yêu cầu bồi thường."

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Role of the Expert
Vai trò của chuyên gia

Do it yourself…

"Ms. [Expert] did not select the base information herself and did not undertake the original research. Ms. [Assistant], who was not called as an expert, undertook this work. Ms. [Expert] relied on [Assistant] to decide what documents and information should be used in the assessment."

Tự mình thực hiện…

"Bà [Chuyên gia] đã không tự lựa chọn thông tin cơ sở và không tự mình thực hiện các phân tích, đánh giá. Bà [Trợ lý], người không được gọi là chuyên gia, đã thực hiện việc này. Bà [Chuyên gia] đã dựa vào [Trợ lý] để quyết định xem những tài liệu và thông tin nào sẽ được sử dụng trong quá trình đánh giá."

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When do you Involve the Expert?
Chuyên gia tham gia khi nào?

Early engagement

- Can't draft pleadings
- But can expert commence reporting so as to indirectly "assist"?
- Private report about case to assist settlement / client risk evaluation

Tham gia từ sớm

- Không thể soạn thảo biên bản bào chữa
- Chuyên gia có thể lập báo cáo kỹ thuật để "hỗ trợ" khách hàng một cách gián tiếp không?
- Báo cáo tách biệt về vụ việc nhằm hỗ trợ việc đàm phán giải quyết / đánh giá rủi ro cho khách hàng

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Tips for Report
Các lời khuyên dành cho báo cáo

- Set out expertise, qualifications, declaration of independence
- Disclosure of working papers, drafts?
- Don't be lawyers

- Thể hiện trình độ, chuyên môn, và sự độc lập, khách quan của mình
- Có nên công khai các bản nháp của báo cáo?
- Đừng làm phần việc của Luật sư

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Tips for Report
Các lời khuyên dành cho báo cáo

- Always check it…

"From the cross examination of Mr. [Expert], the number of machinery moves counted was completely incorrect in any relevant sense at least."

- Luôn luôn kiểm tra…

"Từ cuộc kiểm tra chéo của ông [Chuyên gia], số lần di chuyển của máy móc được tính là hoàn toàn không chính xác, dù là là theo bất kỳ một ý nghĩa liên quan nào."

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PHIÊN A2: LÀM VIỆC HIỆU QUẢ VỚI NHÂN CHỨNG CHUYÊN GIA TRONG TRỌNG TÀI XÂY DỰNG

PANEL A2: EFFECTIVE WORKING WITH EXPERT WITNESS IN CONSTRUCTION ARBITRATION

Moderator

David Lockwood
Managing Director - South-East Asia at Hanscomb Intercontinental

David Lockwood is a Chartered Quantity Surveyor and Fellow of Royal Institution of Chartered Surveyors and has been a Member of the Chartered Institute of Arbitrators for over 10 years and holder of Master of Laws Degree with Distinction in Construction Law and Arbitration from Robert Gordon University in Aberdeen gained in 2008.

David has 35 years' experience in construction and infrastructure projects gained in UK, Singapore, Hong Kong and Vietnam focusing since 2010 on the commercial and contractual issues arising between the parties and providing specialist contract advice on the use and interpretation of the contractual clauses under FIDIC suite of contracts.

David has worked for project owners, main contractors and specialist sub-contractors protecting the commercial objectives of each under the contract terms.

David founded managed and led international consultant firms at Partner / Managing Director level from 2004 to present and has employed and managed up to 90 staff.

David has over the last 10 years been appointed Expert Witness on a number of International Arbitration cases and prepared Expert Reports for the quantum assessment of Contractor's claims for loss and expense resulting from delays. David has presented and defended expert reports under cross-examination at hearings in Hong Kong and Vietnam.

EFFECTIVE WORKING WITH EXPERT WITNESS IN CONSTRUCTION ARBITRATION

Kelvin Aw

Partner and Co-Head of Infrastructure Construction and Energy Disputes,

CMS Singapore

Kelvin Aw is a Partner and Co-Head of Infrastructure Construction and Energy Disputes practice in CMS Singapore. He is a Senior Accredited Specialist for Building and Construction recognised by the Singapore Academy of Law. He is a fellow of the Singapore and Chartered Institutes of Arbitrators, and an accredited Senior Adjudicator with the Singapore Mediation Centre. In addition, he has served on the Council of the Singapore Institute of Arbitrators and chaired its publications committee and has taught construction law modules at the National University of Singapore.

Kelvin is consistently ranked as a leading individual for construction by the Chambers Asia-Pacific: Leading Lawyers for Business and by The Legal 500. He has been recognised by the 2020 to 2023 Best Lawyers, as well as Benchmark Litigation for construction law in Singapore.

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Effective working with Expert Witness in Construction Arbitration

Kelvin Aw
Partner, Co-head Infrastructure Construction Energy Disputes, **CMS Singapore**
Senior Accredited Specialist (Building & Construction), **Singapore Academy of Law**

CMS law·tax·future

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Key Issues/Nội Dung

1. Interaction between Shadow Expert and Expert Witness
2. Briefing of Expert Witness
3. Assisting Counsel / Tribunal in Proceedings
4. Witness Conferencing
5. Expert Witness Joint Statements

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Interaction between Shadow Expert and Expert Witness

- **Shadow Expert:**
  - An expert advisor whose role is to assist the party in advancing its strongest case
  - Does not give evidence in the proceedings
- **Co-Existence of the Shadow Expert and the Expert Witness**
  - Shadow Expert can be involved much earlier on in the matter than the Expert Witness, without concerns over affecting his impartiality (e.g. at the preparation of submissions for the claim/defence)
  - Shadow Expert acts as a bridge of communication between party counsel and Expert Witness
    - Allows presentation of technical information & answering of subsequent enquiries by the Expert Witness to be more efficient
    - Allows for technical matters to be presented strongly in the claim/defence using appropriate expertise, while ensuring that the Expert Witness retains its independence
- **Shadow Expert going on to become the Expert Witness**
  - Engages concerns of whether an individual originally involved in the matter as a Shadow Expert (*i.e.* not required to maintain a position of impartiality) & who has helped in framing the party's strongest case, is thereafter able to fulfil its duty to be objective and independent as an Expert Witness → Affects weight to be given his evidence as an Expert Witness eventually

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Briefing of Expert Witnesses

General Guidelines

Avoid:

- Incomplete briefing documents to deliberately bias the report
- Document-dumping
- Questions scoped too widely
- Close-ended questions/questions which presume the answer
- Asking the expert witness to comment on issues of law

Letter of Instruction

- List of discrete issues the expert witness is instructed to provide an opinion on
- Summary of facts/assumptions to be relied upon for the report
  - Highlight that these same facts/assumptions should be explicitly stated in the report
  - Include chronology of events
- List of documents provided to the expert witness
  - Consistent/simple referencing system
- Timeline
  - Set out the schedule of events/deadlines relevant to the expert
- Fees
- Highlight overriding duty of independence owed to the Tribunal

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Assisting Counsel / Tribunal in Proceedings

- **Counsel's understanding of limitations of Expert Witness's report**: Ensures that the case put forward by Counsel during the arbitration hearing is a position that the Expert Witness is able to agree with and support on the spot under questioning
  - Avoids the situation where an Expert Witness feels pressurized on the stand to agree to a position which he does not necessarily accept, and later be unable to support it → can affect credibility of Expert Witness evidence
- **Expert Witness should not be taking part in fact-finding exercises/answering questions regarding the law**
  - Counsel should avoid this by:
    - Emphasising the factual assumptions/findings the expert is expected to adopt in arriving at his opinion, should the Expert Witness require reminders while on the stand
    - Instructing Expert Witness to provide alternative opinion on various possible factual findings on the currently available evidence

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Witness Conferencing

Overview

- "**Hot-tubbing**"
- Means of adducing evidence whereby two or more witnesses give evidence concurrently before a Tribunal *versus* traditional method of cross-examination
- **Advantages**:
  - Side-by-side presentation of evidence makes it easier to compare witnesses' different views on an issue
  - Improved quality of evidence
  - Promotes efficiency
- **Disadvantages** :
  - Existing unfriendliness or hostility between expert witnesses may impede the presentation of evidence
  - Presence of multiple witnesses generates more unpredictability
  - Greater need for the Tribunal to intervene

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Witness Conferencing

CIArb Guidelines for Witness Conferencing in International Arbitration

- Launched in Singapore on 23 April 2019
- **Aim**: Assist parties, arbitrators and experts in preparing and presenting evidence during Witness Conferencing
- **3 main sections**:
  - Non-exhaustive Checklist of matters for parties to consider in determining whether to even conduct a Witness Conference, considerations include:
  - Set of Standard Directions providing a general framework for witness conferencing to be eventually incorporated as part of an initial procedural order
  - Three variations of Specific Directions to be issued once the parties once the parties have determined to hold a Witness Conference
    - Tribunal-led conference
    - Witness-led conference
    - Counsel-led conference
- Guidelines accompanied by explanatory notes that provide detailed discussion of the items in the checklist and the standard and specific directions

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Expert Witness Joint Statements

- **Expert witnesses' meeting: Purpose** – produce a joint statement which sets out concisely:
  - What they can agree upon, thereby narrowing the issues in contention, and
  - What they cannot agree upon and their reasons for disagreeing
- **Lawyers should not be present** at the meeting, or involved in the negotiation/drafting of joint statement, but may assist with framing of the issues before the meeting
- Traditional approach: Expert witnesses file their individual reports before meeting to produce a joint statement
- Current trend: Expert witnesses meet to discuss the issues/produce the joint statement before filing their individual reports
  - **Advantages**:
    - Prevents expert witnesses committing themselves to a position before the meeting in their individual reports,
      which leads to polarisation and inertia to modify their positions thereafter
    - Allows for early surfacing of discrepancies in information, documents and evidence
- One possible form of the joint statement is a **Scott Schedule**
- Residual issues:
  - Whether discussions are without prejudice and cannot be referred to in proceedings
  - Whether parties are bound by the issues agreed upon by the expert witnesses

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LOCAL PERSPECTIVE ON WORKING WITH EXPERTS

Nguyen Trung Nam (Tony)

Founder, Sr. Partner of EPLegal

Tony Nguyen (FCIArb) is dual-qualified advocate and solicitor in both Vietnam and England & Wales. Tony has spent over twenty years practicing in the oil & gas and energy industries with massive experience (both contentious and non-contentious matters) in production sharing contracts, energy and infrastructure construction contracts and related dispute settlement, including oil & gas onshore/offshore facilities, hydropower plants, thermal power plants, petrochemical plants, refineries and solar energy installation, ship building. Extensive ADR experience with disputes involving parties from Asia, US and UK.

Recognised as a leading individual in international arbitration and dispute resolution in Who's Who Legal, Chambers and Legal 500. Noted as 'a true expert in the field of arbitration,' 'a forward-thinking and highly experienced practitioner' who is 'knowledgeable about arbitration rules, procedures and other practical matters', and 'amazingly dynamic'. Tony is a Benchmark Asia's litigation star, being ranked consistently in ABL Journal's Vietnam Top 100 Lawyers.

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Local perspective on working with experts

Mr. NGUYEN TRUNG NAM (TONY)
Founding & Sr. Partner of EP Legal

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- Construction & Project Management
- Arbitration, Litigation & ADR
- Energy
- Finance & Banking
- Shipping & Aviation

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PRACTICAL ISSUES IN WORKING WITH EXPERTS

Part 1. The Interactions
Part 2. Future vs Actual Damages
Part 3. Other Practical Issues

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THE INTERACTION

- **Complexity and Overlapping of VN laws on Construction**: common vs civil

  Different legal systems → different ways of approaching
- **Challenges for foreign experts** → lawyers must assist at a deeper level

  → Lawyers must understand issues at a certain depth
- **Local lawyers: a bridge for interaction**

  Only international experts are capable + But problems are communication and languages → leading to mis-communication and time-consuming.

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LIQUIDATED DAMAGE

Scope of recognition & quantum (*Vietnamese law* vs *Common law*)

- **Recognized:** How to calculate: $ USD/day but EPC contract already terminated → LD was counted until the termination date or even after that.

  LD requires actual damage? Or proof of quantum of damage?
- **Penalty**: Cap of Penalty vs Cap of LD
- **Unrecognized**: To replace LD = Loss of Profit

  How to calculate Loss of Profit? But-for approach?

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OTHER PRACTICAL ISSUES

- **Multi-disciplined experts work → co-operation is vital**
  - Counsel must understand methodology + to conduct cross-examination
  - Experts to follow instructions while maintaining their independence.
- **Difficult to assess quantum based on authorities' decisions**
  - ✓ Electricity in coal power plants calculated pursuant to a Circular
  - ✓ State-invested projects: civil work's expenses calculated based on Circular of Ministry of Construction/Decision of People's Committee

→ **Hard for experts and counsel to understand**

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EFFECTIVE WORKING WITH EXPERT WITNESS IN CONSTRUCTION ARBITRATION

Matthew Wills

Senior Managing Director APAC, J.S. Held LLC

Matthew has over 28 years' experience in the provision of commercial, quantum, estimating, claims and disputes advice to local and international contractors, owners and operators in the oil & gas engineering, procurement, and construction industries.

His experience on major construction and engineering projects is international and extensive across Asia, the Middle East and Africa, Europe, the U.S., and Latin America.

For the last 23 years, he has principally been involved in the offshore (FLNG, FPSO, FSO, Platforms & Jackets and Marine & Shipbuilding) and onshore (LNG, LPG, Refinery and Process Plants) oil & gas industry and marine industry providing, claims, change order assessment, arbitration/dispute management, expert witness (quantum and technical) appointment, ADR advice, contracts advice and administration.

Technical Expert Witness before the High Court of the Republic of Singapore in relation to a dispute as to the expectation of "all reasonable endeavours" between two joint venture partners on the procurement, fabrication and delivery of an offshore Workover Pulling Unit. The dispute was finally decided by the Court of Appeal in which the Court of Appeal substantially preferred the evidence of Matthew over that of the other expert. See the judgement of KS Energy Services Limited v BR Energy (M) SDN BHD [2014] SGCA 16.

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EFFECTIVE WORKING WITH EXPERT WITNESS IN CONSTRUCTION ARBITRATION

MATTHEW WILLS
Senior Managing Director APAC

JS HELD

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KEY ISSUES/NỘI DUNG

Part 1/Phần 1. Typical Expert Witnesses in Construction Arbitrations
Part 2/Phần 2. Duties and Roles of the Expert Witness
Part 3/Phần 3. Practical Aspects of Working with Experts

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Typical Expert Witness in Construction Arbitrations

Quantum Expert – an expert in cost engineering / quantity surveying to understand and analyse the costing information relevant to the project (e.g., bid estimates, contract award amounts, Bills of Quantity, valuation of variations, site running costs, etc.) and opine on the appropriate monetary compensation for each head claim.

Delay / Disruption Expert – an expert in project planning / project controls to understand and analyse the scheduling of the project and opine on the parties' responsibilities for the delay events based on the critical path for the contractor's performance of the project.

Engineering / Technical Expert – Depending on the nature of the dispute, specialists in architecture, façade, fire protection, mechanical/electrical engineering, structural engineering, safety, etc. may be required to provide engineering or technical opinion.

Accounting Expert– an expert in economic damages / forensic accounting to understand and analyse the contractor's accounting records and evaluate likely losses (e.g., loss of profit, loss of past and future earnings, valuations, cash-flow analysis) arising from liability.

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Duties and Roles of the Expert Witness

RICS

RICS Practice Statement and Guidance, *'Surveyors acting as expert witnesses', 4th edition, February 2023* provides useful guidance for the **quantum expert**:

Overriding duty as an expert witness **is to the Tribunal**. *(PS 2.1)*

Duty for expert to apply reasonable skill and care in arriving at expert opinion. *(PS 4.1(b))*

No conditional or success-based arrangements *(PS 10.1)*

Ensure not conflicted to any parties to the arbitration or if any prior relationship, to be disclosed *(PS 2.6 and GN 3.3)*

Impartiality and transparency *('Principal message', page 6):*

- **independent and unbiased opinion ;**
- **falls within the expert's expertise, experience and knowledge;**
- **state main facts and any assumptions relevant to the expert's conclusions; and**
- **uninfluenced by instructing party.**

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Practical Aspects of Working with Experts

From a Quantum / Delay perspective:

- **Instructions to the Expert**:
  - Details of Parties involved, details of project, nature of claims, and for experts to confirm ability to accept appointment.
  - Clear instructions on issues or heads of claims required for the expert to provide expert opinion.
  - Reasonable deadlines, the earlier the appointment the better.
  - Expert may need to be transparent with instructions. In some instances, experts are required to attached instructions with the expert's report.
  - To state clearly when nature of the expert's opinion is required to be based on opinions of other experts or other documentary evidence.

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Practical Aspects of Working with Experts

From a Quantum / Delay perspective:

- **Early Engagement / Appointment**
  - Will enable a party to get an early opinion from the perspective of the expert as to both the strength and weaknesses of its claim when considered in a construction arbitration forum.
  - Provides objective specialist advice on what other documents, analyses or resources are required to strengthen its claim or counter claim.
  - Instructing party may have misunderstood certain principles and evaluation methodologies leading to over or under valued claim submissions.
  - Provides sufficient time for experts to conduct detailed analysis to provide robust opinions especially for complex construction projects.

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Practical Aspects of Working with Experts

From a Quantum / Delay perspective:

- **Early Expert Conclave(s)**
  - Jointly agreed list of issues for experts of the same discipline to opine upon.
  - Methodology of analysis - **Quantum example**, *"figures-as figures"* evaluation. The assumption that both parties do have entitlement to make the claims and counter claims and what these claims amount to. But matters of entitlement are for the Tribunal to decide.
  - Methodology of analysis - **Delay example**, Windows Analysis – Which AACE Intl. RP to use? / SCL Protocol?
  - Agreement on the available documentary evidence and procedures required to review them. **Delay example**, where different baseline schedules are available, experts to agree on the baseline to use.
  - Establish a platform and methodology to share relevant evidence. **Quantum example**, invoices and proof of payments not often attached during pleadings due to volume of documents. Typically, some form of cloud-based storage.

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Practical Aspects of Working with Experts

From a Quantum / Delay perspective:

- **Joint Meeting(s) & Joint Report(s) between experts**
  - Generally, after exchange of expert reports.
  - Encourages experts to attempt agreement where possible prior to the hearing.
  - Saves time for parties and assists Tribunal to only deal with disagreed matters during hearing.
  - Provides transparency on any assumptions, basis, principles, evaluation methodologies applied by opposing experts and where they disagree.
  - Speeds up the process of understanding a contractor's claim based on the evidence. **Delay example**, the contractor may have more scheduling data than the Employer and experts may be able to exchange this schedule data; **Quantum example**, understanding a contractor's cost accounting system/ledger.
  - Experts need not dwell on any agreed claims in further reports – saves time.

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Practical Aspects of Working with Experts

From a Quantum / Delay perspective:
Complex construction arbitrations often involve very large amounts of documentary evidence;

- **Auditing of Actual Costs**
  - In circumstances where the time may be limited, or cost considerations do not permit the physical review of thousands of documents, and if parties agree, an audit of cost can be performed.
  - **Quantum example**, both experts undertake a physical audit of the claimants accounting and payment documents at the claimant's office based on pre-agreed criteria and or “blind” sampling.
- **Schedule Validation Exercise**
  - **Delay example**, the contractor’s progress reports may contain errors or are incomplete – if parties agree, a joint validation exercise can be performed based on actual progress against other documentary evidence such as letters, photographs, progress claims so as actual project progress can be agreed or disagreed between the experts.

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Q&A

Xin trân trọng cám ơn Quý vị đã chú ý lắng nghe!
Thank you!

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EFFECTIVE WORKING WITH EXPERT WITNESSES IN CONSTRUCTION ARBITRATION

Tom Taylor

Managing Director of Expert Services at Socotec

Tom is a Chartered Quantity Surveyor with almost 20 years' experience in the construction industry, working for contractors, employers, and consultancies, tackling complex and high-value claims on some of the world's highest profile building, energy, civil engineering, infrastructure, and oil and gas projects. He has advised on construction projects in Asia, Australia, Africa, North America, and throughout Europe. Tom has been instructed over 130 times as an independent quantum expert. He has been appointed by public and private clients, contractors, and subcontractors in litigation, international arbitration, and other alternative dispute resolution fora, both internationally and in courts in the UK, including the Technology and Construction Court (TCC). Tom has testified as a quantum expert on more than 10 occasions. He sits as a DAB member on energy generation projects and holds Masters' degrees in both Quantity Surveying and Construction Law.

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EFFECTIVE WORKING WITH EXPERT WITNESSES IN CONSTRUCTION ARBITRATION

TOM TAYLOR
Managing Director of Expert Services
SOCOTEC Advisory

SOCOTEC

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Question, leading to the development of a working hypothesis…

Within the International Construction Arbitration landscape, are the various rules, regulations and protocols relating to party-appointed Experts appropriate to effectively facilitate the assistance and value provided to the Tribunal and to the parties, by party-appointed Experts?

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KEY ISSUES

Part 1. Evolution of the Expert's role in legal proceedings (UK)

Part 2. Laws, rules and specific provisions governing Expert evidence

Part 3. Protocol for Expert evidence in International Construction Arbitration?

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Evolution of the Expert's role (1)

No clear definition of an Expert Witness in law.

How do we know what an Expert Witnesses role and purpose in legal proceedings is?

Folkes *v* Chadd (1782) – Lord Mansfield *"His opinion, deduced from all these facts is that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr Smeaton understands the construction of harbours, the causes of their destruction and how remedied… …The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr Smeaton **alone** can judge…"*

Davie v Magistrates of Edinburgh (1953) – Lord President Cooper *"Their duty is to furnish the judge… …with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence… …The scientific opinion evidence, **if intelligible, convincing and tested**, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case"*

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Evolution of the Expert's role (2)

Duties and responsibilities of Expert Witnesses in civil cases comprehensively addressed in *Ikarian Reefer* case (1993). Eight experts involved in the case, many judged not to have fully understood their role and responsibilities. Cresswell J gave judgement, principles of which were largely reflected in Civil Procedure Rules (**CPR**) 1998 and the accompanying Practice Directions (**PD**) for Experts:

1. Independent product, uninfluenced as to form or content by the exigencies of litigation (CPR 35.3; PD 35.2.1).
2. Assistance to the court by way of objective, unbiased opinion on matters within their expertise (CPR 35.3; PD 35.2.2).
3. Experts should state facts/assumptions relied on, should not omit facts which could detract from opinion (PD 35.2.3).
4. Should be made clear when a question or issue is outside their expertise (PD 35.2.4 (a)).
5. Where insufficient data is available, opinions should be appropriately qualified (PD 35.2.4 (b)).
6. If there is a change in opinion for any reason, such a change should be communicated without delay (PD 35.2.5).
7. Where reference material is referred to (photographs, calculations, measurements, etc.), it must be provided with the report.

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Laws, rules and specific provisions governing Expert evidence (1)

The general duties and responsibilities of Expert Witnesses in civil cases are, largely, settled:

- Independent, objective and unbiased.
- Opinions on matters within their expertise.
- Should not venture into matters of fact or law.
- Primary duty to assist the Court/Tribunal.

This is generally well known and easily said to be understood.

BUT, are the *specific* rules and regulations that govern the roles and duties of an Expert Witness in complex Construction Arbitration proceedings (typically fact-heavy, resulting in many thousands of documents, and often taking years to be fully resolved) appropriate to facilitate efficient and effective Expert Witness evidence?

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Laws, rules and specific provisions governing Expert evidence (2)

(English) Arbitration Act (1996)

37 Power to appoint experts, legal advisers or assessors.

(1) Unless otherwise agreed by the parties—

(a) the tribunal may—

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

No specific provision for party-appointed Expert Witnesses.

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Laws, rules and specific provisions governing Expert evidence (3)

London Court of International Arbitration (LCIA), Arbitration Rules (2020)

Article 21 Expert to Arbitral Tribunal

21.1 The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal.

21.2 …

Again though, party-appointed Experts are dealt with somewhat lightly under the general heading of “witnesses”:

Article 20 Witnesses

20.1 The provisions of this Article 20 shall apply to any fact ***or expert witness*** *on whose evidence a party relies.*

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Laws, rules and specific provisions governing Expert evidence (4)

ICC Arbitration Rules (2021)

Article 25 Establishing the Facts of the Case.

2. *The arbitral tribunal may decide to hear witnesses, **experts appointed by the parties** or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.*
3. *The arbitral tribunal, after consulting the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.*

No other material mention of party-appointed Expert Witnesses.

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Laws, rules and specific provisions governing Expert evidence (5)

CIArb Practice Guideline; Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (2007)
- Governs the preparation of Expert evidence (subject to agreement that it shall be used) (Article 2).
- Procedure for adducing Expert evidence – reports, joint reports, and testimony (Articles 6&7).

IBA Rules on the Taking of Evidence in International Arbitration (2020 ed., orig. 1999)
- Often adopted in construction contract arbitration clauses, or at commencement of arbitration – again, voluntary.
- Detailed guidance specific to party-appointed Experts (Article 5). Prescribes form, content and conduct of Experts.

Civil Justice Council; Guidance for the instruction of experts in civil claims (2014)
- Detailed guidance on complying with Part 35 of the CPR.
- Prescribes that Experts have an overriding objective to assist the courts in dealing with cases proportionately and expeditiously

RICS, Surveyors Acting as Expert Witnesses, 4th edition (2023) – typically Quantum Experts
- Practice statement of mandatory requirements and guidance for RICS members (chartered surveyors) when acting as Experts.
- Deals with duties, conditions, reports, oral evidence, amendments and resolving differences.

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Case study; Expert evidence in practice (1)

- Major defects in a series of high-rise buildings and marine installations, requiring all residents/occupants to be decanted and major programme of remedial works undertaken.
- 6 experts appointed by each party: Architectural, Marine & Structural Engineering, M&E, Fire, and Quantum.
- Memorial approach to arbitration procedure – statement of case and all evidence served simultaneously.
- Quantum expert evidence prepared largely without knowledge of technical evidence due to timetable.
- Following memorials, many alternative scenarios arise from the different facts asserted by the parties, and the technical evidence adduced as to the cause of and potential solutions to remedy the defects.
- Period for development of finalised quantum expert evidence and quantum joint statement is increasingly compressed by sequential technical joint statements, large number of alternative scenarios emerge.
- Final quantum joint statement is a lengthy and complicated Scott Schedule, with little time for interrogation of other expert's position and narrowing of issues.
- Satisfactory for the Parties? For the Tribunal?

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Case study; Expert evidence in practice (2)

- Critical and non-critical Employer delays on a major energy generation project. Contractor claims from Employer.
- Accounting, Delay and Quantum Experts appointed by both sides.
- Joint statements on accounting (veracity of Contractor's cost ledger) and delay (periods when critical and non-critical delays were felt based on alternative versions of the facts) ordered and delivered prior to quantum reports.
- Quantum reports streamlined by:
  - Early involvement of Claimant's Quantum Expert; SoC is based on a sustainable case.
  - Evidence not being prepared on issues which have fallen away as a result of the conclusions of the accounting and delay joint statement processes.
  - Early quantum joint statement process agreeing methodology and measure of loss.
- Second quantum joint statement presented to the Tribunal containing:
  - Limited scope of disagreement and a dynamic joint schedule which calculates the correct outcome based on a series of decision matrices; subject to Tribunal's decision on the facts.
- Post-hearing, Tribunal seeks joint confirmation from quantum experts on discreet areas of award.

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A Protocol for Expert evidence in International Construction Arbitration?

- 70% of practitioners want to see Tribunals streamline expert evidence on issues of liability and quantum; and also expect that Tribunals should schedule expert evidence earlier in the procedural timetable to allow party-appointed experts more time to narrow and agree issues. (BCLP Arbitration Survey 2021: Expert Evidence in International Arbitration)
- Over 60% of practitioners consider that party-appointed experts should report directly to the Tribunal on progress made in reaching agreement. (BCLP Arbitration Survey 2021: Expert Evidence in International Arbitration)
- Experts in the discreet fields of Quantum, Delay, Technical (Engineering, Architecture), and Accounting are frequently appointed in international construction arbitration proceedings; and many of these Experts work only in the construction dispute resolution field.
- Protocol dealing with complex matters often addressed by Quantum and Delay Experts has achieved widespread traction in a short period of time. (SCL D&D Protocol, 2017)

- An excellent and extensive wider commentary on the role and value of expert evidence is provided by Professor Doug Jones AO

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Q&A

Thank you

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BUỔI CHIỀU - KHÁN PHÒNG 2

PHẦN B: CÔNG NGHỆ SỐ TRONG TRỌNG TÀI XÂY DỰNG QUỐC TẾ

AFTERNOON - BALLROOM 2

SECTION B: DIGITAL TECHNOLOGY IN INTERNATIONAL CONSTRUCTION ARBITRATION

PHIÊN B1: CÔNG NGHỆ HỖ TRỢ CÁC BÊN VÀ TRỌNG TÀI VIÊN TRONG TRỌNG TÀI XÂY DỰNG

PANEL B1: TECHNOLOGY SUPPORTING PARTIES AND ARBITRATORS IN CONSTRUCTION ARBITRATION

Moderator

Dr. Nguyen Thi Hoa
University Lecturer at International Law Faculty, HCMUL

Dr Nguyen Thi Hoa has been a lecturer at Ho Chi Minh city University of law in Vietnam since September 2019, where she teaches and researches international business law, international commercial arbitration law, international commercial contract negotiation and drafting skill. In addition, since April 2022, she is also a reviewer for the Journal of Legal Affairs and Dispute Resolution in Engineering and Construction (indexed on Scopus – 1st quartile in 2020–2022) of the American Society of Civil Engineering. She is also currently a member of the Executive Committee of the Society of Construction Law in Vietnam (SCLVN). Before becoming a lecturer, she worked as a legal adviser in the Department of Justice of Ho Chi Minh City in Vietnam (2010–August 20219) and her job involved advising on public–private partnership contracts, construction law, investment law, international dispute resolution, promotion of commercial arbitration, recognition and enforcement of decisions of foreign authorities, etc. In December 2018, she finished her PhD thesis with honours at Panthéon-Assas Paris II University in France on the topic of 'Dispute resolution procedures in the international construction sector under FIDIC forms of contracts'. From September to December 2018, she worked as an intern in a construction law firm in Paris. From March 2023, she has been also invited to act as expert witness for the dispute brought to international arbitration tribunal.

TECHNOLOGY IN CONSTRUCTION ARBITRATION – THE ARBITRATOR'S PERSPECTIVE

Nhu – Hoang Tran Thang

Counsel at Peter & Kim

Nhu-Hoang Tran Thang is a French trained lawyer registered with the Paris bar and a Swiss national with Vietnamese roots. She practices international arbitration, covering both investment and commercial arbitration. She has acted as arbitrator, counsel or assistant to the arbitral tribunal in over thirty arbitrations conducted under various frequently applied rules and related to a variety of industries. She has developed solid expertise in energy-related disputes and has practiced extensively under Swiss, French and other civil laws. Nhu-Hoang is also well versed in the development of Investor-State disputes in Southeast Asia. Before joining Peter & Kim, Nhu-Hoang practiced international arbitration at LALIVE and at the office of renowned arbitrator Pierre Tercier. Prior to that, she gained experience in the arbitration teams of magic circle firms in Paris and at arbitration boutiques in Geneva and London.

Nhu-Hoang is a former co-chair of the young branch of the International Council for Commercial Arbitration (ICCA) and regularly speaks and publishes in the field of international arbitration. She is a member of the Executive Committee of the Rising Arbitrators' Initiative (RAI), and a co-founder of the Energy Related Arbitration Practitioners (ENERAP)'s Geneva Chapter.

In 2023, she was selected as one of the 20 Who's Who Legal Arbitration Thought Leaders Global Elite Under 45 (non-partner category).

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Technology in Construction Arbitration - the Arbitrator's Perspective

NHU-HOANG TRAN THANG – Peter & Kim

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KEY ISSUES

Part 1. Electronic communications & digital evidence
Part 2. File keeping and drafting of the award
Part 3. Virtual hearings and meetings
Part 4. Security

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Electronic Communications & Digital Evidence (1/2)

- Law of the seat, applicable arbitration rules
- Specific rules applicable to the arbitration (Procedural Order No. 1)
- Guidance from institutions
  - ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings (2022)
  - UNCITRAL Notes on Organizing Arbitral Proceedings (2016)

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Electronic Communications & Digital Evidence (2/2)

- Methods of electronic exchange
- Online case management platforms
- Hard copies?
- Procedural decisions
- Costs
- Proof of service and signature requirements

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File keeping and Drafting of the Award

Exhibit Manager

Sharepoint

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Virtual hearings and meetings (1/4)

- Law of the seat
  - ICCA Right to a Physical Hearing Project
- Applicable arbitration rules
  - VIAC Arbitration Rule 25(1)
  - ICC Arbitration Rule 26(1)
  - Swiss Arbitration Rule 27(2)
  - UNCITRAL Arbitration Rule 17(1)
- Specific rules applicable to the arbitration (Procedural Order No. 1)

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Virtual hearings and meetings (2/4)

- Guidance from institutions
  - IBA Rules on the Taking of Evidence on International Arbitration, Rule 8(2) (2021)
  - ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings (2022)
  - ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings (2021)
  - UNCITRAL Notes on Organizing Arbitral Proceedings (2016)
  - Seoul Protocol on Video Conferencing in International Arbitration (2020)
  - SIAC Guide: Taking Your Arbitration Remote (2020)

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Virtual hearings and meetings (3/4)

- Hearing protocol
- Advance preparation and testing
- Electronic bundles, online live transcript and operators

OPUS2

- Minimum equipment

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Virtual hearings and meetings (4/4)

- Ensuing the integrity of the evidentiary hearing
- Ensuring equal treatment of the Parties
  - Access to technology
  - Time zones

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Security

- Law of the seat
- Regional regulations
- Duties of arbitrators
- Guidance from institutions
  - ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings (2022), referring to
  - ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2022)

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CONSTRUCTION ARBITRATION: DRONES

Daniel Waldek

Partner at Herbert Smith Freehills

Dan specialises in construction, energy, and infrastructure disputes. He has acted as counsel in arbitrations relating to conventional and renewable power projects, onshore and offshore oil and gas projects, refinery, petrochemical and other process plants as well as road, rail, water and airport projects.

Dan advises on complex claims under a large range of construction contracts covering design and build, turnkey, EPCIC and EPCM arrangements, as well as production sharing contracts, offtake and feedstock supply agreements, and concession agreements. Dan's work is multi-jurisdictional, with a strong focus on projects in Indonesia, Vietnam, Singapore, Malaysia, Thailand and South Asia.

Dan regularly appears as counsel and advocate in ICC and other arbitrations. Dan also advises on arbitration related court proceedings including restrains on bond calls, jurisdictional challenges, set aside applications and enforcement proceedings. Dan also sits as an arbitrator.

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HERBERT SMITH FREEHILLS

Construction Arbitration: Drones

Dan Waldek
Partner, Herbert Smith Freehills LLP

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KEY ISSUES/NỘI DUNG

Use of drones in Construction Arbitrations

Legal Considerations

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Construction Arbitrations: Common claims

Construction Arbitration: Proving your case

For any claim, the burden is on the party asserting the claim to prove its position using the best evidence.

Traditional forms of evidence:	Letters
	Emails
	Minutes of Meeting
	Progress Reports
	Schedules
	Photographs
	Witness Statements
	Expert Reports

Construction Arbitration: Proving your case

Drones be used to capture data in a cost-effective and safe manner to prove your case:

Capture different types of data, e.g. visual, infra-red, thermal, LIDAR, gas / moisture

Data can be collected periodically

Easy to use in areas which may be difficult or dangerous for human inspections

Construction Arbitration: Proving your case

How can drone data be used to improve your case?

Delay Claims
- Capture visual data on progress over time

Defects
- Capture HD imagery of pipework in hard to access areas

Variations
- Identify out of scope work

Force Majeure
- Demonstrate existence of extreme weather events, and impact on project work

Pricing
- Demonstrate extent of civil earthwork volumes, terrain and elevation

Project Management
- Monitor access to site, mobilisation / de-mobilisation
- Site conditions

Site Visits
- Targeted and remote access

Drone Construction Site Progress Report

- Schedule and milestone data
- Defects
- Easy to present as evidence

Drone Construction Timelapse

- Cause of delay
- Critical path analysis
- Sequence of events

Legal Considerations

- Regional or national drone flight regulations
- Restricted airspace
- Privacy: workers and visitors consent
- Risk from drone accidents
- Insurance requirements
- IP - data storage, processing, third party operators

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Q&A

Xin trân trọng cám ơn Quý vị đã chú ý lắng nghe!
Thank you!

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EMPLOYMENT OF TECHNOLOGIES IN CONSTRUCTION ARBITRATION FROM THE PARTIES' PERSPECTIVE

Minh Nguyen

Special Counsel and Head of Dispute Resolution Practice of ACSV Legal

Minh Nguyen is a Special Counsel and Head of Dispute Resolution Practice of ACSV Legal. She joined ACSV Legal in 2019 after having worked nearly ten years for various international law firms and corporations, including a Magic Circle firm. Prior to joining ACSV Legal, Minh worked as Legal Compliance Manager in the SEA&NZ Business Unit of the largest brewing company in the world.

Minh obtained an LLM in 2017 in International Arbitration from Pepperdine University with one of the highest-grade point averages in her graduation class. Minh also attended the intensive International Commercial Arbitration course in Harvard Law School in January 2023. As the Head of the Dispute Resolution Practice of ACSV Legal, Minh has directly advised and represented clients in some multi-million-dollar cases arbitrated at the SIAC, the ICC, and the VIAC.

Minh has been a registered arbitrator at the Pacific International Arbitration Centre in Vietnam since 2018 and an Adjunct Lecturer in the Master of Civil Law Program – a joint program between the University of Economics and Law of Vietnam and the University of Paris 1 Pantheon-Sorbonne – since 2019.

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Employment of technologies in construction arbitration from the parties' perspective

MINH NGUYEN – ACSV LEGAL

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KEY ISSUES

Part 1. Research Tool and Database to Choose the Right Arbitrator

Part 2. Search Engine for Arbitration

Part 3. ChatGPT – Food for thoughts

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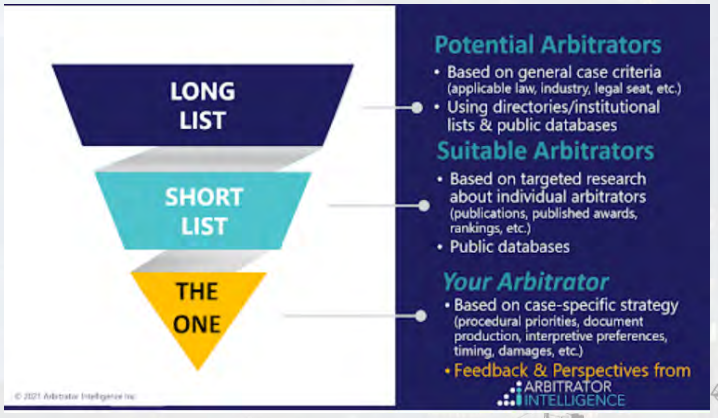
Part 1. Research Tool and Database to Choose a Right Arbitrator



Source: https://arbitratorintelligence.com/the-three-steps-in-appointing-arbitrators-and-which-one-is-most-important/

HOW TO FILTER THE POTENTIAL ARBITRATOR CANDIDATES WHO ARE RIGHT FOR YOUR CASE?

In most cases, arbitrator selection follows a basic 3-step process:

1. Start with a Long List of Potential Arbitrators
2. Pare it down to a Short List of Suitable Arbitrators
3. Pick The Arbitrator to appoint

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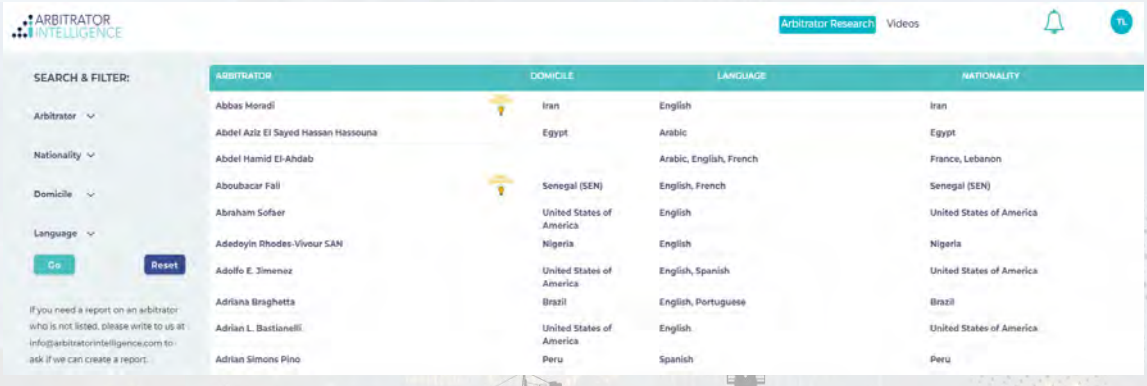
Part 1. Research Tool and Database to Choose a Right Arbitrator

ARBITRATOR SEARCH ON ARBITRATOR INTELLIGENCE (https://arbitratorintelligence.com/)



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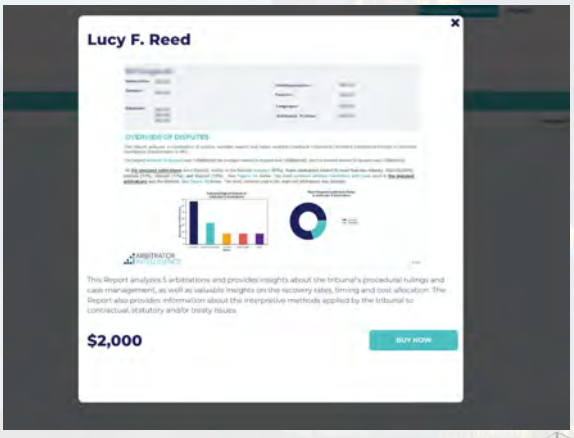
Part 1. Research Tool and Database to Choose a Right Arbitrator



For example, arbitrators identify in the Survey of Arbitrator Intelligence their perspectives on the efficacy of:

- Tribunal efforts to encourage settlement
- Use of Redfern Schedules
- Page limits on parties' submissions
- "Documents only" arbitration
- Online hearings even over party objection
- Broad and/or electronic document production

These statistics in the Survey Report must be purchased by counsels and third-party funders.

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Part 1. Research Tool and Database to Choose a Right Arbitrator

Examples of the questions raised in the Arbitrator Intelligence Questionnaire (AIQ)

ALLOCATION OF COSTS & FEES

Excluding lawyers' fees, which of the following describe(s) the award of arbitration costs (please select all that apply)?

- ○ The tribunal awarded all costs to the Claimant
- ○ The tribunal awarded all costs to the Respondent/Counterclaimant
- ○ The tribunal allocated costs evenly between the Claimant and Respondent
- ○ The tribunal awarded costs in accordance with the parties' agreement
- ○ The tribunal allocated costs based on an assessment of the relative merit of each parties' arguments (if indicated)
- ○ The tribunal allocated costs to take account of other considerations, such as alleged misconduct during the proceedings (if indicated)
- ○ Other (please specify)

Which of the following describe(s) the award of lawyers' fees (please select all that apply)?

- ○ The tribunal ordered the Respondent to pay the Claimant's lawyers' fees
- ○ The tribunal ordered the Claimant to pay the Respondent's lawyers' fees
- ○ The tribunal awarded lawyers' fees in accordance with the parties' agreement
- ○ The tribunal left each party to bear its own lawyers' fees
- ○ The tribunal awarded lawyers' fees based on an assessment of the relative merit of each parties' arguments (if indicated)
- ○ The tribunal awarded lawyers' fees to take account of other considerations, such as alleged misconduct during the proceedings (if indicated)
- ○ Other (please specify)

Are there any special circumstances in this case that affect your answers to the questions above? If so, please explain:

Database for Arbitrator Intelligence needs the input from the involved parties including parties' counsels.

The **Arbitrator Intelligence Questionnaire (AIQ)** is a feedback questionnaire that will be used by **Arbitrator Intelligence** to collect information on case management and decision-making practices of the international arbitrator.

AIQ, for instance, aggregates biographical information about various arbitrators as well as statistics related to past decisions such as claimants' rates of recovery, with the aim of providing reports.

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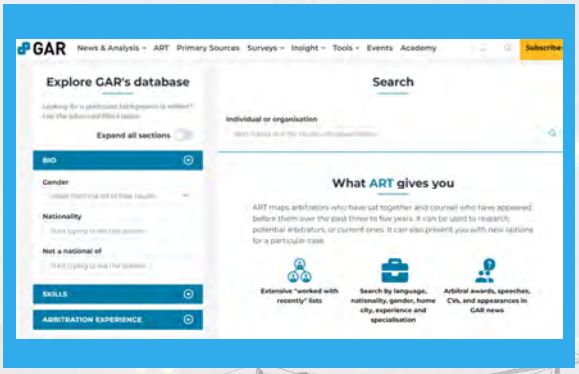
Part 1. Research Tool and Database to Choose a Right Arbitrator

GAR's Database
https://globalarbitrationreview.com/tools/arbitrator-research-tool



DELOS's Database
https://member-delosdr.org/
(Database is open to all with no cost)

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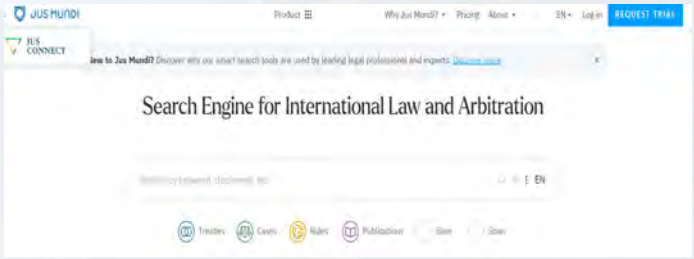
Part 2. Search Engine for Arbitration

https://jusmundi.com/en



This International Arbitration Search Engine instantly searches for international arbitration information in dozens of leading online international arbitration legal resources. This tool is particularly useful for finding information on international arbitration such as arbitration awards, arbitration doctrine, arbitrator profiles (for a conflict check), arbitration rules, and arbitration jurisprudence.

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Part 3. ChatGPT – Food for Thoughts .

Please analyse and compare the rulings on liquidated damages in construction contract-based disputes within the perspectives of the arbitrators who have the education background in a civil law jurisdiction and a common law jurisdiction?

As an AI language model, I do not have personal opinions or biases. However, I can provide a general overview of the differences between the civil law and common law approaches to liquidated damages in construction contract-based disputes.

In a civil law jurisdiction, arbitrators typically apply a strict interpretation of the contract and follow the provisions of the law. Liquidated damages are viewed as a penalty for breach of contract, and their enforceability depends on whether they are reasonable and proportional to the damages suffered by the innocent party. The arbitrators would look at the actual loss suffered by the aggrieved party, and if the liquidated damages are excessive, they may be reduced.

In contrast, common law arbitrators tend to give more weight to the parties' intentions and the commercial context of the contract. Liquidated damages are viewed as a genuine pre-estimate of the damages likely to be suffered by the innocent party, and are generally enforced unless they are unconscionable, extravagant or a penalty. The arbitrators may consider factors such as the bargaining power of the parties, the commercial context of the contract, and the difficulty of calculating the actual damages suffered.

CHAT GPT and Arbitration?

Maybe in a long-run ChatGPT can optimally analyse past rulings and opinions made by arbitrators and identify patterns in their reasoning or decision-making.

The Financial Times says that it *"promises to thrust AI into everyday life, and shake up the tech world."*

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Q&A

Xin trân trọng cám ơn Quý vị đã chú ý lắng nghe!
Thank you!

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PHIÊN B2: TÍCH HỢP QUÉT LASER, BIM, VÀ CÁC CÔNG CỤ ICT KHÁC TRONG XỬ LÝ TRANH CHẤP XÂY DỰNG

PANEL B2: INTEGRATING BIM, LASER SCANNING AND OTHER ICT TOOLS IN CONSTRUCTION DISPUTE RESOLUTION: ISSUES AND AVENUES

Moderator

Assoc. Prof. Viet Dzung Tran
Dean of the Faculty of International Law,
Ho Chi Minh City University of Law

Assoc. Prof. Tran Viet Dung holds PhD of Law from National University of Singapore (NUS); also read international trade policy at Harvard Kennedy School. His specialisation includes international trade and investment law, competition, international dispute settlement.

He also teaches LLM Programmes of the University of West England, Jean Moulin University Law School, Montesquieu University of Bordeaux, Chulalongkorn University; member of Editorial Board of the Kutafin University Law Review (from 2014) and Vietnames Journal of Legal Sciences (from 2018).

Tran combines academic knowledge with practical experience as an international lawyer. He has practiced law at WongPartnership LLP and KhattarWong LLP in Singapore, and was the country manager for KhattarWong Vietnam (2010-2014); a founding member of DL&Partners. He has undertaken many consultancies for MNCs with respect to their foreign investment in Vietnam, as well as supported Vietnamese enterprises to conduct business abroad. He is the author of many articles, books and monographs in the field of international trade and international investment. He is recognized by prestigious international lawyer ranking organizations such as Legal500, Chambers, AsiaLaw.

REALITY CAPTURE FOR LAWYERS OR HOW I LEARNED TO STOP WORRYING AND LOVE LASER SCANNING

Paul Menzies

General Director of GeoInstinct Vietnam Co. Ltd.

Paul Menzies is the General Director of GeoInstinct Vietnam Co. Ltd., a leading Integrated Measurement & Geospatial Consultancy in Vietnam. Coming from a background in Civil Engineering, Paul has worked on Civil Engineering and Infrastructure projects in the UK and China.

GeoInstinct has grown under his leadership to cover the complete range of Surveying & Geospatial services from Topographic Surveys, 3D Laser Scanning, Mobile Mapping, Underground Utilities Surveys and more. GeoInstinct in recent years has expanded to offer a full range of consultancy and advisory for Digital Twins, and has a strong strategic partnership with Aurecon Group.

Projects in Vietnam have included ABB, Ford Motor Company, RMIT University, Viettel, and many others with GeoInstinct now having clients in more than 10 countries. This has provided excellent experience in: contract negotiation, financial management and reporting, administration of contracts, project management and the implementation of strict compliance for both project standard and anti-bribery.

Paul was a co-founder The Society for Construction Law to Vietnam and continues to promote positive professional development and standards in construction law, construction and surveying.

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GeoInstinct

Reality Capture for Lawyers Or How I Learned to Stop Worrying and Love Laser Scanning

Paul Timothy Menzies
General Director
GeoInstinct Vietnam Co. Ltd.

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KEY ISSUES

Part 1. Reality Capture Technology

Part 2. Types of Data

Part 3. Case Study:

- **Wind Turbine Inspection**
- **Construction Verification**
- **Road Measurements**

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Reality Capture Technology






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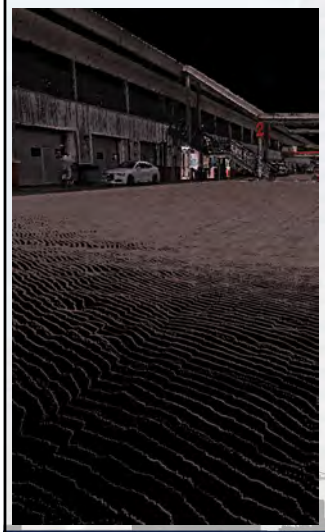
Point Cloud | Imagery | Other Sensors



...terpreting is available throughout the program
...nh bày đều có dịch cabin sang tiếng Việt

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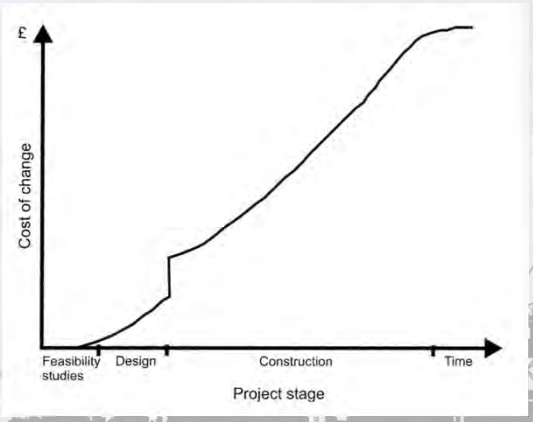
Reality Capture Technology

Feasibility → Site Investigation → **Tender** → Design → Construction → Inspection → Handover and Maintenance



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Reality Capture Technology

Failed Project

- What happens when the project fails?
- Who will pay for works already completed?
- How will the completed works be measured?
- Is the surveying process open to fraud?

Poor Quality

- How to quantify the issues?
- How to identify the responsible party?
- When did the event occur?
- Is this a 'one-off' event or regular occurance?

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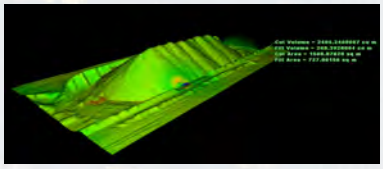
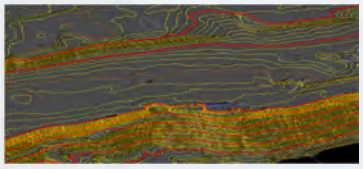
Types of Data

Inspections

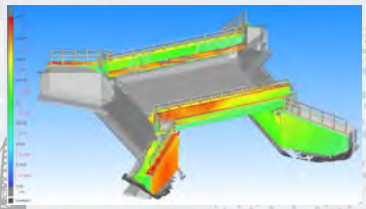


Volumes & Stockpiles



Site Settlement

As-Built Verification



Structural Assessments

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KEY ISSUES

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Part 2. Types of Data

Part 3. Case Study:

Wind Turbine Inspection

Construction Verification

Road Measurements

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Case Study | **Inspection**

- Case study – Applies both during construction and at the as-built stage.
- Especially useful if already implementing BIM, but applies also to a CAD workflow
- Increasingly common for international clients
- QS – materials, installed features, etc.
- Laser Scanning + UAV + GPR

Due to **confidentially**, examples augmented by published case studies from 3rd parties.

Laser Scanning
-BLK2GO
-RTC360
-P50
-Verity

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KEY ISSUES

Part 1. Reality Capture Technology

Part 2. Types of Data

Part 3. Case Study:

Wind Turbine Inspection

Construction Verification

Road Measurements

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GeoInstinct

Case Study | **Construction Verification**

Case study – Applies both during construction and at the as-built stage.
Especially useful if already implementing BIM, but applies also to a CAD workflow
Increasingly common for international clients
QS – materials, installed features, etc.
Laser Scanning + UAV + GPR

Due to **confidentially**, examples augmented by published case studies from 3rd parties.

1 – Control Network
2 – Laser Scanning
3 – Underground

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GeoInstinct

KEY ISSUES

Part 1. Reality Capture Technology

Part 2. Types of Data

Part 3. Case Study:

- Wind Turbine Inspection
- Construction Verification
- **Road Measurements**

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GeoInstinct

Case Study | **Road in Vietnam**

- GeoInstinct commissioned to perform Mobile Mapping services.
- The investor commissioned the work as they had concerns about the quality of the project.
- Outputs required included:
  - Geo-referenced Point Cloud
  - Geo-referenced Photos
  - Topographical Drawings
  - DTM / DEM / DSM
  - Identification of Potholes
  - Level and Settlement Checks
- Additionally:
  - Results Certified by Level 1 Surveyor
  - Raw Data Retained

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GeoInstinct

Case Study | **Road in Vietnam**

Important Notes

- **Accuracy** no poorer than 2 cm deviation to actual **(Difficult!)**
- **Resolution** of minimum of 1 point every 10 cm2 on road surface
- **Geo-referenced** to VN-2000 TM-3 (1XX-XX)
- **Geo-referenced** during capture and linked to a project control network

Method Statement

- GeoInstinct used the GeoInstinct Apollo MMS
  - Developed in-house in 2021 **(Make in Vietnam!)**
  - Parts sourced from Industry-Leaders in Germany, Canada
  - Software developed in partnership with developers in Europe
  - Reliability and Accuracy testing of more than 1000 km in late 2021
- Geo-referenced with a High-End GNSS Base Station set over site control point

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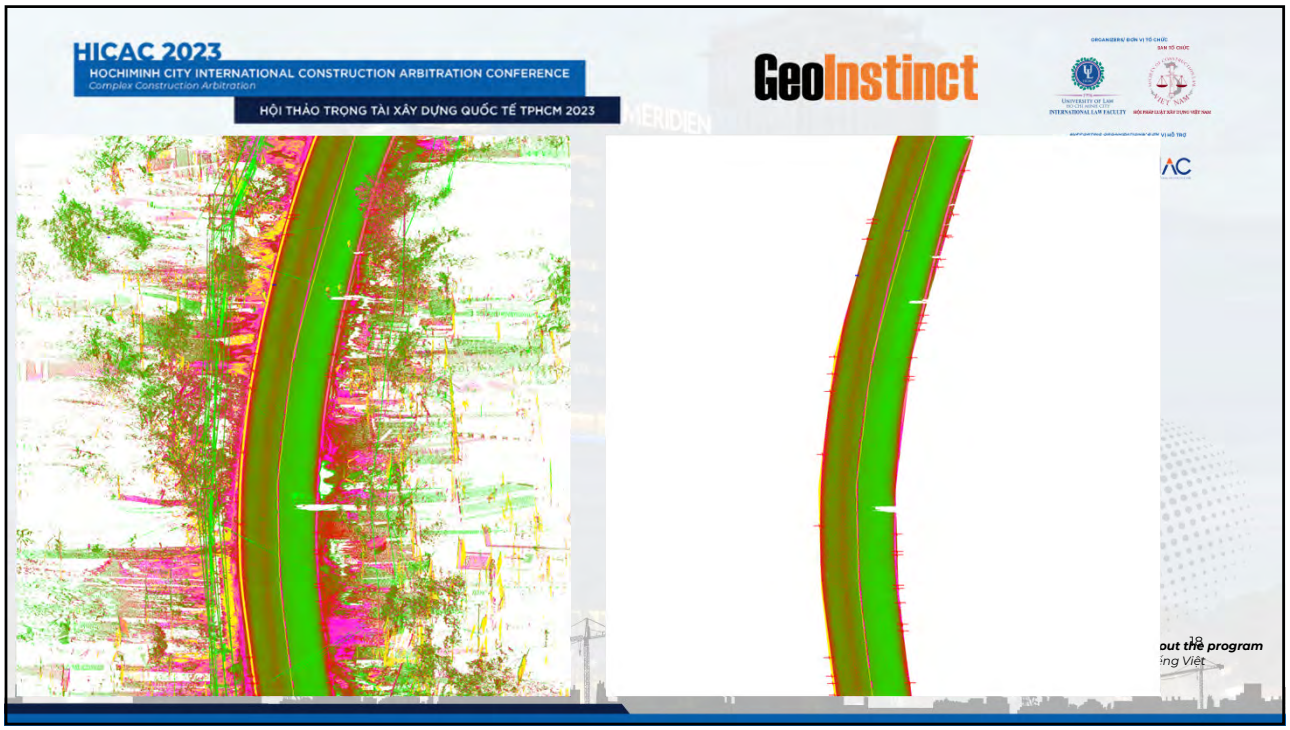
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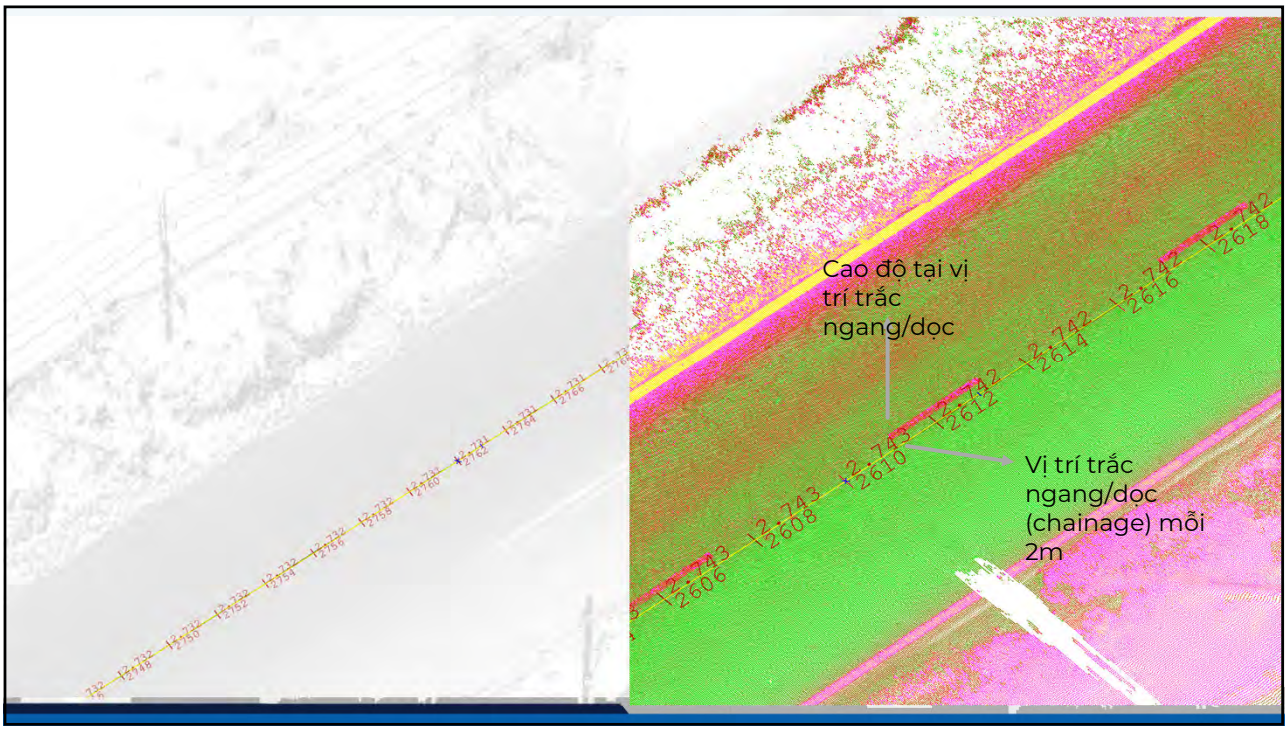
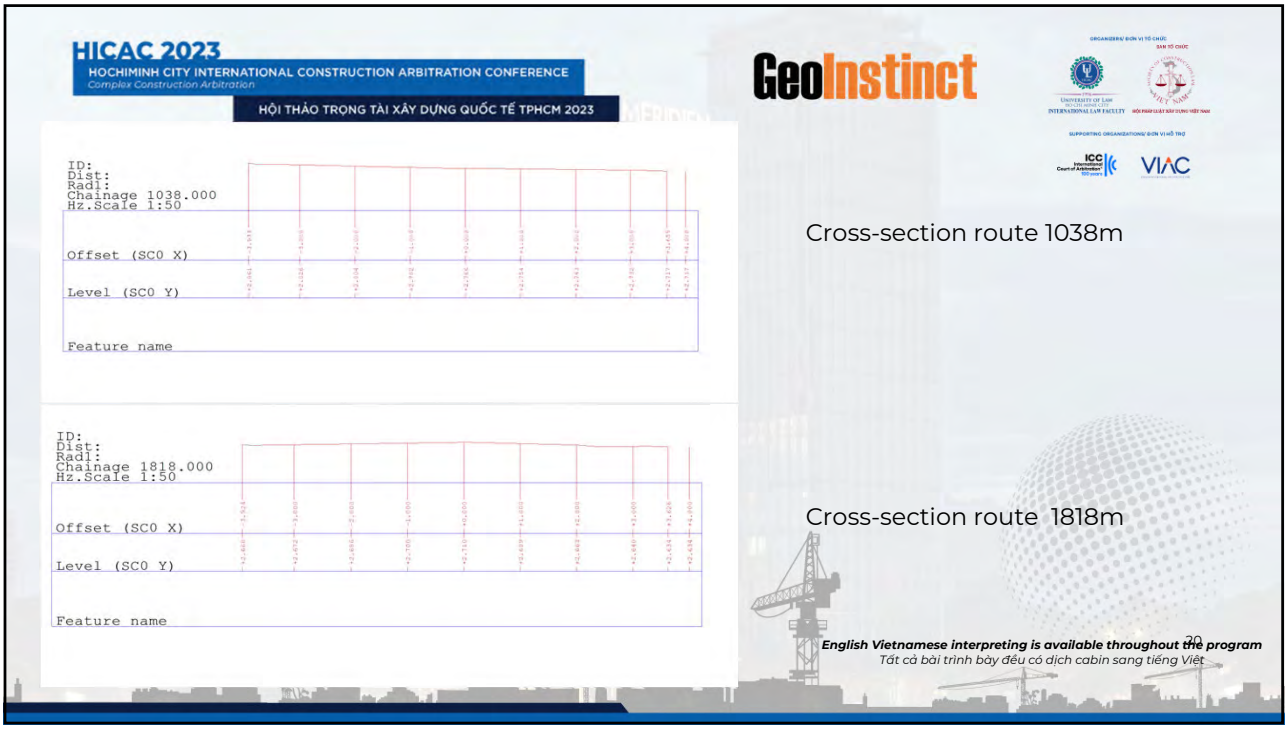

Cao độ tại vị trí trắc ngang/dọc
Vị trí trắc ngang/dọc (chainage) mỗi 2m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GeoInstinct
ID:
Dist:
Radi:
Chainage 1038.000
Hz.Scale 1:50
Offset (SC0 X)
Level (SC0 Y)
Feature name
Cross-section route 1038m
ID:
Dist:
Radi:
Chainage 1818.000
Hz.Scale 1:50
Offset (SC0 X)
Level (SC0 Y)
Feature name
Cross-section route 1818m
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Tất cả bài trình bày đều có dịch cabin sang tiếng Việt
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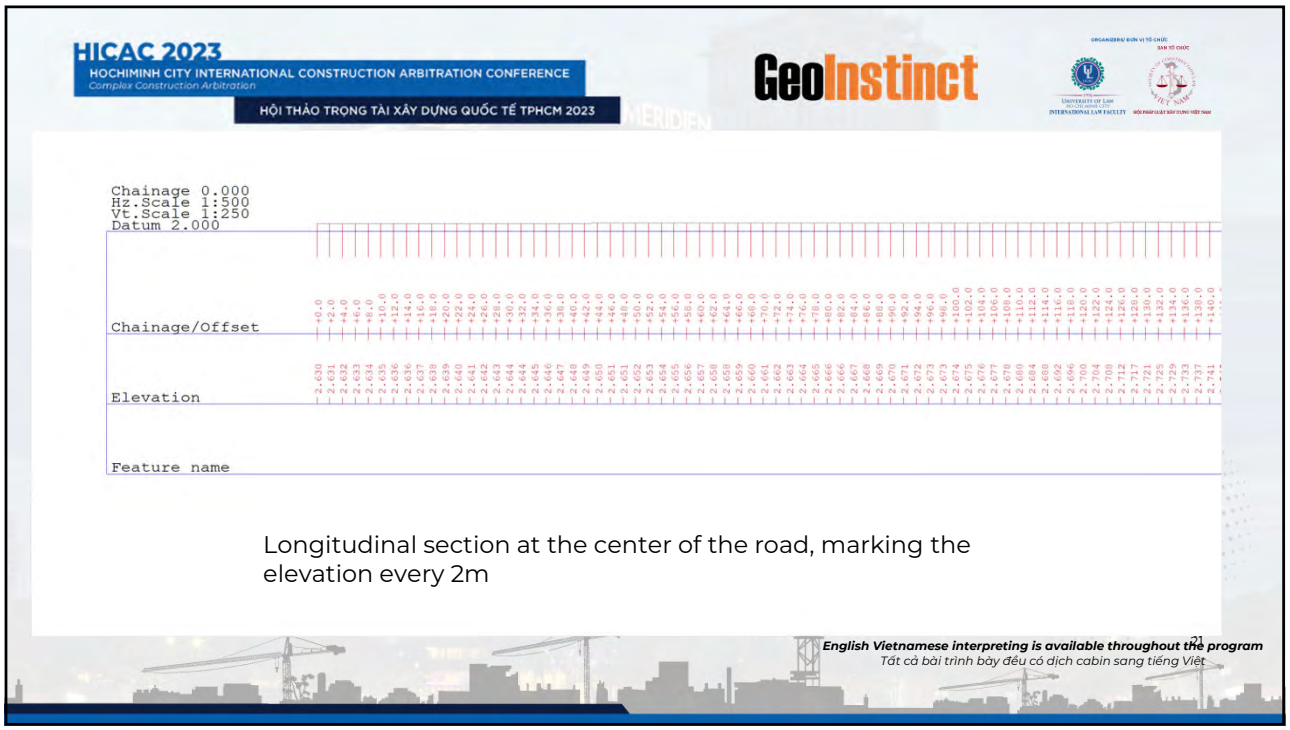
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GeoInstinct
Chainage 0.000
Hz.Scale 1:500
Vt.Scale 1:250
Datum 2.000
Chainage/Offset
Elevation
Feature name
Longitudinal section at the center of the road, marking the elevation every 2m
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Tất cả bài trình bày đều có dịch cabin sang tiếng Việt
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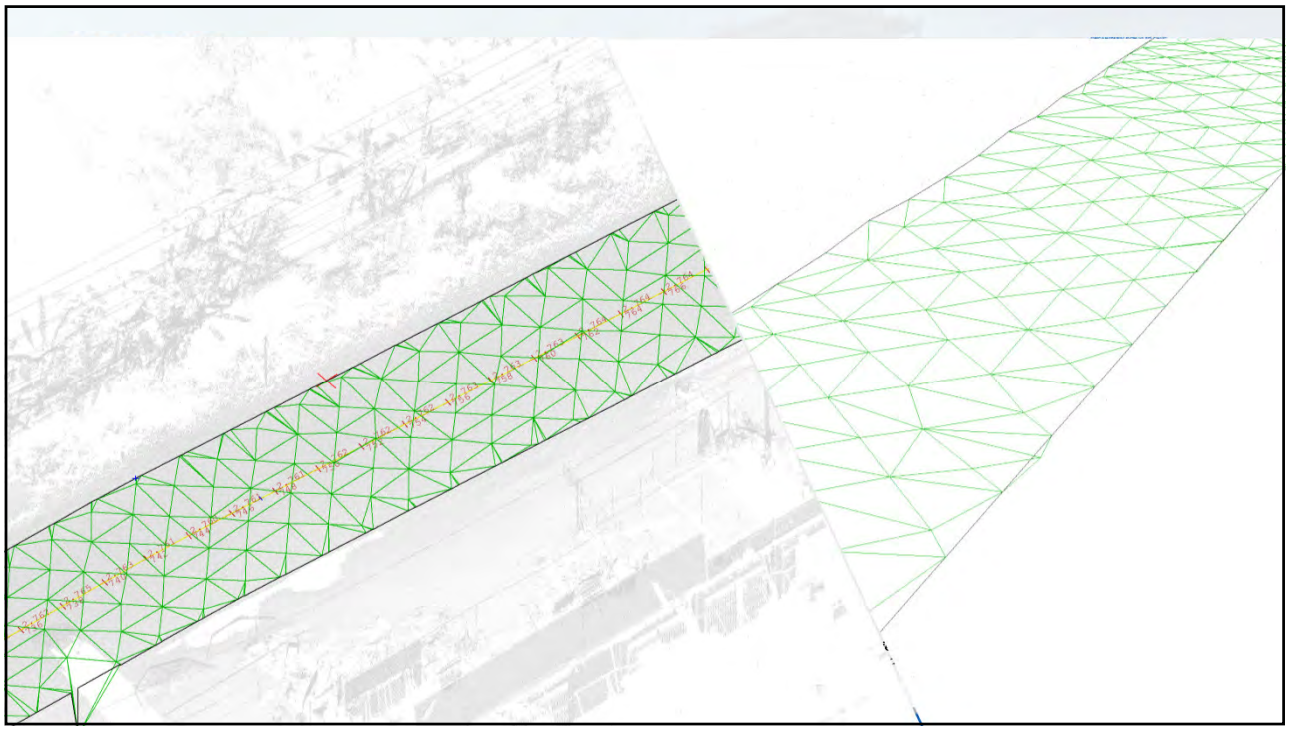
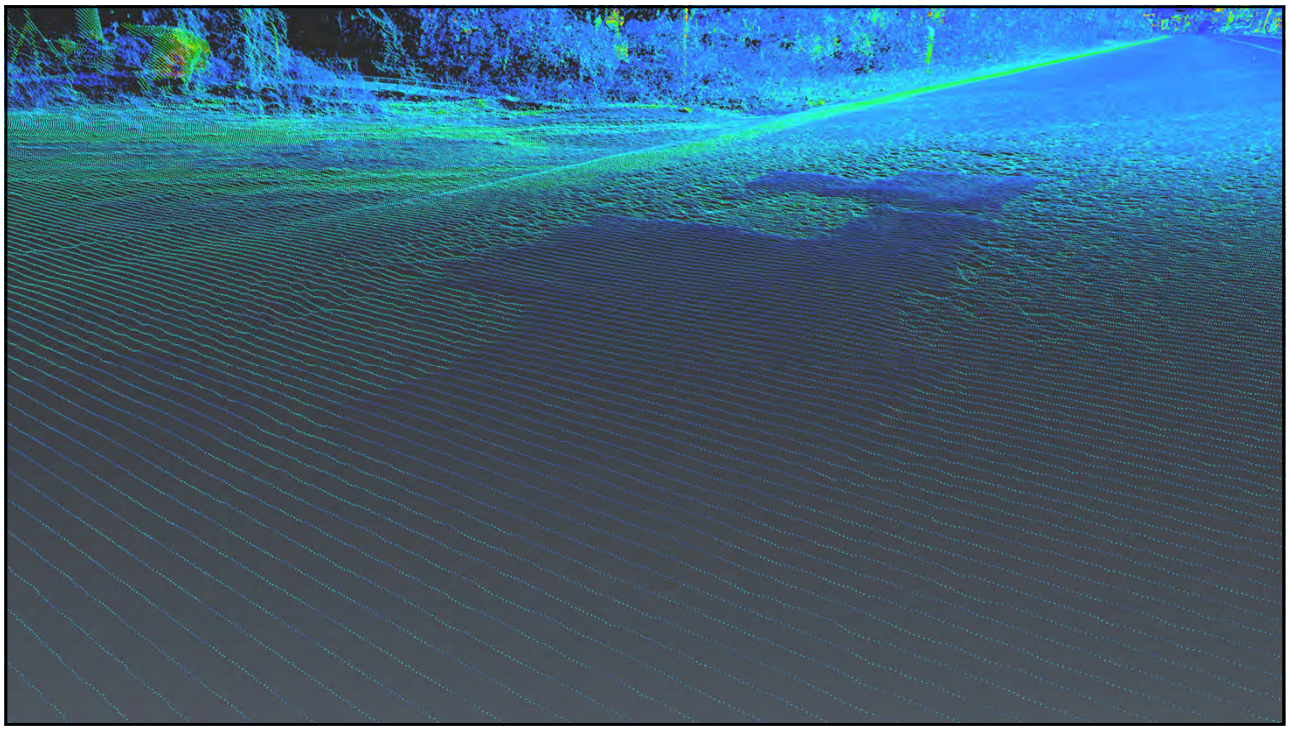
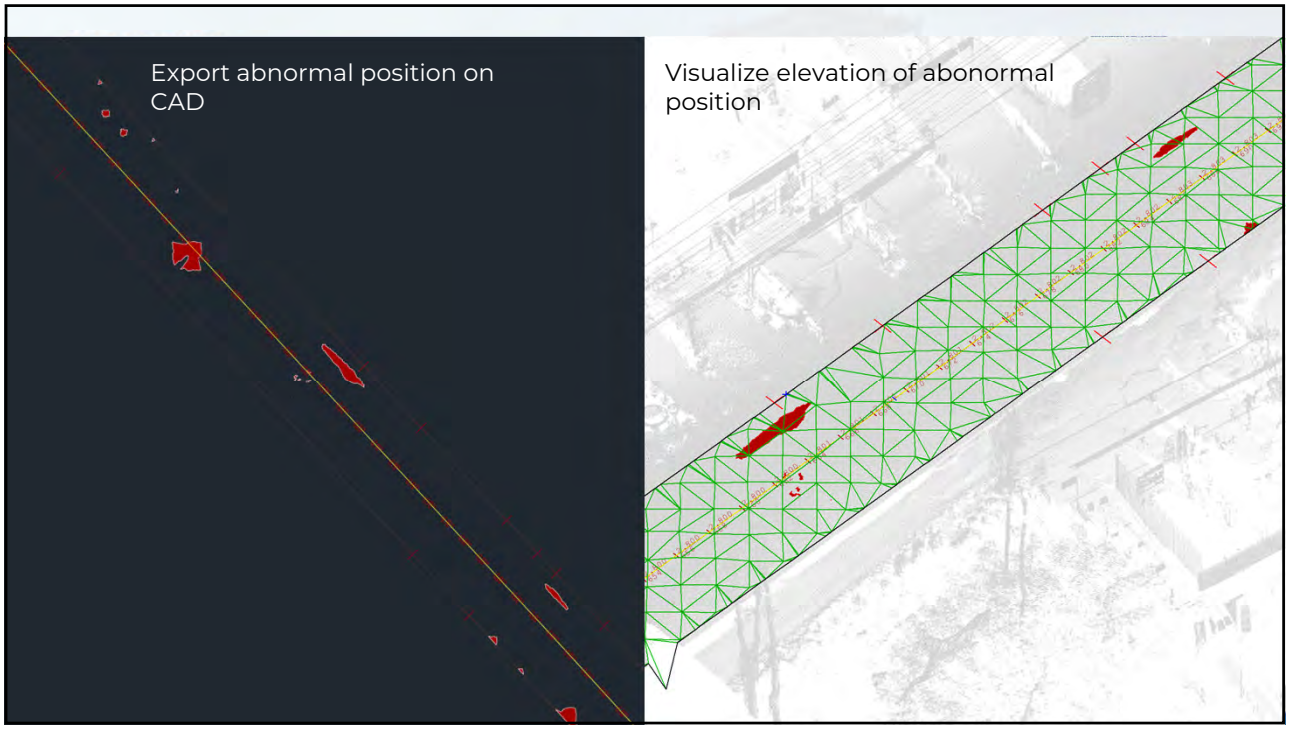
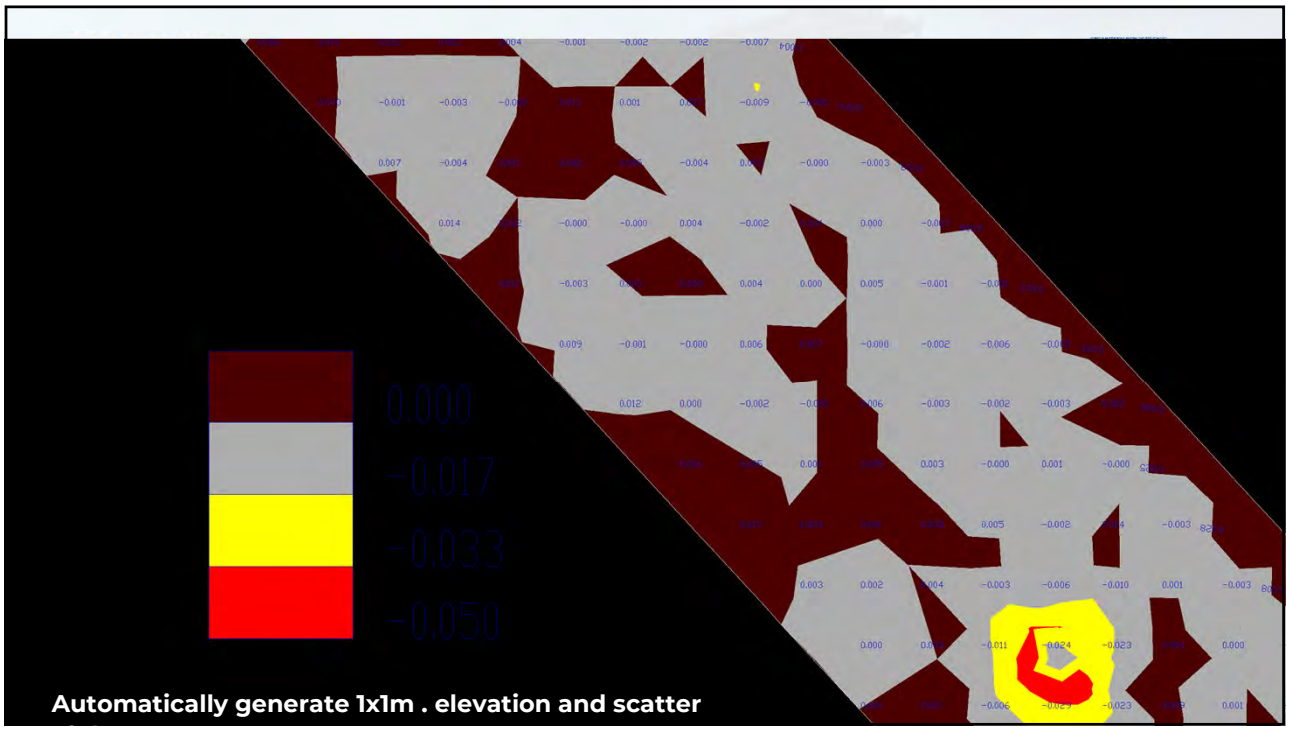
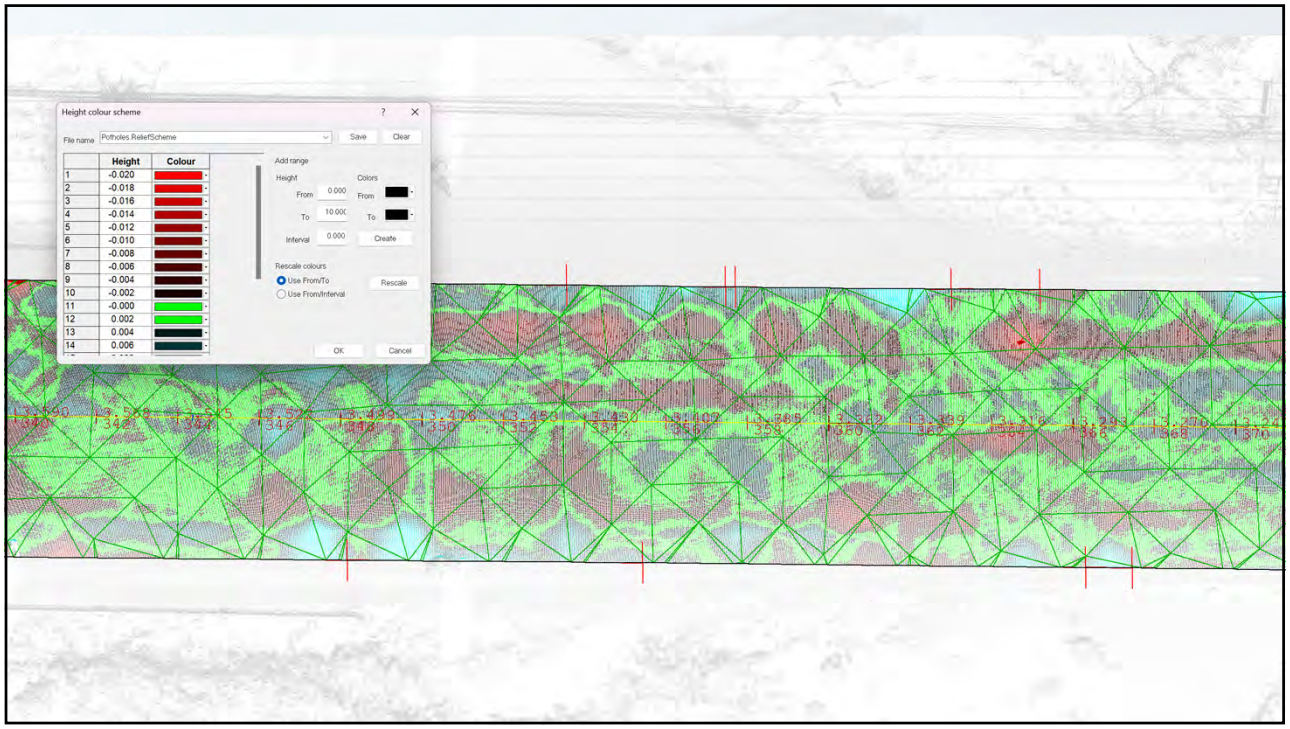
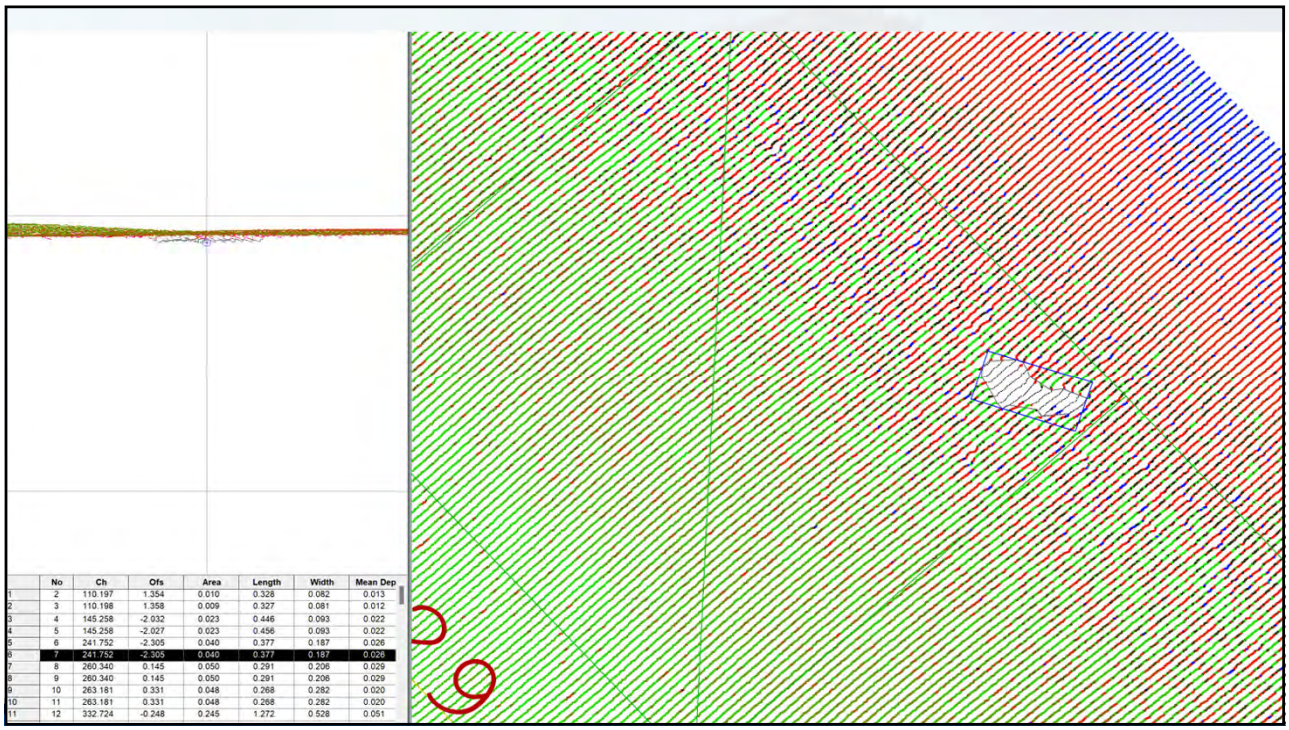




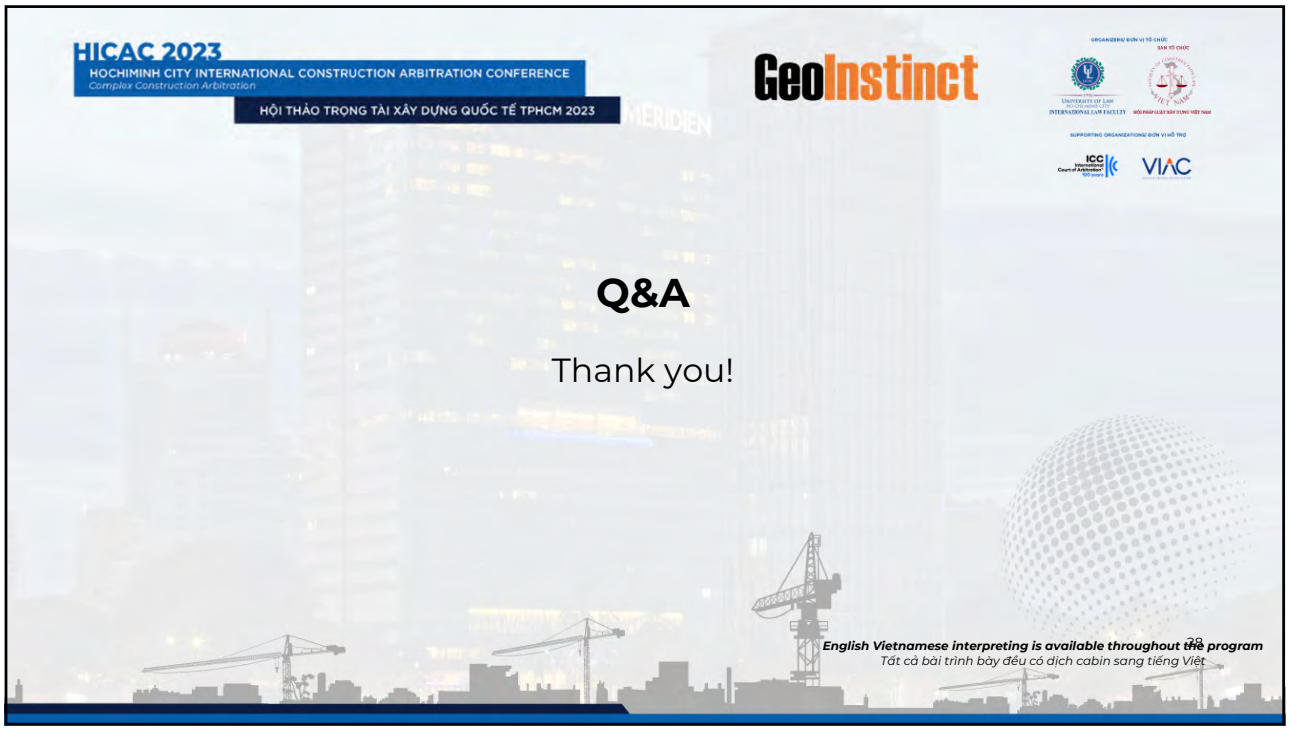

Export abnormal position on CAD
Visualize elevation of abonormal position


0.000
-0.017
-0.033
-0.050
Automatically generate 1x1m . elevation and scatter


Height colour scheme
File name
Potholes ReliefScheme
Save
Clear
Height
Colour
Add range
Height
From
To
Interval
Create
Colors
Rescale colours
Use From/To
Use From/Interval
Rescale
OK
Cancel



	No	Ch	Ofs	Area	Length	Width	Mean Dep
1	2	110.197	1.354	0.010	0.328	0.082	0.013
2	3	110.198	1.358	0.009	0.327	0.081	0.012
3	4	145.258	-2.032	0.023	0.446	0.093	0.022
4	5	145.258	-2.027	0.023	0.456	0.093	0.022
5	6	241.752	-2.305	0.040	0.377	0.187	0.026
6	7	241.752	-2.305	0.040	0.377	0.187	0.026
7	8	260.340	0.145	0.050	0.291	0.206	0.029
8	9	260.340	0.145	0.050	0.291	0.206	0.029
9	10	263.181	0.331	0.048	0.268	0.282	0.020
10	11	263.181	0.331	0.048	0.268	0.282	0.020
11	12	332.724	-0.248	0.245	1.272	0.528	0.051



BUILDING INFORMATION MODELLING (BIM) AND DISPUTE RESOLUTION

Maximilian Benz

Associate Director at HKA

Maximilian Benz is a chartered quantity surveyor with the Royal Institution of Chartered Surveyors a quantum expert witness in international arbitration and mediation proceedings, holding over a decade of experience in industry.

Maximilian's expertise is drawn from working with professional quantity surveying consultancies, contractors and owners. The last seven years focus has been on expert witness and expert advisory matters.

Maximilian has developed knowledge through working on numerous iconic projects globally in the leisure, power and utilities, commercial, retail, rail, oil & gas and aerospace sectors. These projects range from office fit out's to multibillion-dollar funded airports.

Maximilian has provided expert witness and advisory services, conducting quantum analysis of project data and accounts to provide advisory and witness reports on matters in dispute, more recently his includes an understanding of the application of BIM in disputes.

Maximilian's areas of expertise is quantum. His experience includes; estimation of damages and estimation of construction, assessment of change, assessment of prolongation, assessment of disruption and assessment of employer claims.

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Building Information Modelling (BIM) and Dispute Resolution

HKIAC

17 April 2023
Singapore

Maximilian Benz

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Maximilian Benz BSc LLM MRICS MCIArb APAEWE AMAE

Associate Director & Quantum Expert

Education

- BSc Quantity Surveying
- LLM Construction Law & Arbitration
- MRICS (Chartered Quantity Surveyor, Royal Institution of Chartered Surveyors)
- MCIArb (Member of the Chartered Institute of Arbitrators)
- APAEWE (Advanced Professional Award in Expert Witness Evidence)
- AMAE (Associate Member, Academy of Experts)

Industry Memberships

- Member of the Society of Construction Law, Singapore

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Clients have access to thought leaders with diverse skills and the ability to anticipate, investigate and resolve complex challenges.

Who we are

HKA is the world's leading consultancy of choice for multi-disciplinary expert and specialist services in risk mitigation and dispute resolution within the capital projects and infrastructure sector.

We also have extensive experience advising clients on the economic impact of commercial and investment treaty disputes and in forensic accounting matters, across all industry sectors.

In addition, HKA supports companies that conduct business with the US Federal Government, providing them with consulting services on complex government contracting matters.

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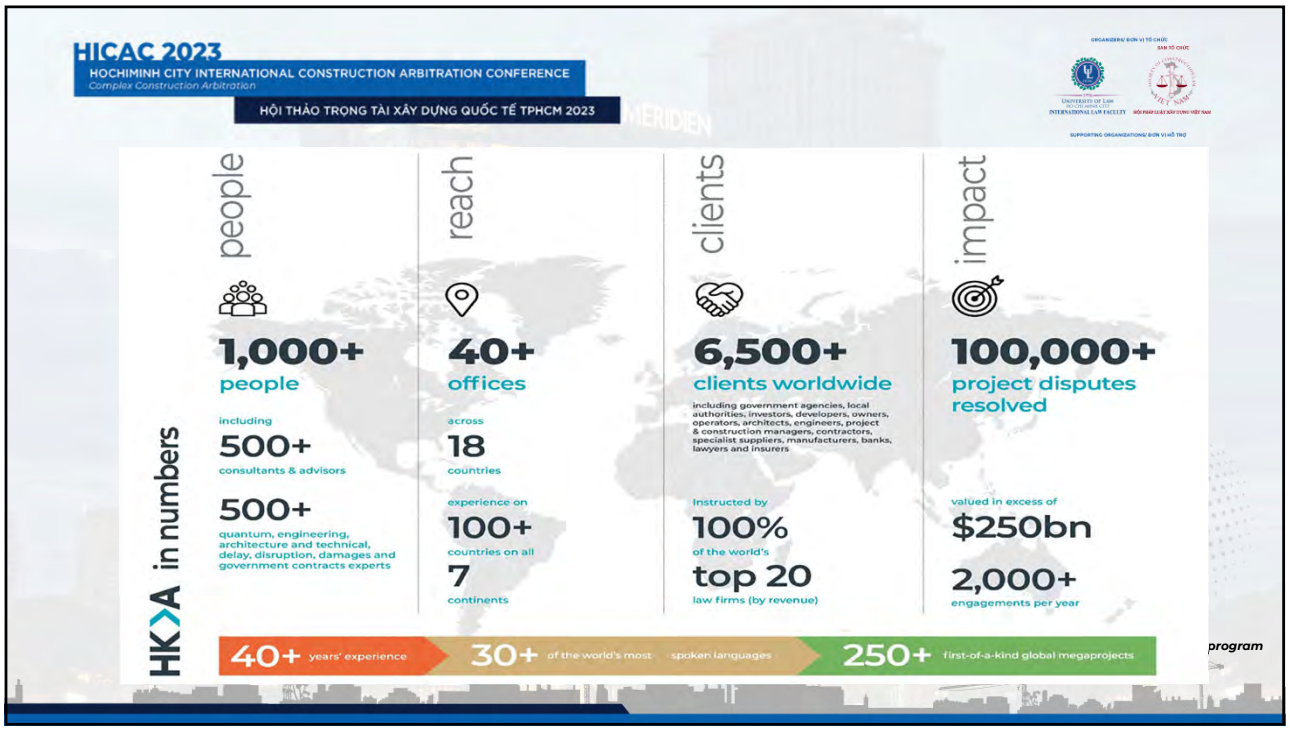
Our services

- Expert
- Claims and dispute resolution
- Advisory
- Multi-disciplinary (QED+)
- Engineering, Architectural & Technical
- Forensic Accounting & Commercial Damages
- Government Contracts
- Cybersecurity & Privacy Risk Management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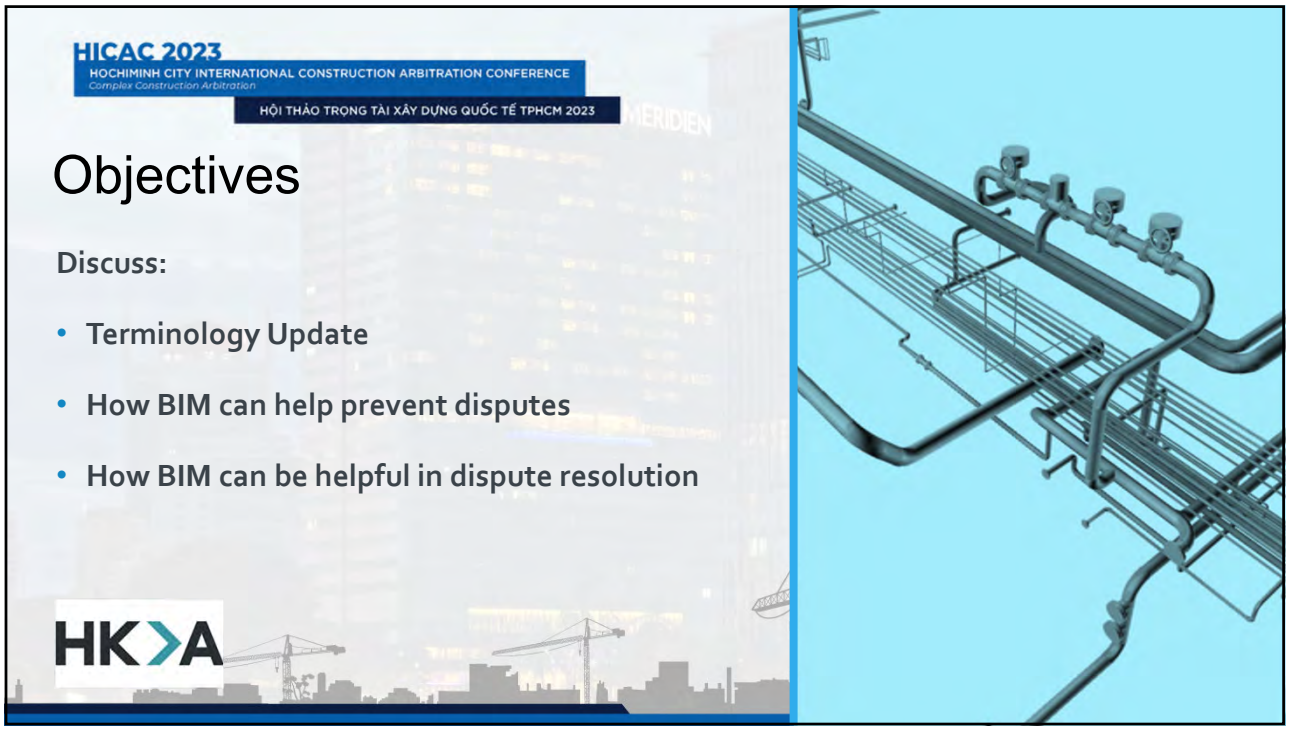
HK>A in numbers
people
1,000+
people
including
500+
consultants & advisors
500+
quantum, engineering, architecture and technical, delay, disruption, damages and government contracts experts
reach
40+
offices
across
18
countries
experience on
100+
countries on all
7
continents
clients
6,500+
clients worldwide
including government agencies, local authorities, investors, developers, owners, operators, architects, engineers, project & construction managers, contractors, specialist suppliers, manufacturers, banks, lawyers and insurers
Instructed by
100%
of the world's
top 20
law firms (by revenue)
impact
100,000+
project disputes resolved
valued in excess of
$250bn
2,000+
engagements per year
40+ years' experience
30+ of the world's most spoken languages
250+ first-of-a-kind global megaprojects
program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Objectives
Discuss:
• Terminology Update
• How BIM can help prevent disputes
• How BIM can be helpful in dispute resolution
HK>A

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Shifting Industry Focus away from BIM

Common Misconceptions

Building

- BIM is relevant to all built assets, not just *'buildings'*
- BIM is relevant to all stages of a built assets lifecycle, not just the construction '*building*' phase

Information Management

Modelling

- BIM is not just about '3D Modelling'
- Term arguably excludes members of industry outside Modelling

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Shifting Focus from BIM to IM: Example

Example of U.K. BIM Alliance new name
(NIMA is "Greek" for Thread)

Explanation: https://www.bimplus.co.uk/nima-uk-bim-alliance-puts-information-management-first-with-new-name-new-approach/

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How can BIM help to prevent Disputes?

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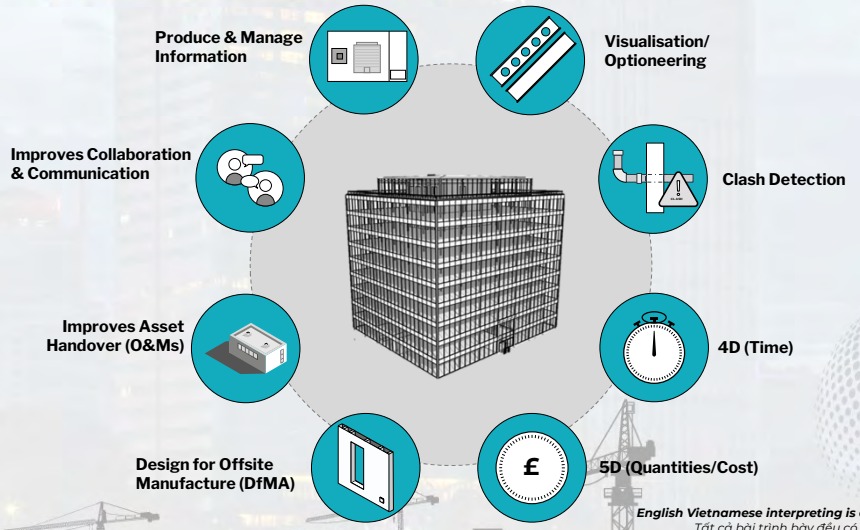
BIM & Dispute Avoidance



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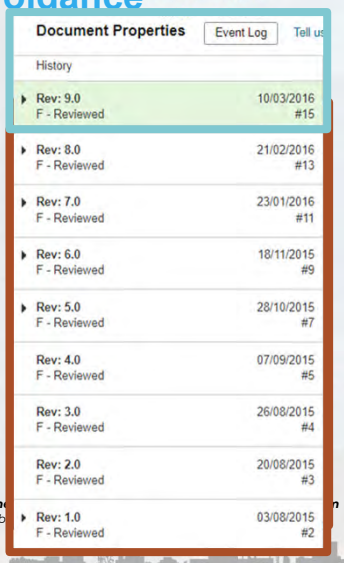
Common Data Environments (CDEs) & Dispute Avoidance

Container Name	Description	Status	Revision	Author	Submittal Date	Container Classificaiton
7001-BBH-ZZ-ZZ-DR-A-00301	First Floor Plan	S3	P04	Joe Blogs	12/11/2017	PM_40_30 : Design information
7001-BBH-ZZ-ZZ-DR-A-00312	West Elevation	A3	C06	Joe Blogs	12/11/2017	PM_40_30 : Design information

Container Name / ID Field

Additional Container Metadata Assignments

1 - 100 of 368,096 documents



- Help Manage large volumes of data
- Easier to find latest revisions of a document …
- Store **superseded** versions (which may come in useful later).
- Adhering to an Information Management plan should also enable parties to be able to sort information efficiently.

BIM & CDEs: "BIM, at its most basic level, could be described as a process by which 3D models and a common data environment are used to access and share information across the supply chain in order to increase the efficiency of delivering and operating projects." Croft, Winfield, Contracts playing catch up in digital revolution, Construction Law (2019) 30 7 Cons.Law 21, [August 2019]

English Vietnam
Tất cả b

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CDEs & Dispute Avoidance

Problems

30%
Initial Project Data Lost

https://www.emerson.com/documents/automation/operational-readiness-bringing-gap-between-construction-operations-for-new-capital-assets-en-68086.pdf

13%
Time spent searching for data

https://constructionblog.autodesk.com/construction-common-data-environment/

Solution

Common Data Environments

https://ukbimframework.org/wp-content/uploads/2020/09/Guidance-Part-C_Facilitating-the-common-data-environment-workflow-and-technical-solutions_Edition-1.pdf

Common data environment (CDE): *"agreed source of information for any given project or asset, for collecting, managing and disseminating each information container through a managed process." ISO 19650-1*

Popular CDE solutions: Aconex, Projectwise, Asite.

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How can BIM help in Dispute Resolution?

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What is an Expert Witness?

Experts – overriding duty to the court

35·3

(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

CPR 35 Duties of an Expert Witness

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How is evidence changing in dispute resolution?

Building Information Models

- Models are increasingly being issued in Evidence.
- Models can provide insight into design, delay, and quantum issues.

BIM provisions in Contracts

- Lawyers are increasingly referring to BIM to make/defend against claims (e.g. referencing BIM Execution Plans (BEPs), model coordination efforts, or Protocols).

Common Data Environments

- CDEs (Data Repositories) are also featuring in claims
- CDEs contain records which are useful in claims (e.g. uploads, downloads, comments, approvals).

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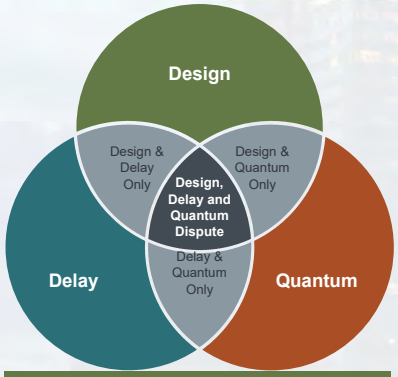
How can models help?



Was the Design coordinated?

Did the uncoordinated design impact progress on site?

What cost impacts would reasonably arise as a result of variations?

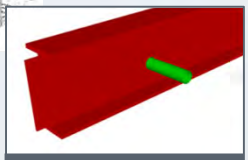
Did the design flaw result in delay and cost impact to the claimant?

Architectural Design | Structural Design | MEP Design

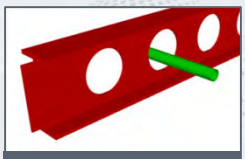


Main Contractor
Subcontractor
Contract Administrator
Client

Federated Models



Clash identified 04 June 2019



Clash Resolved 04 September 2019

Models can provide Useful, Clear, Factual, Contemporaneous Digital Evidence

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HKA BIM Services

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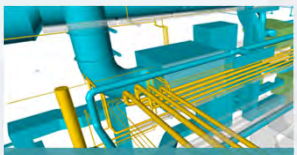
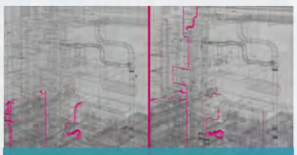
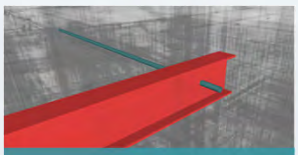

Data Analysis

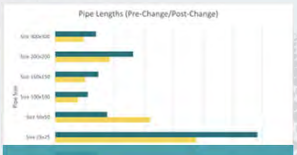

Design Change Analysis


Level of Effort Analysis


Clash Detection


Data Validation


4D (BIM +Time)



5D (BIM + Cost)

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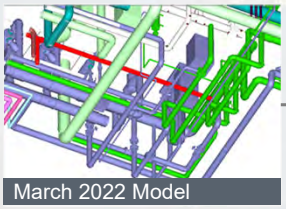
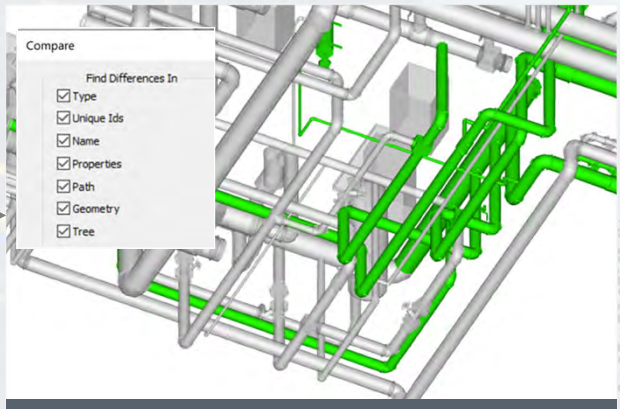
Example of Design Claim Design Change Analysis


January 2022 Model


March 2022 Model



Differences between January and March 2022 Model Revisions

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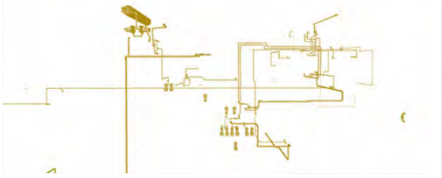
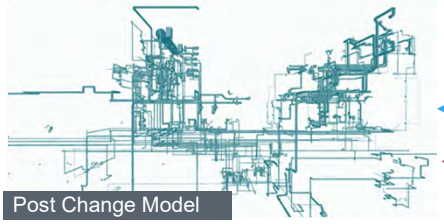
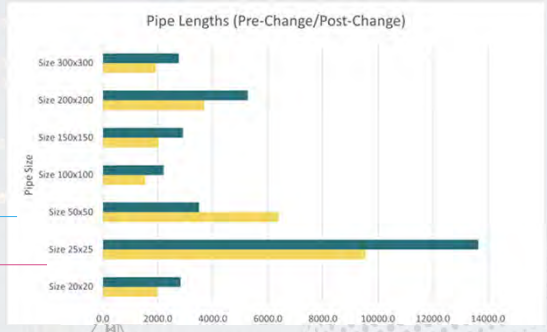
Example of using Models in Quantum Claims

Pre Change Model





Post Change Model



Output of 5D analysis

*Only possible when reliable data is included in model

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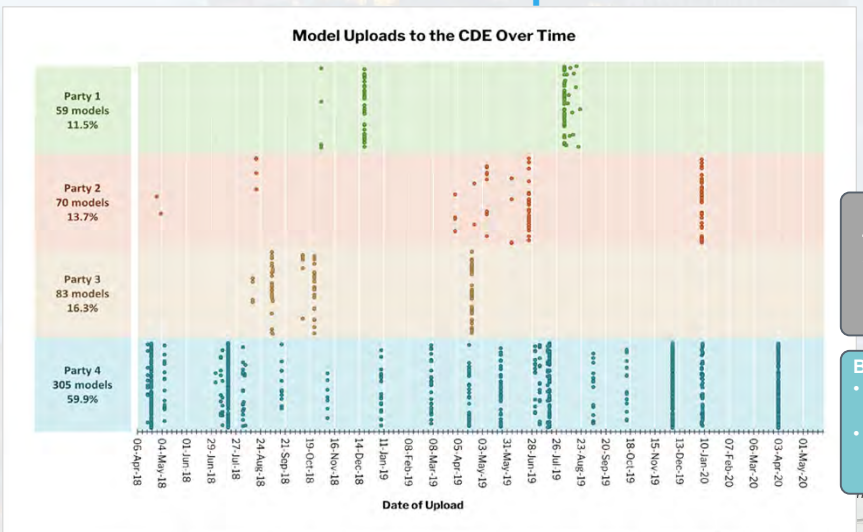
Data Visualisation Example



Left: Data visualization comparing design data uploads to Aconex by 4 designers

Task: Describe how Data was shared by Parties in the project?

Benefits
- **CDE evidence typically easy to analyse**
- **Easier to communicate factual evidence clearly**

program

*Only possible IF you have access…

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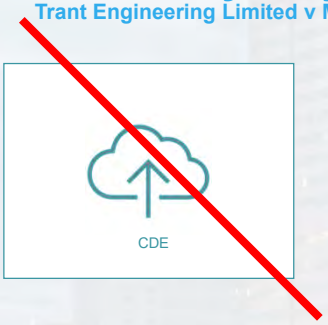
CDEs may only be helpful if you have access

Trant Engineering Limited v Mott MacDonald Limited [2017] EWHC 2061 (TCC)



Judge: Mrs Justice O'Farrell DBE
Date: July 2017
Described as **"The first reported UK BIM case"**

Facts: MMD (consultant) blocked access to Projectwise during a dispute with Trant (client) regarding non-payment.
Trant successfully sought an injunction for access.

Consider copying all data to your businesses servers, or ensure contract stipulates access to CDEs in the event of a dispute

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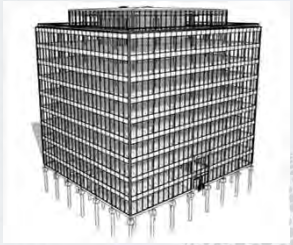
Conclusion

- Non-digitised or Disorganised evidence is harder to analyse.
- Models & CDEs can be incredibly useful (providing we have access, and the data is relevant to the dispute).
- BIM isn't causing any disputes, but models and CDEs may provide relevant **Factual Contemporaneous Evidence**.
- This is essential data for **writing claims & writing expert witness reports.**



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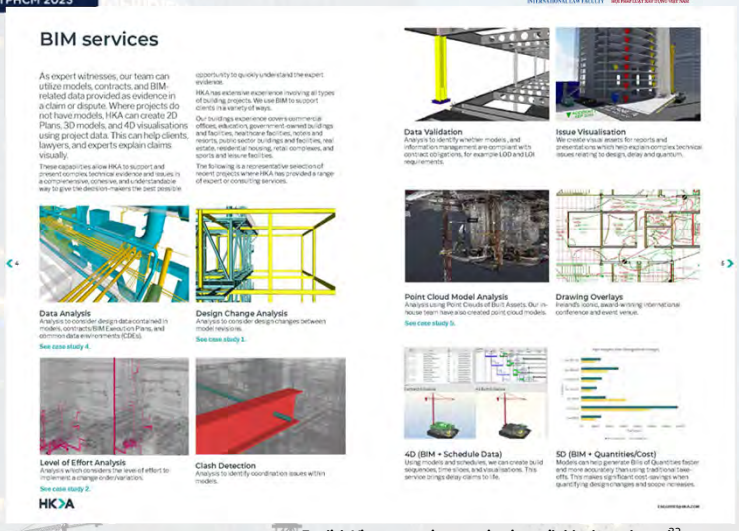

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Q&A

Thank for listening

AGILE. COLLABORATIVE. CONFIDENT. INNOVATIVE. PASSIONATE

HKA

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ADMISSIBILITY AND ASSESSMENT OF ELECTRONIC EVIDENCE IN CONSTRUCTION ARBITRATION PROCEEDINGS – AN ANALYSIS FROM VIETNAMESE LAW PERSPECTIVE

Nguyen Thi Lan Huong

Deputy Head of the Department of International Trade Law,

Faculty of International Law,

Ho Chi Minh City University of Law

Mrs. Huong received a Master's degree in law from Nagoya University, Japan in 2012 within the framework of Human resources Development scholarship funded by the Japanese government. She is currently a PhD Candidate at University of Lausanne, Switzerland. She is also a researcher at Centre of Comparative, European and International Law, University of Lausanne, Switzerland.

Mrs. Huong teaches and researches in the area of international trade and investment law, international dispute settlement, trade-investment and sustainable development. Mrs. Huong has published many articles and books in the field of international trade and investment law. Her most recent books include: Investor-State dispute settlement: legal issues and practice in the context of intergartion, Ho Chi Minh City National University Publishing 2018 (Co-editor and Co-author) and Investor-State Arbitration: Rules-Procedures-Practices, Ho Chi Minh City National University Publishing, 2021 (Co-editor and Co-author).

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Admissibility and Assessment of Electronic evidence in Construction Arbitration Proceedings - An analysis from Vietnamese law perspective

NGUYEN THI LAN HUONG
Deputy Head of Department of International Trade Law
International Law Faculty, HCMC University of Law

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KEY ISSUES

Part 1. Electronic evidence in construction disputes

Part 2. The admissibility and assessment of unlawfully obtained electronic evidence under Vietnamese law

Part 3. Suggestions

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Part 1. Electronic evidence in construction disputes

1.1 Introduction of Electronic evidence

- Digital evidence/electronic evidence: "*Digital Evidence is any information of probative value that is either stored or transmitted in a digital form.*"

[The Scientific Working Group on Digital Evidence, "Digital Evidence: Standards and Principles", Forensic Science Communications, April 2000 - Volume 2 - Number 2]

- A Document is "*anything in which information is recorded or maintained in any form, including but not limited to paper or electronic form*"

[Rule 111(1),(2) Model European Rules of Civil Procedure 2020]

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Part 1. Electronic evidence in construction disputes

1.2. Electronic evidence in construction disputes

- Recorded progress data
- Photographic, video-recorded
- Building Information Modelling (BIM)
- .....

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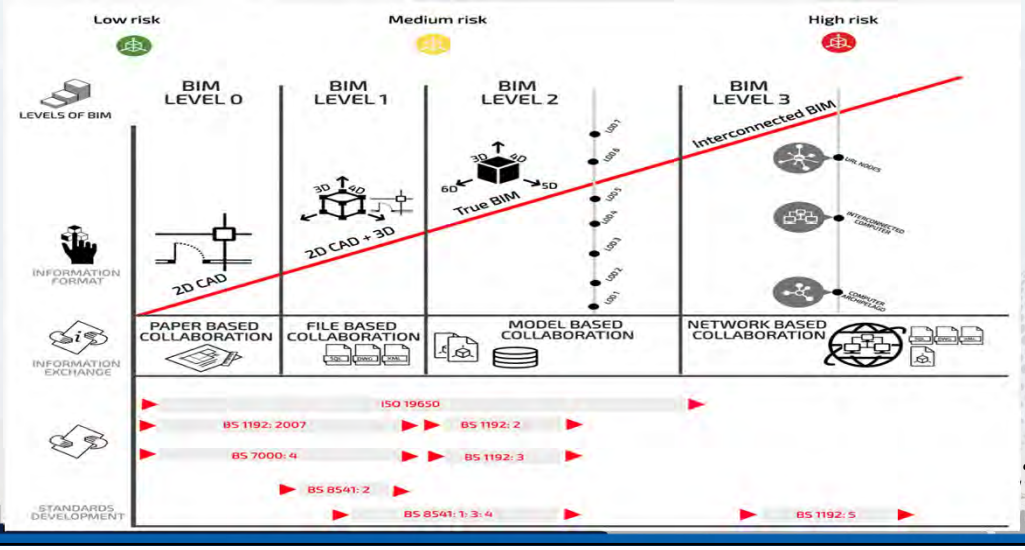
Part 1. Electronic evidence in construction disputes



The cyber risks of networked common data environment and levels of BIM [Anil Sawhney et al, Construction 4.0: An Innovation Flatform for the Build environment" , Routledge 2020]

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Part 2. The admissibility and assessment of unlawfully obtained electronic evidence under Vietnamese law

- **Questions to be solved:**

- What evidence is admissible in an international arbitration proceeding?
- What constitutes unlawfully obtained evidence? Does public disclosure of a confidential document make it admissible as evidence?
- Does the interest in truth-finding prevail over confidentiality and privilege?
- Does accepting unlawfully obtained electronic evidence undermine the fairness of arbitration proceedings? Would accepting such evidence encourage future illegal behavior?
- What if the party providing the evidence was involved in the underlying unauthorized public disclosure?
- If unlawfully obtained electronic evidence is the only tool to uncover the truth, should it be accepted?
- Whether admitting such evidence led to setting aside the arbitral award on procedural public policy grounds?

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Part 2. The admissibility and assessment of unlawfully obtained electronic evidence under Vietnamese law

2.1 Grounds for Admitting unlawfully Obtained Electronic Evidence

(i) To ensure the objective of arbitration proceedings in accordance with the jurisdiction of the arbitral tribunal

(ii) To protect fundamental rights (right to a fair trial) [Art. 15.1, 70.5 Vietnamese Civil Procedure Code 2015, Art. 4.2 and 4.3 Vietnamese Law on Commercial Arbitration 2010]

(iii) The admissibility is not contrary to relating evidence rules under Vietnamese law [Art. 6, Art. 48.3, Art. 108, Art .286 Vietnamese Civil Procedure Code 2015]

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Part 2. The admissibility and assessment of unlawfully obtained electronic evidence under Vietnamese law

2.2 Grounds for excluding unlawfully Obtained Electronic Evidence

(i) Electronic evidence is protected by law (public policy): (Art. 2 of the Law on Protection of State Secrets 2018)

(ii) Privilege documents/information [Art. 4.3, Art. 68.2(đ) Vietnamese Law on Commercial Arbitration 2010]

(iii) Violation of principle of good faith or clean hands

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Part 3. Suggestions

3.1 Arbitration tribunals

- Improving knowledge of technology and case law
- Art 9,2 IBA rules 2020 on the Taking of Evidence in International Arbitration

3.2 Construction sector

- Cybersecurity
- Good faith
- IBA rules 2020

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Q&A

Xin trân trọng cám ơn Quý vị đã chú ý lắng nghe!
Thank you!

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BUỔI CHIỀU - PHÒNG TÂN THUẬN - HIỆP PHƯỚC

PHẦN C: CÁC QUY TẮC TRỌNG TÀI TRONG KHU VỰC VÀ VIỆC ÁP DỤNG VÀO CÁC VỤ TRỌNG TÀI XÂY DỰNG PHỨC TẠP

AFTERNOON - ROOM TAN THUAN - HIEP PHUOC

SECTION C : ARBITRATION RULES OF REGIONAL INSTITUTIONS AND THEIR APPLICATION IN COMPLEX CONSTRUCTION ARBITRATION

PHIÊN C1: CÁC QUY TẮC TRỌNG TÀI KHU VỰC ÁP DỤNG TRONG CÁC TRANH CHẤP XÂY DỰNG NHIỀU BÊN NHIỀU HỢP ĐỒNG

PANEL C1: ARBITRATION RULES OF REGIONAL INSTITUTIONS IN COMPLEX MULTI-PARTY MULTI-CONTRACT CONSTRUCTION ARBITRATION

Moderator

Amanda Lees
International Arbitration Partner at King & Wood Mallesons

Amanda leads the South-East Asia Disputes team of King & Wood Mallesons. Having been based in Singapore for 11 years and with more than 22 years' experience in dispute resolution in the region, Amanda is an expert in international commercial and investment treaty arbitration in the Asia Pacific region. She also acts as international counsel in complex cross border litigation including instructing on proceedings in the Singapore International Commercial Court appealed to the Court of Appeal.

Amanda acts as counsel in large complex disputes across a range of industries, with a particular focus on construction, infrastructure, energy and resources and technology disputes.

Amanda represented the Republic of Indonesia as advocate in its successful defence of a US$580 million claim under the India-Indonesia BIT, which was arbitrated under the UNCITRAL Rules and administered by the PCA.

Amanda sits as an arbitrator regularly (including on a number of Vietnamese disputes) and has had 22 appointments as arbitrator by SIAC, ICC and LCIA, including as emergency arbitrator, expedited arbitrator and presiding arbitrator. Amanda is listed on the panels of SIAC, HKIAC, ICDR (AAA) and JCAA.

Amanda is a Fellow and Director of the Chartered Institute of Arbitrators in Singapore and Fellow of the Singapore Institute of Arbitrators. As part of the CIARB Faculty, Amanda has taught international arbitration to hundreds of lawyers and other professionals throughout Asia.

She is a regular speaker at international conferences, has published widely on international arbitration and is ranked as a leading individual for international arbitration by Legal 500 and 'most in-demand arbitrator' in Chambers Global.

COMPLEX MULTI-PARTY MULTI-CONTRACT CONSTRUCTION ARBITRATION AND ARBITRATION RULES

Heather Yee Jing Wah

Assistant Director of the Asian International Arbitration Centre (AIAC, Malaysia)

Ms. Heather Yee is a Fellow of the Chartered Institute of Arbitrators (CIArb) and accredited mediator. She is currently serving as the Assistant Director of the Asian International Arbitration Centre (AIAC). She regularly advises on alternative dispute resolution matters including mediation, adjudication, expert determination, ad hoc arbitration and institutional arbitration. She edited the book publication 'Standard Form of Building Contracts Compared' published by LexisNexis in 2022 and frequently invited to judge in international moot competitions and to speak in international events, forums and conferences on topics relating to dispute resolution and dispute settlement.

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COMPLEX MULTI-PARTY MULTI-CONTRACT CONSTRUCTION ARBITRATION AND ARBITRATION RULES

HEATHER YEE JING WAH
Assistant Director, AIAC

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KEY ISSUES

Part 1 – Multi-Party & Multi-Contract Arbitration

Part 2 – The AIAC Arbitration Rules 2021

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Part 1
Multi-Party & Multi-Contract Arbitration

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Multi-Party & Multi-Contract Arbitration

- As a brief overview, the **fundamental characteristics of arbitration** comprise of the following:
  - confidentiality of proceedings
  - tribunal neutrality and impartiality
  - party autonomy
  - flexibility in the choice of the applicable procedural and the substantive laws
  - universal enforceability

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Multi-Party & Multi-Contract Arbitration

- Construction contracts would involve multiple contracts intersecting at different tiers of projects entered with multiple parties. The need for an efficient and universally enforceable dispute resolution mechanism targeted for multi-party disputes, such as multi-party arbitration, is particularly relevant.

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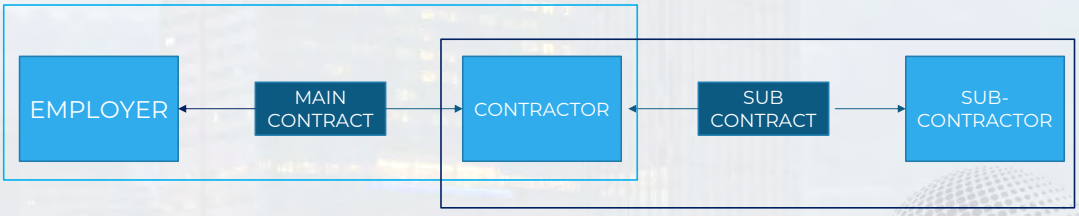
Multi-Party & Multi-Contract Arbitration



- While the terms multi-party arbitration and multi-contract arbitration are often mentioned interchangeably with regards to complex arbitrations, these terms are conceptually different.

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Multi-Party & Multi-Contract Arbitration

- **Multi-Party Arbitration**: all the contracting parties may be bound by a single contract containing a standard arbitration clause, thus it can be safely assumed that all the parties have consented to multi-party arbitration
- It is understood to mean as arbitration which deals with dispute involving more than two parties.

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Multi-Party & Multi-Contract Arbitration

- **Multi-Contract Arbitration:** involves disputes under multiple contracts executed between the same parties if the arbitral proceedings dealing with the disputes under different contracts but are consolidated into a single arbitration
- Construction projects would involve multiple contracts intersecting at different tiers of projects entered with multiple parties.

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Part 2
AIAC Arbitration Rules 2021 (2021 Rules)

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2021 Rules

- The 2021 Rules provide for two main provisions on multi-party and multi-contract arbitration: **Rule 21 (Joinder of Parties)** and **Rule 22 (Consolidation of Proceedings).**

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2021 Rules – Rule 21 (Joinder of Parties)

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Rule 21 (Joinder of Parties)

- Any Party to an arbitration or an additional party ("Additional Party") may, *no later than the filing of the statement of defence and counterclaim*, or at any time thereafter provided there exists exceptional circumstances, request one or more Additional Parties to be joined as a Party to the arbitration ("Joinder Request") **(Rule 21.1)**
- Rationale for Deadline: Joinder Requests should not be used as a dilatory tactic to delay the proceedings.

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Rule 21 (Joinder of Parties)

- Requirements for Joinder Request:
  a) all Parties to the arbitration and the Additional Party consent in writing to the joinder;
  b) such Additional Party is *prima facie* bound by the arbitration agreement that gives rise to the arbitral proceedings; or
  c) the participation of such Additional Party is necessary for the efficient resolution of the dispute and directly affects the outcome of the arbitral proceedings. **(Rule 21.1)**

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Rule 21 (Joinder of Parties)

- Under **Rule 21.1(b)**, "prima facie bound" means that the Additional Party has to have a sufficient legal nexus to the underlying contract .
- When raised at the early stages of the proceedings, the Joinder of Parties assist the tribunal to contextualize and delineate the relevant procedural and merits issues, and streamline the procedural agenda and timeline.

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Rule 21 (Joinder of Parties)

- **Rule 21.4** enumerates the requirements for Joinder Request, including, but not limited to:
  - information as to whether the Additional Party is to be joined as a Claimant or a Respondent to the arbitration, and *any relief or remedy* sought by or against the Additional Party; **(Rule 21.4(c))**
  - a copy of the documentation in which the arbitration agreement is contained in or *in respect of which the nexus to the Additional Party arises from*; **(Rule 21.4(d))**
    - Note: This requirement caters to situations where the potential Additional Party is not a party to the arbitration agreement.

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Rule 21 (Joinder of Parties)

- **Rule 21.4** enumerates the requirements for Joinder Request, including, but not limited to:
  - a brief description of the legal and factual basis in support of the Joinder Request, including the *relief or remedy sought*; **(Rule 21.4(e))**
  - any Communication between the Parties *relating to the intended joinder* that the requesting Party deems relevant to the Joinder Request **(Rule 21.4(g))**

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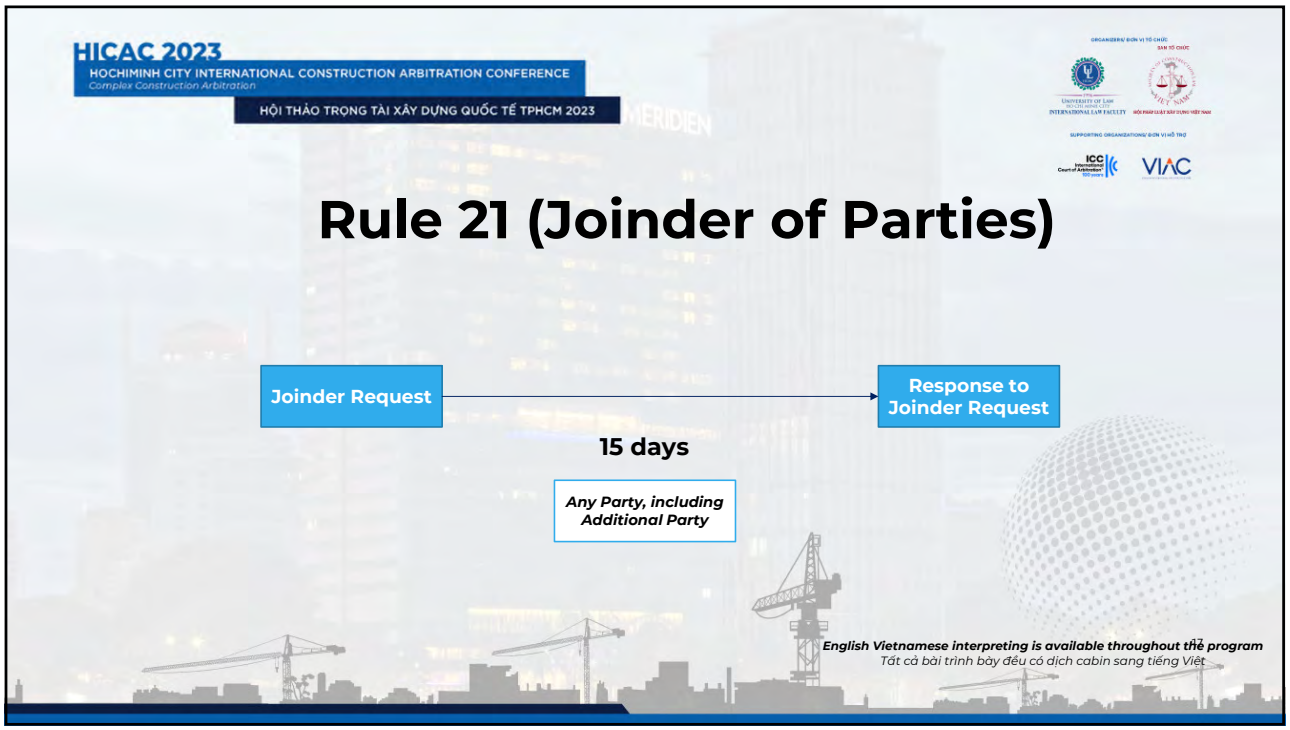
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Rule 21 (Joinder of Parties)
Joinder Request
Response to Joinder Request
15 days
Any Party, including Additional Party
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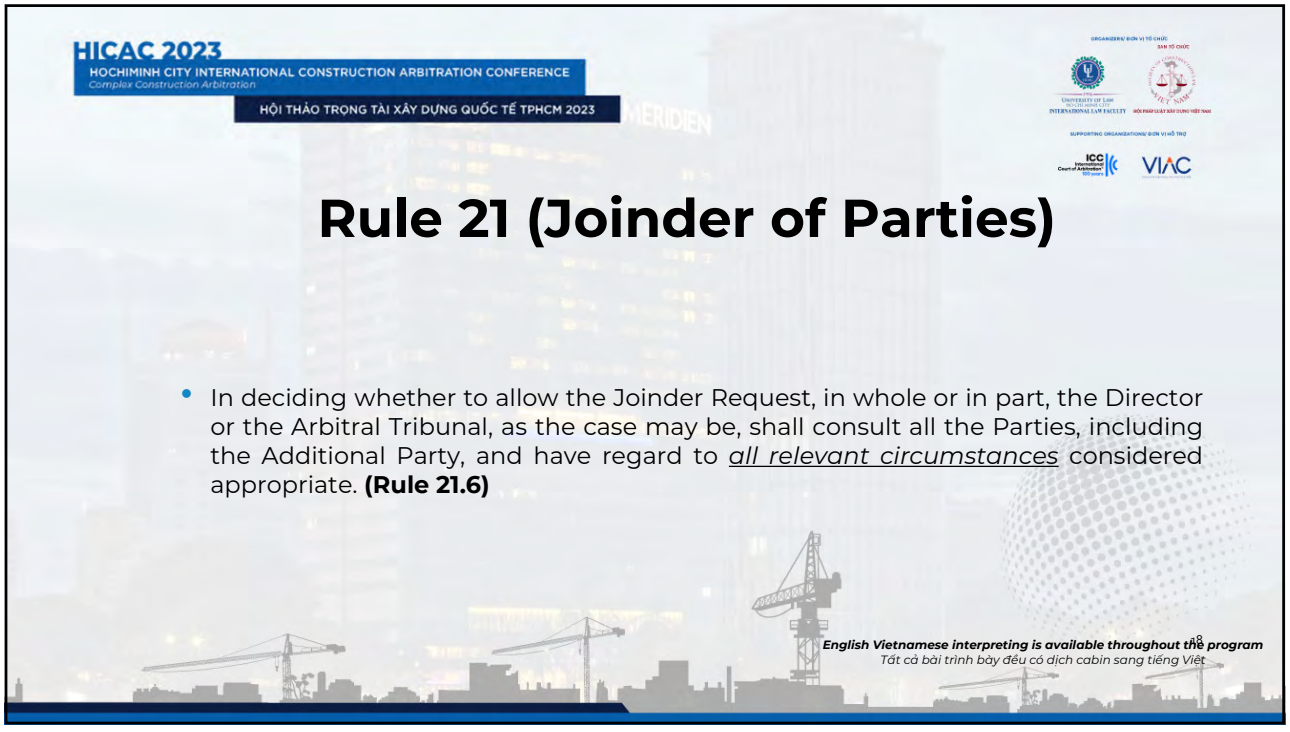
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Rule 21 (Joinder of Parties)
In deciding whether to allow the Joinder Request, in whole or in part, the Director or the Arbitral Tribunal, as the case may be, shall consult all the Parties, including the Additional Party, and have regard to all relevant circumstances considered appropriate. (Rule 21.6)
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Rule 21 (Joinder of Parties)

- Any decision by the Director pursuant to Rule 21.6 to allow the Joinder Request is without prejudice to the Arbitral Tribunal's power to decide any question as to its jurisdiction arising from such a decision. **(Rule 21.7)**
- The Tribunal may maintain or overturn the Director's decision to allow the Joinder Request, especially if there is a challenge to the same.

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Rule 21 (Joinder of Parties)

- Other considerations:
  - If a Joinder Request is allowed, the Director may, in his discretion, release any arbitrator already confirmed or appointed, and thereafter appoint the Arbitral Tribunal in accordance with the procedure in Rule 9.7. **(Rule 21.8)**
  - The date on which the Joinder Request is allowed by the Director or the Arbitral Tribunal, as the case may be, shall be deemed the date of the registration of the arbitration in respect of the Additional Party. **(Rule 21.9)**

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

Rule 21 (Joinder of Parties)

- A joinder mechanism enables an Additional Party to be joined in an ongoing proceeding as either Claimant or Respondent.
- This offers time and cost efficiencies to both parties, as well as a streamlined resolution of disputes.

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2021 Rules – Rule 22 (Consolidation of Proceedings)

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Rule 22 (Consolidation of Proceedings)

- In relation to **Rule 5**, where claims arise out of multiple contracts, the Claimant may file a single notice of arbitration with payment of a single non-refundable registration fee pursuant to **Rule 7**, provided that a Consolidation Request is also submitted to the AIAC pursuant to **Rule 22.4.**
- The 2021 Rules allow a multi-contract arbitration to commence through a single notice of arbitration in relation to claims from multiple contracts between the same parties.

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Rule 22 (Consolidation of Proceedings)

- In addition, at the request of a Party, the Director has the power to consolidate two or more arbitral proceedings where the claims and counterclaims are made under different arbitration agreements, provided that the dispute arises from the same legal relationship and the arbitration agreements are compatible. **(Rule 22.1(c))**
- The dispute must arise from the same legal relationship and the arbitration agreements must be compatible.

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Rule 22 (Consolidation of Proceedings)

- **Rule 22.3** enumerates the requirements for a Consolidation Request, including, but not limited to:
  - a copy of the documentation in which the arbitration agreement is contained in or in respect of which the dispute referred to arbitration arises from; **(Rule 22.3(b))**
  - a copy of any separate arbitration or submission agreement; **(Rule 22.3(c))**

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Rule 22 (Consolidation of Proceedings)

- In deciding whether to allow the Consolidation Request, the Director shall consult all Parties and the Arbitral Tribunal, and have regard to all relevant circumstances considered appropriate. **(Rule 22.5)**
- One factor includes whether the disputes under each arbitration concern the *same legal relationship*.
- One factor includes whether the rights or reliefs claimed are in respect of, or arise out of, the *same transaction* or a *series of related transactions*.

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Rule 22 (Consolidation of Proceedings)

- Grant of Consolidation Request
  - When two or more arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise determined by the Director after consulting the Parties. **(Rule 22.7)**

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

Rule 22 (Consolidation of Proceedings)

- Dismissal of Consolidation Request
  - Where the Director dismisses a Consolidation Request, then: (a) any arbitrations that are not consolidated shall continue as separate arbitral proceedings; and (b) in the event of claims arising out of multiple contracts, the Claimant shall be required to issue separate notices of arbitration pursuant to each contract and submit separate Registration Requests, including the proof of payment of the non-refundable registration fee, in respect of each arbitration. **(Rule 22.6)**

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Rule 22 (Consolidation of Proceedings)

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

Rule 22 (Consolidation of Proceedings)

- Where a Consolidation Request is allowed, the Director shall determine a reasonable sum for any fees and expenses payable to any arbitrator who is released from the arbitral proceedings. **(Rule 22.9)**
- The Director's decision to allow a Consolidation Request shall not affect the validity of any act done or order made by any arbitrator who is released from the arbitral proceedings pursuant to Rule 22.8. **(Rule 22.10)**

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COMPLEX MULTI-PARTY MULTI-CONTRACT CONSTRUCTION ARBITRATION UNDER SIAC RULES

Duong Hoang

Deputy Counsel at Singapore International Arbitration Centre (SIAC)

Duong speaks Vietnamese and English. Duong is qualified to practice law in Vietnam.

Duong is now the Deputy Counsel of the Singapore International Arbitration Centre (SIAC). Prior to joining SIAC, Duong worked as a counsel at a leading international arbitration centre in Vietnam where she administered domestic and international arbitration matters conducted under the auspice of the arbitration law of Vietnam and UNCITRAL Arbitration Rules. She thereafter practiced international arbitration with the Singapore office of a leading Vietnam-based law firm where she focused on Vietnam-related matters in construction and petroleum sectors.

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COMPLEX MULTI-PARTY MULTI-CONTRACT CONSTRUCTION ARBITRATION UNDER SIAC RULES

Duong Hoang, Deputy Counsel, SIAC

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Complex Construction Arbitration
HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

KEY ISSUES

Part 1. Who we are

Part 2. Why SIAC

Part 3. Arbitrating at SIAC

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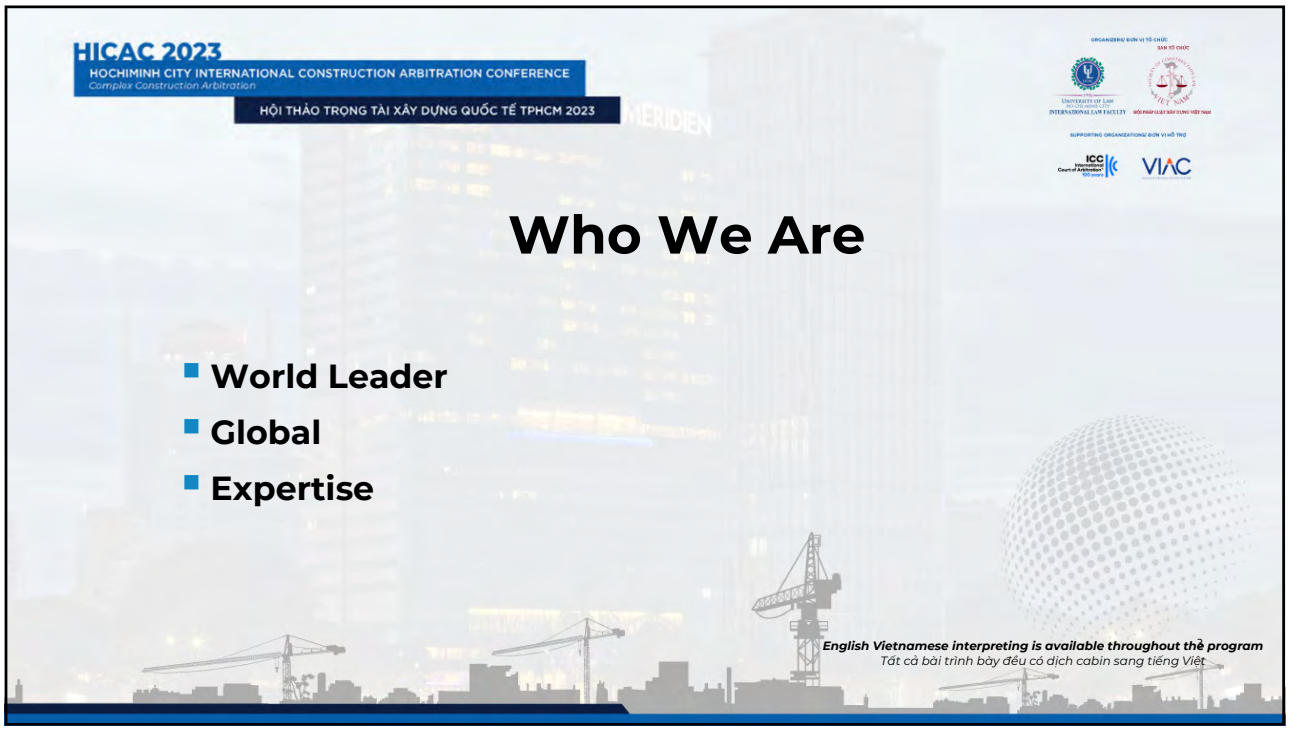
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Complex Construction Arbitration
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Who We Are
World Leader
Global
Expertise
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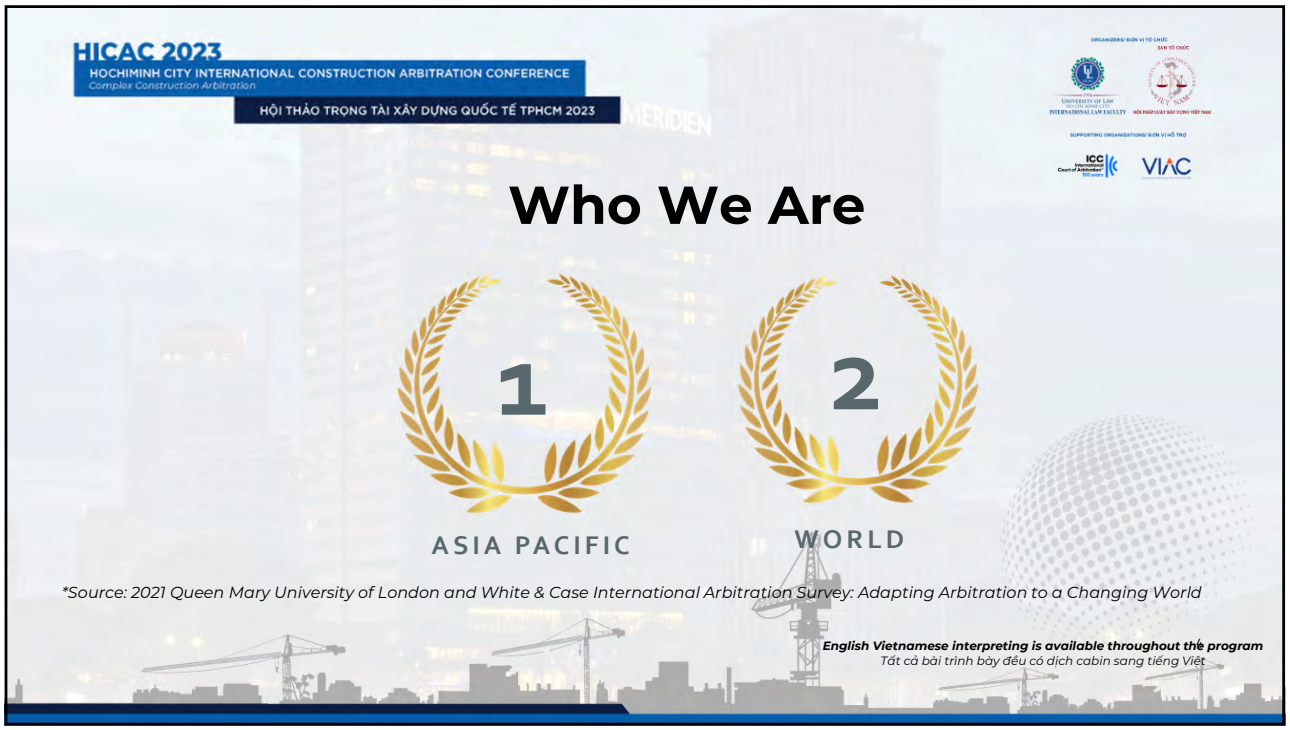
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Who We Are
1
ASIA PACIFIC
2
WORLD
*Source: 2021 Queen Mary University of London and White & Case International Arbitration Survey: Adapting Arbitration to a Changing World
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SIAC's Global Offices

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Users from Over 100 Jurisdictions Over the Last Five Years

1. Afghanistan
2. Anguilla
3. Australia
4. Austria
5. Azerbaijan
6. Bahamas
7. Bahrain
8. Bangladesh
9. Belarus
10. Belgium
11. Belize
12. Benin
13. Bermuda
14. Botswana
15. Brazil
16. British Virgin Islands
17. Brunei
18. Cambodia
19. Cameroon
20. Canada
21. Cayman Islands
22. Chile
23. China
24. Cyprus
25. Czech Republic
26. Denmark
27. Egypt
28. Fiji
29. Finland
30. France
31. Republic of Ghana
32. Germany
33. Gibraltar
34. Greece
35. Guinea
36. Hong Kong SAR
37. India
38. Indonesia
39. Iran
40. Ireland
41. Isle of Man
42. Israel
43. Italy
44. Ivory Coast
45. Japan
46. Jersey
47. Kazakhstan
48. Kenya
49. Kingdom of Tonga
50. Kuwait
51. Laos
52. Lebanon
53. Liechtenstein
54. Lithuania
55. Luxembourg
56. Macau
57. Madagascar
58. Malaysia
59. Maldives
60. Marshall Islands
61. Mauritania
62. Mauritius
63. Mexico
64. Monaco
65. Mongolia
66. Morocco
67. Mozambique
68. Myanmar
69. Nepal
70. Nigeria
71. Netherlands
72. New Zealand
73. Norway
74. Oman
75. Pakistan
76. Panama
77. Papua New Guinea
78. Philippines
79. Portugal
80. Qatar
81. Russia
82. Rwanda
83. Saint Kitts and Nevis
84. Samoa
85. Saudi Arabia
86. Seychelles
87. Singapore
88. Solomon Islands
89. South Africa
90. South Korea
91. Spain
92. Sri Lanka
93. Sweden
94. Switzerland
95. Taiwan
96. Tanzania
97. Thailand
98. Turkey
99. Turks and Caicos Islands
100. Uganda
101. United Arab Emirates
102. Ukraine
103. United Kingdom
104. Uruguay
105. USA
106. Uzbekistan
107. Vanuatu
108. Vietnam
109. Zambia

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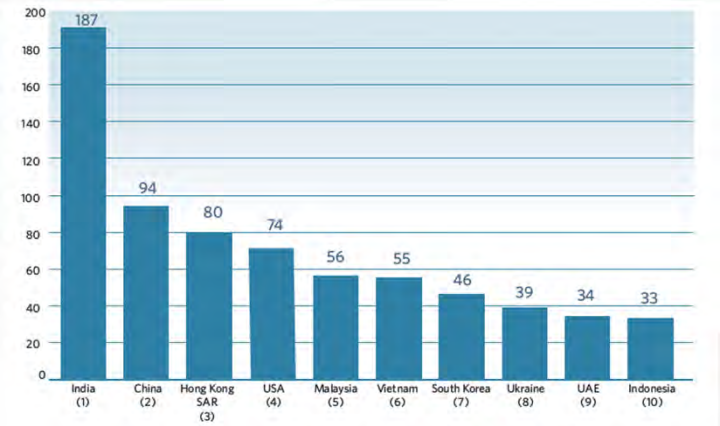
Top 10 Foreign Users (2021)



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Why SIAC

- **Gold-Standard Service**
- **Cost Efficient**
- **Trusted**
- **Innovative**

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Gold-Standard Service

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Costs at SIAC

- **Certainty and Transparency - With an ad valorem Schedule of Fees**
- **Flexibility**
- **Fair Cost Determination**

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Cost Efficient

	Median duration of arbitration for all tribunals (months)	Median total costs of arbitration for all tribunals (USD)
SIAC	11.7	USD 29,567
HKIAC	13	USD 64,606
LCIA	16	USD 97,000
SCC	13.5	Undisclosed

*Total costs of arbitration comprise the combined sum of tribunal fees and administration fees disclosed only.

Sources:
LCIA - http://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx
SCC - http://www.sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf
HKIAC - http://www.hkiac.org/content/costs-duration
CMS - https://www.cms-lawnowasia.law/en/sgh/publication/costs-and-duration-a-comparison-of-the-hkiac-lcia-scc-and-siac-studies

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Sources:
LCIA - http://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx
SCC - http://www.sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf
HKIAC - http://www.hkiac.org/content/costs-duration
CMS - https://www.cms-lawnowasia.law/en/sgh/publication/costs-and-duration-a-comparison-of-the-hkiac-lcia-scc-and-siac-studies

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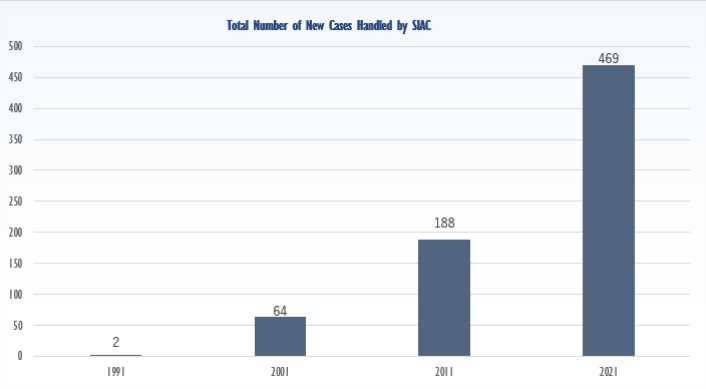
Trusted



USD 6.54 billion
Total sum in dispute for all new case fillings with SIAC in 2021

USD 1.95 billion
Highest sum in dispute for a single administered case in 2021

USD 21.81 million
Average value for all new case filings in 2021

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

Innovative

- Expedited Procedure
- Emergency Arbitration
- Early Dismissal
- Consolidation
- Joinder
- Arb-Med-Arb

Innovative Procedural Tools to Reduce Time & Costs

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Expedited Procedure (EP)

821
Number of applications received as at 31 March 2023

479
Number of applications granted as at 31 March 2023

When may a Party apply for EP?

- When sum in dispute does not exceed SGD 6,000,000; or
- When parties agree; or
- In cases of exceptional urgency
- Useful for lower-value, less complex disputes
- President of Court of Arbitration determines application

What happens when application is granted?

- Matter is referred to a sole arbitrator
- Award to be made within 6 months

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Emergency Arbitration (EA)

1. Application in Writing to Registrar
2. Acceptance of EA application by President of SIAC Court of Arbitration
2. Appointment of EA
3. Consideration of Application

1. Concurrent with or following filing of a Notice of Arbitration
   - Prior to constitution of Tribunal
   - Accompanied by payment of administration fee and requisite deposits

2. Appointment is made **within 1 day** of receipt by Registrar of application and payment of fee

2. Any challenge to appointment must be made **within 2 days** of communication by Registrar of EA appointment and circumstances disclosed

3. Schedule for consideration of application by EA is made **within 2 days** from appointment

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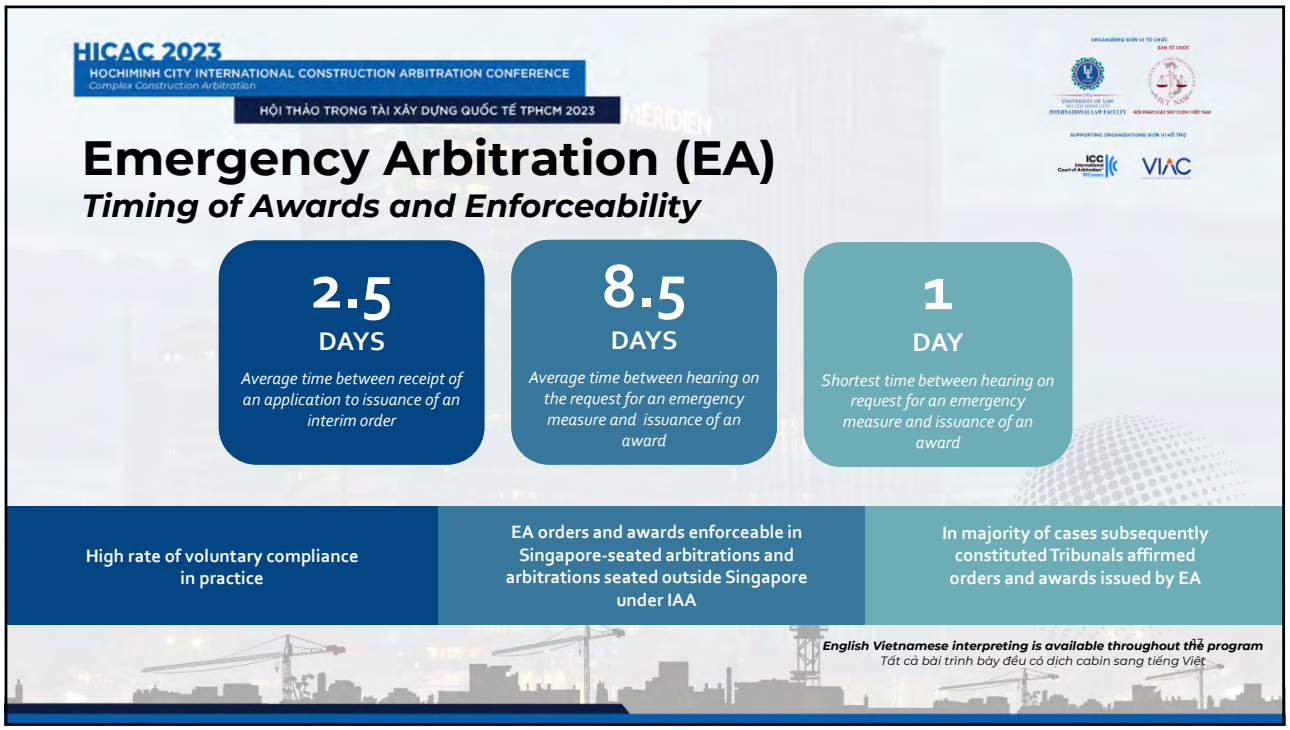
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Emergency Arbitration (EA)
Timing of Awards and Enforceability
2.5
DAYS
Average time between receipt of an application to issuance of an interim order
8.5
DAYS
Average time between hearing on the request for an emergency measure and issuance of an award
1
DAY
Shortest time between hearing on request for an emergency measure and issuance of an award
High rate of voluntary compliance in practice
EA orders and awards enforceable in Singapore-seated arbitrations and arbitrations seated outside Singapore under IAA
In majority of cases subsequently constituted Tribunals affirmed orders and awards issued by EA
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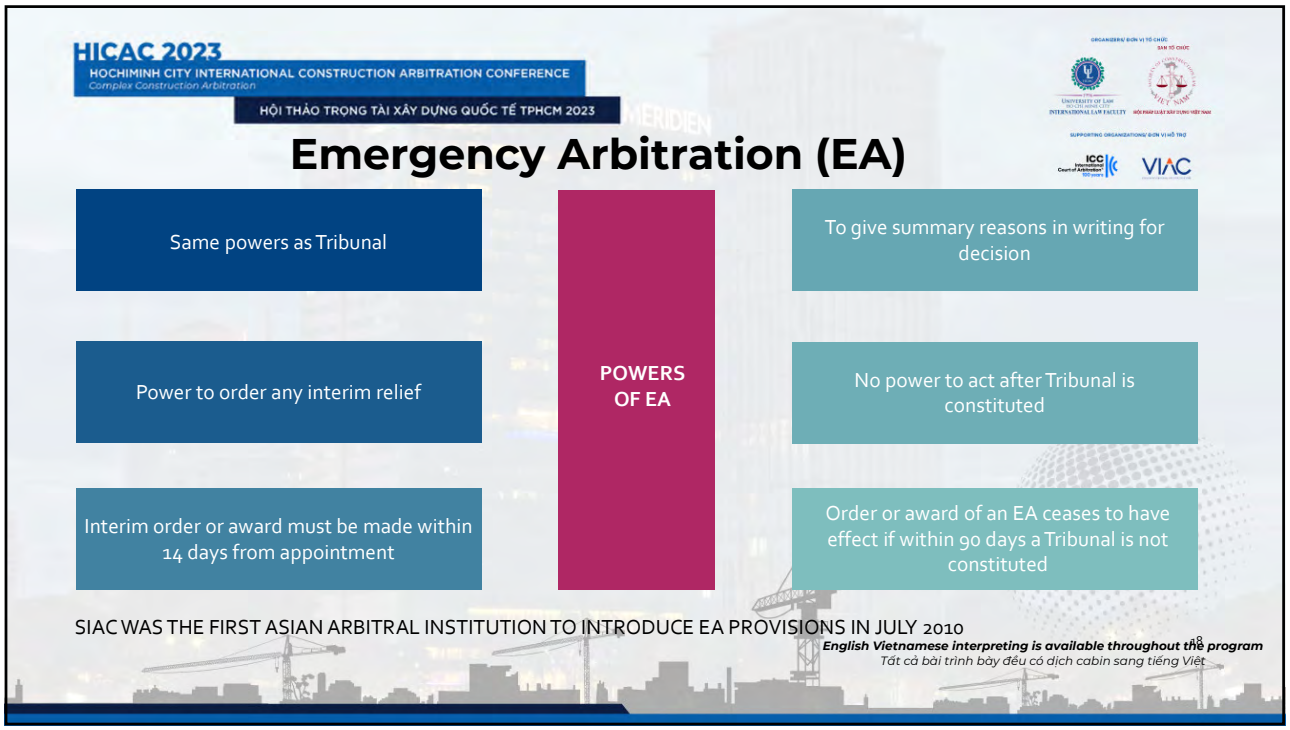
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Complex Construction Arbitration
HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023
Emergency Arbitration (EA)
Same powers as Tribunal
Power to order any interim relief
Interim order or award must be made within 14 days from appointment
POWERS OF EA
To give summary reasons in writing for decision
No power to act after Tribunal is constituted
Order or award of an EA ceases to have effect if within 90 days a Tribunal is not constituted
SIAC WAS THE FIRST ASIAN ARBITRAL INSTITUTION TO INTRODUCE EA PROVISIONS IN JULY 2010
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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

Emergency Arbitration (EA)

Timeline	Procedural Steps
Day 1	Application for emergency interim relief is filed along with notice of arbitration commencing the arbitration (with request to appoint EA)
Day 2	If application is accepted, EA is appointed by President, SIAC
Day 3	EA conducts procedural teleconference
Day 3	EA may issue any interim orders
Day 3	EA sets out schedule for consideration of emergency interim relief application
Day 4+	Parties file submissions
Day 8+	EA conducts hearing (if necessary, through teleconference or video conference)
Day 9+	EA submits draft award to SIAC for scrutiny
Day 10+	EA award is issued to parties

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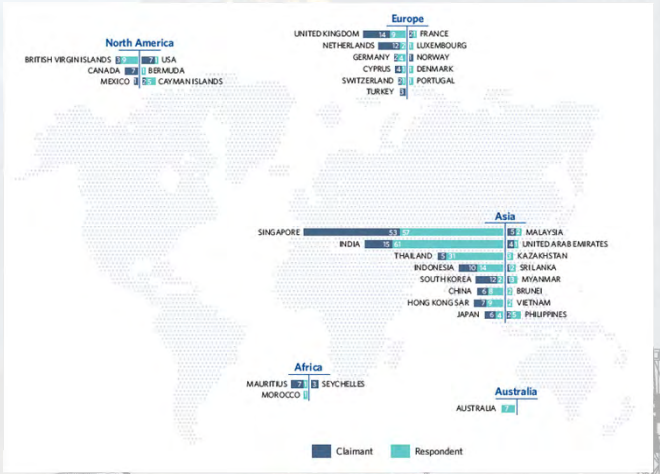
Geographical Origin of Parties in EA cases (2010-2021)



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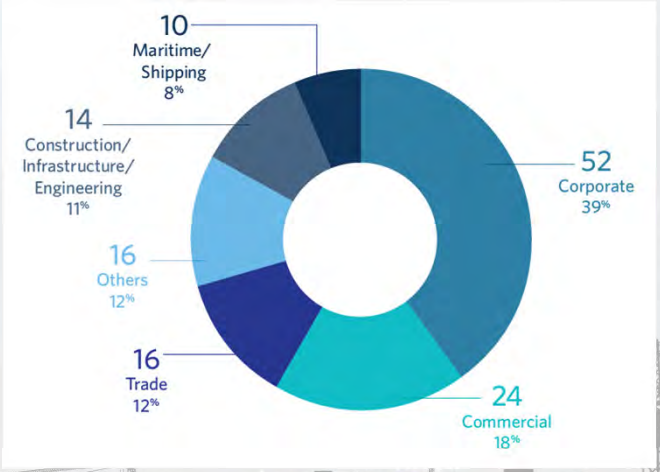
Analysis of Dispute Sectors in EA cases (2010-2021)



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Emergency Arbitration (EA)

OUTCOMES OF APPLICATIONS FOR EMERGENCY RELIEF	
Granted	44
Granted (by consent)	7
Granted (in part)	25
No orders made (application withdrawn)	16
Rejected	37
Pending	15
TOTAL (as at 31 March 2023)	**144**

SIAC Emergency Arbitration Fees

SIAC Administration Fee	**SGD 5,000** *(+ GST if applicable)*
Deposits for EA's Fee* and Expenses	**SGD 30,000** *(unless Registrar determines otherwise)*
Total Payable upon Filing	**SGD 35,000** *(+ GST on SIAC's administration fee if applicable)*

*EA's Fee shall be fixed at **SGD 25,000** *(unless Registrar determines otherwise)*

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Early Dismissal (ED)

First of its kind amongst major institutional rules for commercial arbitration

- Parties may apply to Tribunal for Early Dismissal if claim/defence is:
  - Manifestly without legal merit (Rule 29.1(a)); or
  - Manifestly outside jurisdiction of the Tribunal (Rule 29.1(b))
- Procedure has potential to provide significant savings of time and cost
- As a safeguard against unmeritorious applications, Tribunal retains discretion to decide whether an application for early dismissal should be allowed to proceed

As of 31 March 2023

59 *Number of applications received*

30 *Number of applications allowed to proceed under Rule 29.3*

22 were made under Rule 29.1(a)
2 were made under Rule 29.1(b)
6 were made under Rule 29.1(a) and/or 29.1(b)

Final Outcome:
- **11** Granted (6 in whole, 5 in part)
- **14** Rejected (made under Rule 29.1(a))
- **1** Withdrawn
- **4** Pending

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Joinder
(Rule 7)

- Allows both parties and non-parties to be joined in pending arbitration proceedings under these Rules
- Such an application may be made to SIAC Court of Arbitration (before Tribunal has been constituted) or to the Tribunal directly (after constitution of Tribunal)

As of 31 March 2023

57 *Number of applications received*

29 *Number of applications granted*

Consolidation
(Rule 8)

- After arbitration proceedings have been commenced, any party may make an application for consolidation of multiple arbitrations
- Such an application may be made to SIAC Court of Arbitration (before Tribunal has been constituted) or to the Tribunal directly (after constitution of Tribunal)

384 *Number of applications received*

247 *Number of applications granted*

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SIAC-SIMC Arb-Med-Arb Service is a one-stop process where a dispute is first referred to arbitration before mediation is attempted

Arbitration → Mediation → Arbitration

- If mediation is successful, parties may request their mediated settlement be made a consent arbitral award with advantages of enforceability under New York Convention
- If mediation is unsuccessful, parties may proceed with arbitration
- The average settlement rate for mediation at SIMC is approximately 75%

As of 31 December 2022

29
Number of SIAC-SIMC Arb-Med-Arb cases
involving parties from BVI, Cayman Island, Germany, India, Japan, Singapore, Switzerland, Taiwan, Thailand and UAE

248
Number of SIMC Mediation Cases
involving parties from Australia, Brunei, Cayman Islands, Cambodia, China, France, Germany, Hong Kong, India, Indonesia, Isle of Man, Japan, Kazakhstan, Laos, Macau SAR, Malaysia, Maldives, Mongolia, Myanmar, Netherlands, Papua New Guinea, Singapore, South Korea, Taiwan, Thailand, UAE, UK, US and Vietnam

277
Total number of Arb-Med-Arb and SIMC Mediation cases
Total sum in dispute: > USD 3.1 billion

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Arbitrating at SIAC

- **International Arbitration Lifecycle**
- **Functions of the Secretariat**

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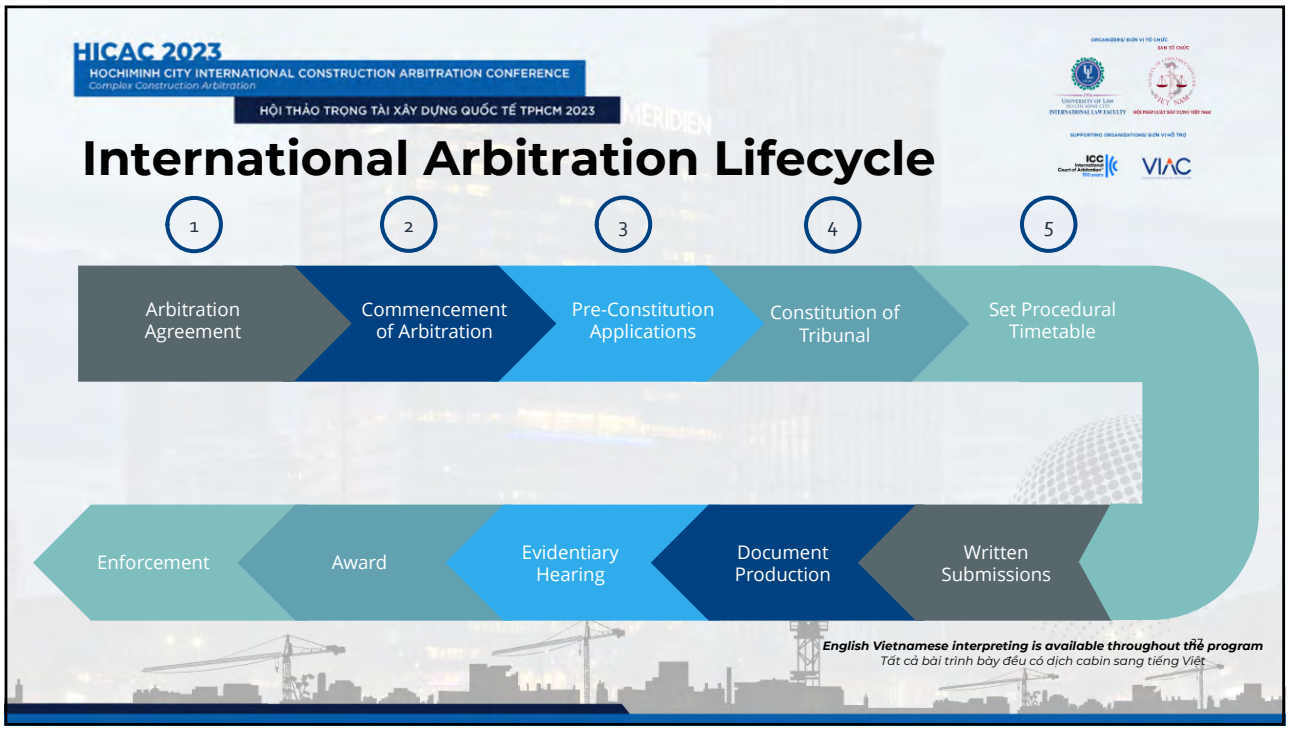
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International Arbitration Lifecycle
1
2
3
4
5
Arbitration Agreement
Commencement of Arbitration
Pre-Constitution Applications
Constitution of Tribunal
Set Procedural Timetable
Written Submissions
Document Production
Evidentiary Hearing
Award
Enforcement
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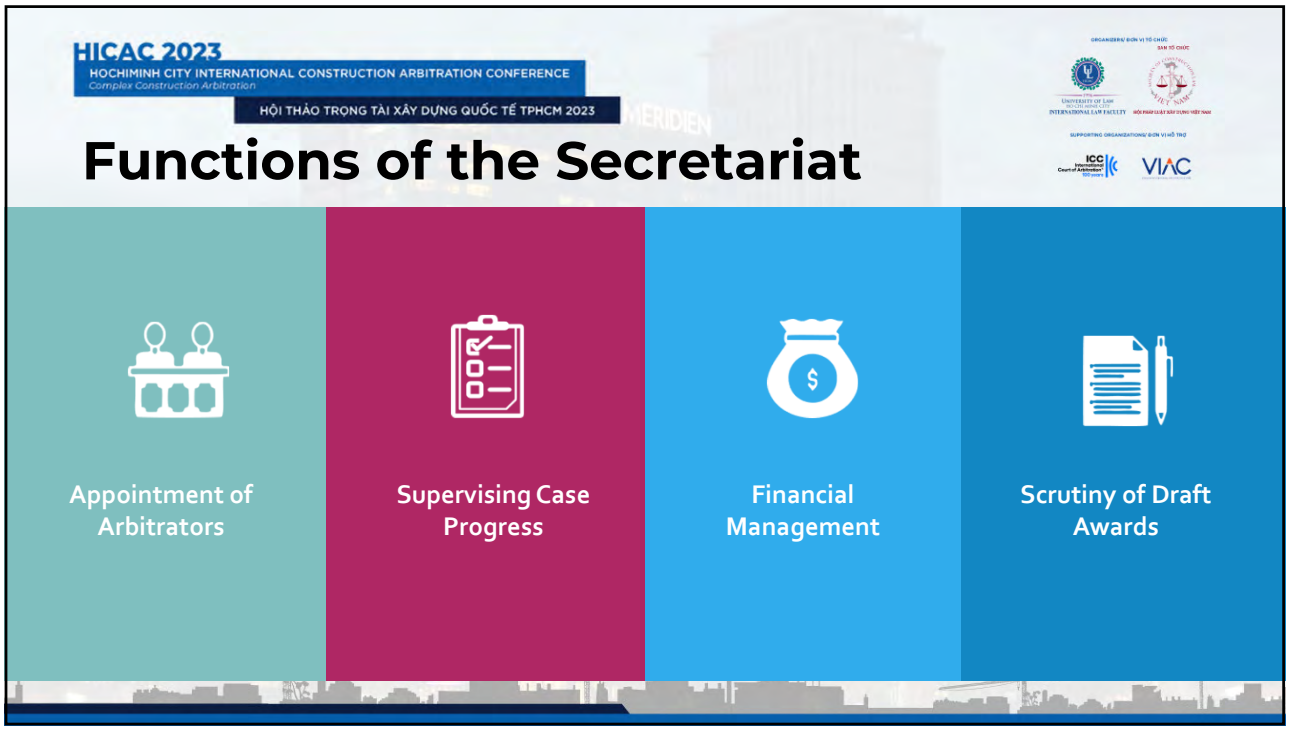
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Functions of the Secretariat
Appointment of Arbitrators
Supervising Case Progress
Financial Management
Scrutiny of Draft Awards

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(Revised as of 12 January 2023)

SIAC Model Clause

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].*

The Tribunal shall consist of _____** arbitrator(s).

The language of the arbitration shall be _____.

[In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation to the arbitration, the parties agree (a) to commence such proceedings before the Singapore International Commercial Court ("the SICC"); and (b) in any event, that such proceedings shall be heard and adjudicated by the SICC.]***

** Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").*
*** State an odd number. Either state one, or state three.*
**** The inclusion of this sentence is recommended if the arbitration commenced to resolve the dispute will be/is an international commercial arbitration, and Singapore is chosen as the seat of arbitration.*

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Q&A

Thank you!

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HOW TO HANDLE COMPLEX CONSTRUCTION ARBITRATION VIA KCAB RULES

Sangyub (Sean) Lee

Deputy Director of the KCAB INTERNATIONAL

Mr. Sangyub (Sean) Lee is the Deputy Director of the KCAB INTERNATIONAL, Korean Commercial Arbitration Board's international division, also an attorney admitted to the New York State bar.

Prior to joining KCAB INTERNATIONAL, he had worked as a journalist and an in-house counsel for one of the most influential local newspaper companies. He had a role in trying to keep the public informed of KCAB's achievements and potential through writing a variety of articles, especially covering international arbitration.

Joining KCAB INTERNATIONAL, among his various responsibilities he is mainly in charge of promotion of institution by managing diverse networks of the international arbitration community, also administering international arbitration cases as a case counsel, ensuring the efficiency and cost-effectiveness of the procedures under the KCAB or UNCITRAL International Rules.

He has contributed with many activities in relation to the development of ADR in Korea by leading the public relations efforts to further enhance the standing of KCAB INTERNATIONAL – and Seoul as a seat of arbitration – for the domestic and global users, including teaching students as an adjunct professor in Yonsei University (Republic of Korea).

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COMPLEX
MULTI-PARTY MULTI-CONTRACT CONSTRUCTION ARBITRATION
AND ARBITRATION RULES

How to Handle Complex Construction Arbitration via KCAB Rules

Sangyub (Sean) Lee / Case Counsel

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Tables

Part 1. General Background
- Rich Experience of Korean E&C Companies and KCAB

Part 2. KCAB's International Arbitration Rules
- Joinder, Consolidation, Interim Measure, or Discovery

Part 3. KCAB's Practice for User-friendly Approach

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Korean E&C Companies' Overseas Projects

Title: Overseas Construction Orders
Unit: Million USD

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total	64,877	65,206	66,009	46,144	28,190	29,005	32,115	22,327	35,130	30,616
(YoY,%)	8	1	1	-30	-39	3	11	-30	57	-13
Civil Engineering	8,794	18,128	5,664	8,504	6,440	5,139	7,162	4,539	9,838	5,859
Architecture	14,322	5,446	4,928	7,110	5,330	2,408	5,378	4,913	5,029	2,648
Plant	39,549	39,649	51,721	26,490	13,250	19,912	18,377	10,870	18,635	17,891
Electricity/Telecommunication	1,396	999	1,589	1,040	1,483	709	379	797	773	3,118
Service	818	983	2,107	3,001	1,690	835	819	1,208	855	1,100

Source: International Contractor's Association of Korea
Footnote:*Rate of increase/decrease is year on year(%)

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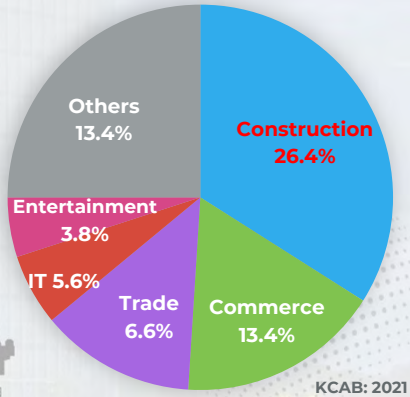
Rich Experience in Construction Disputes

By Sector	Case #s	Ratio
Construction	**132**	**26.4%**
Commerce	67	13.4%
Trade	33	6.6%
IT	78	15.6%
Entertainment	19	3.8%
Maritime	18	3.6%
Real Estate Property	11	2.2%
Intellectual Property	8	1.6%
Labor Employment	4	0.8%
Finance	4	0.8%
M&A, Joint Venture	9	1.8%
Others	67	13.4%
Covid 19	117	23.4
Total	**500**	**100%**

% by Sector



KCAB: 2021 Data

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Construction Projects in Vietnam

1998~2022 Running Total of Korean Investment to Vietnam by Sector

Sector	# of Projects	Investment (million USD)	Ratio (%)
Construction & Real Estate	1146	12692.4	15.8

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Nationality of KCAB's Users

Nationality	Ratio (%)
America	15.7
Africa(Ghana)	2.0
Europe	17.6
Asia-Pacific	60.8 (Vietnam – 3rd largest user)
Middle-East(Iran, UAE)	4.0

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Enhancement of Bargaining Power

01
GDP Growth
Averaging **5.45%**
between 1988 and 2019

02
Annual export growth
Averaging **9.27%**
between 1988 and 2019

03
GNI per capita
Increased rapidly
from USD 67 in the 1950s
to **USD 33,790** in 2019

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KCAB's International Arbitration Rules (effective as of June 2016)

- **In case one of the parties is foreign entity, the International Rules apply**
- **Default Language of Arbitration : English**
- **Parties' full autonomy to nominate its arbitrator (freely choose in the List or not)**

- Reflects recent trends (in line with other leading institutions' Rules)
- Main Revision
  - ✓ Emergency Measure by Emergency Arbitrator (Apx 3)
  - ✓ Joinder, Single Arbitration, and Consolidation (Article 21, 22, & 23)
  - ✓ Expanding the scope of expedited procedure (Article 43~49)
  - ✓ Introducing electronic methods (Article 4)
- Currently revising rules for announcement in early 2024

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A multi-contract situation may arise where:

1. A party may request to add 'new party' into a single arbitration to be resolved by a single tribunal
2. A claimant may make different claims arising out of different contracts in its initial request for arbitration
3. On-going arbitrations resolving claim(s) arising out of different contracts between the same parties may be 'consolidated' into a single arbitration

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Joinder

- Article 21. Joinder of Additional Parties
- The Tribunal may allow new party to be joined in the arbitration proceedings by application of a party, provided that one of the following conditions is met:

  - All parties and the new party have all agreed in writing to the joinder; or

  - The new party is a party to the same arbitration agreement with the parties and the new party has agreed in writing to the joinder
- The Tribunal has a discretion to decide whether it allows the joinder or not
- Even if the new party is joined, this shall not affect the constitution of the Tribunal

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Joinder - Consent of Parties

AIAC	SIAC	KCAB
All parties' and the new party's consent in writing If the new party is prima facie bound by same agreement or if a joinder of the new party is regarded necessary, it's consent is not required	All parties' and the new party's consent (writing not mentioned) If the new party is prima facie bound by same agreement, it's consent is not required	All parties' and the new party's consent in writing If the new party is in same agreement, its' consent is only required

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Joinder – When and Who Decide?

AIAC	SIAC	KCAB
Before constitution of the Tribunal (no later than the filing of SOD and counterclaim) – the Secretariat (the Director) After constitution – the Tribunal All parties shall submit its opinion within 15 days of receipt of the joinder request	Before constitution of the Tribunal – the Court After constitution – the Tribunal	No specific timing requirement Only the Tribunal

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Joinder – Requirements for Request

AIAC	SIAC	KCAB
• Case reference # • Names & Contact Details • New Party's position • Relief or Remedy • A copy of documentation for arbitration agreement • Legal and factual basis • Confirmation for receipt of all parties	• Case reference # • Names & Contact Details • New Party's position • A copy of arbitration agreement • Legal and factual basis	N/A

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Single Arbitration under Multiple Contracts

- Article 22
- The Secretariat may allow submission of claims arising out of multiple contracts within a single Request for Arbitration, provided that:

  - the Secretariat is prima facie satisfied that all of the contracts provide for arbitration under the Rules,
  - the arbitration agreements' compatibility is recognized, and
  - the claims arise out of the same transaction or series of transactions.

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Consolidation

- Article 24. Consolidation of Claims
- At the request of a party, the Tribunal may consolidate claims if:

  - on-going arbitrations are under the Rules and between the same parties, and

  - any one arbitrator of a tribunal has not been appointed in such separate arbitration proceedings
- In determining whether or not to consolidate claims, the Tribunal shall take into account the arbitration agreement(s), the nature of the claims, and any other relevant circumstances

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Consolidation

AIAC	SIAC	KCAB
• All parties agree in writing; • Under the same agreement; or • Same legal relationship and different but compatible agreements • The Director decides	• All parties agree; • Under the same agreement; or • Same legal relationship / Contracts consisting of a primary and its ancillary contract / Same transaction or series of transaction • Before constitution - The Court decides • After constitution - The Tribunal decides	• Between the same parties • The Tribunal decides

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Maintain the status quo: Interim Measure

- Article 32 Conservatory and Interim Measures
- The Tribunal may order any of the measures at the request of the party:

  - To maintain or restore the status quo pending determination of the dispute;

  - To take action that would prevent current or imminent prejudice to the arbitration proceedings;

  - To provide a means of preserving assets; or

  - To preserve evidence that may be relevant and material to the resolution of the dispute.
- The Tribunal can grant that measure subject to appropriate security, furnished by the requesting party in a form of an Order or an Award
- Before the request is submitted to the Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for conservatory and interim measures.

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Maintain the status quo: Emergency Arbitration

- Appendix 3
- A party can request interim measure by emergency arbitrator before the constitution of the Tribunal
- The Secretariat appoints a sole arbitrator within 2 days of receipt of such request
- Any party can challenge the said appointment within 2 days from notice of appointment
- The emergency arbitrator may and shall order any measures within 15 days from his appointment
- Emergency measure can be modified, amended, suspended, or terminated by the Tribunal in whole or part.

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Discovery

- Article 26
- The Tribunal can order the parties to produce evidence and make any property, site, or object under their control any time unless there is an agreement in writing
- The Tribunal may order a party to provide a summary of evidence, which will be presented, with the other party and them
- Each party has burden of proof, and the Tribunal may determine the admissibility, relevance, materiality and weight of any evidence

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Expedited Procedure

- Chapter 6 Articles 43~49
- In case claim amount does not exceed KRW 500 million (USD 400,000)
- The Secretariat shall appoint a sole arbitrator unless otherwise agreed by the parties
- The hearing shall generally be held only once unless the sole arbitrator deems it more necessary
- The Award shall be made within 6 months from the date of constitution of the Tribunal

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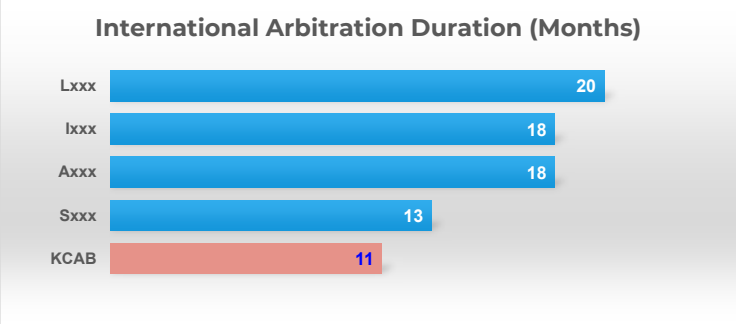
Time-efficient: Swiftness



ICC/AAA ICDR: "How to work with the Swiss Rules: The Counsel's Perspective" by Gabrielle Nater-Bass
http://www.homburger.ch/fileadmin/publications/FIVEYEARSSWISS_01.pdf (From 2008) Footnote 21
LCIA: http://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx
SIAC: http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR_2016_24pp_WEBversion_edited.pdf
KCAB: 2016 Data

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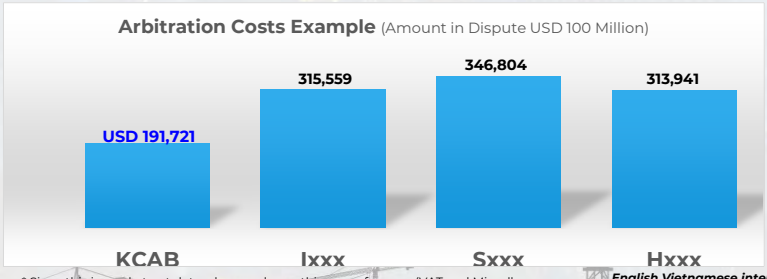
Cost-effective: Competitive Costs

Administrative Fees :

- In KCAB, the administrative fees increase step by step based on the amount in dispute interval
- Some leading institutions apply fixed fees in case the amount in dispute is either below or above certain amount
- **KCAB's administrative fees do not exceed KRW 150,000,000 (appx. USD 120,000)**



* Since this is an abstract data, please only use this as a reference. (VAT and Miscellaneous costs not included)

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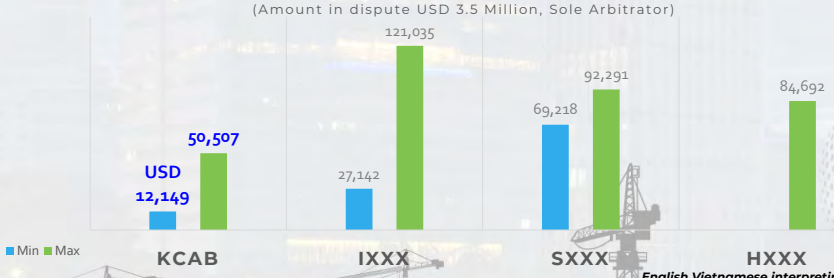
Cost-effective: Competitive Costs

Arbitrator's Fees :

- In KCAB, the arbitrator's fees increase step by step based on the amount in dispute interval
- Like some leading institutions, KCAB applies fixed fees in case the amount in dispute is less than certain amount
- In some institutions, you can choose either hourly rates or ad valorem
- **KCAB arbitrator's fees are predictable since KCAB does not apply hourly rates**

Arbitrator's Fees Example
(Amount in dispute USD 3.5 Million, Sole Arbitrator)



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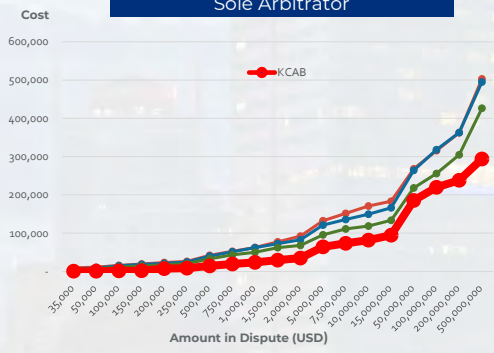
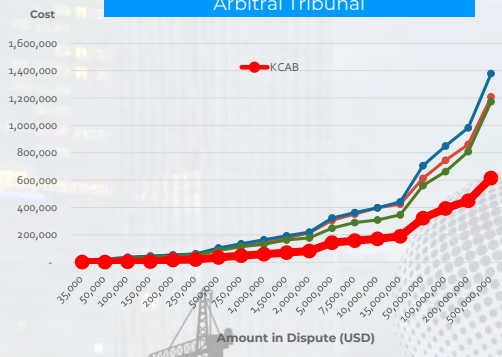
Cost-effective: Competitive Costs

Total Cost of Arbitration
Sole Arbitrator



Total Cost of Arbitration
Arbitral Tribunal



Amount in dispute (1 million $) appx. 55% cheaper

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Virtual Hearing

- Article 16. Conduct of the Proceedings
- Subject to the Rules and any agreement between the parties, the Tribunal may conduct the arbitration in any manner it considers appropriate, provided that the parties are treated with equality and that each party is given a fair opportunity to present its case at appropriate stages of the proceedings
- The Tribunal shall hold hearings in order to examine witnesses or the present arguments at appropriate stages of the proceedings unless agreed otherwise

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Seoul IDRC: Cutting-edge Hearing Facilities

SEOUL IDRC
Seoul IDRC,
Your Ideal Centre for ADR
www.sidrc.org

User-oriented Facilities & Dedicated Services

Survey on Hearing Centre Preferences
Ranked 5th in IT Services
Source: Guide to Regional Arbitration (volume 7 - 2019)

The Seoul IDRC, located on the 18th floor of the Trade Tower, provides state-of-the-art arbitration hearing facilities and professional services optimized for dispute resolution proceedings.

Virtual Hearing Services - Arbitration Hearings, Mediation, Meetings, Conferences

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PANEL C2: KINH NGHIỆM TỪ BAN THƯ KÝ CỦA CÁC TRUNG TÂM TRỌNG TÀI TRONG KHU VỰC KHI GIẢI QUYẾT CÁC VỤ VIỆC TRỌNG TÀI PHỨC TẠP VỀ XÂY DỰNG

PANEL C2: EXPERIENCES FROM SECRETARIAT OF REGIONAL INSTITUTIONS IN DEALING WITH COMPLEX CONSTRUCTION ARBITRATION

Moderator

Tan Cheng Hye Johnny
Independent Arbitrator
SIMI & SMC Accredited Mediator
Adjudicator

Johnny obtained his first degree in Architecture from the University of Western Australia. He was a founding partner of LT&T Architects where he practised for almost 30 years. Johnny practises as an independent arbitrator. He is a Past President of the Singapore Institute of Arbitrators (SIArb), having served two terms as President from 2007 to 2011.

Johnny is on the panel of several arbitration centres including SIAC, AIAC, HKIAC, DIAC, SCIA, and LCIA. He is a member of the Advisory Council to the National Commercial Arbitration Centre, Cambodia.

An accredited mediator with SIMI, Johnny is a Principal Mediator with several mediation centres including the SMC, CCPIT/CCOIC Mediation Centre, MHJMC, JIMC (Kyoto), IDDRMI, and SCMC.

An accredited adjudicator, Johnny also sits on the Construction Adjudicator Accreditation Committee (CAAC) and the Singapore Infrastructure Dispute Protocol Advisory Committee.

Johnny has held various positions in the Singapore Institute of Architects (SIA) and served as its Vice-President from 1998 to 2000.

Johnny has been appointed as arbitrator in both institutional and ad hoc arbitration cases. He has also been appointed as adjudicator as well as review adjudicator in several adjudication applications.

DEALING WITH COMPLEX CONSTRUCTION DISPUTES - OBSERVATIONS FROM VIAC'S PRACTICE

Hang Vu Thi
Deputy Director of the Secretariat cum Head of International Cooperation, Vietnam International Arbitration Centre (VIAC)

In nearly a decade working at Vietnam International Arbitration Centre (VIAC), Hang has participated in directly administering over 300 arbitration cases at VIAC, especially those with involvement of foreign parties and/or foreign arbitrators and currently leads the Counsel team at VIAC Hanoi. Hang is assiting the Secretary General in R&D activities that target to the renovation and improvement of arbitration procedures at VIAC and to new services of arbitration and other ADRs to be provided by VIAC. Hang is also in charge of organizing internal workshops for VIAC's listed arbitrators to encourage the exchange of experience and arbitrator skills for better quality of arbitration at VIAC.

As a member of VIAC's Science Council, Ms. Hang has participated in research activities of the Council, directly attending to comment on legal documents regulating commercial and arbitration activities in Vietnam (the Civil Code, Commercial Law, Enterprise Law, Law on Commercial Arbitration, etc.). Hang is the host of VIAC's annual series focusion on arbitration – VIAC's Arbitration Series (VAS in 2020, 2021, 2022 and counting).

With regard to international cooperation, Ms. Hang is in charge of international cooperation activities regarding arbitration and ADRs methods, coordinating cooperation activities with VIAC's international partners focusing on raising the awareness of public on ADRs, enhancing knowledge and experience of ADRs users in Vietnam, and promoting commercial arbitration as well as other ADRs in Vietnam collectively.

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DEALING WITH COMPLEX CONSTRUCTION DISPUTES - observations from VIAC's practice

VIETNAM INTERNATIONAL ARBITRATION CENTRE

HANG, VU (Ms)

Deputy Director, SECRETARIAT

VIETNAM INTERNATIONAL ARBITRATION CENTRE (VIAC)

hang.vu@viac.org.vn

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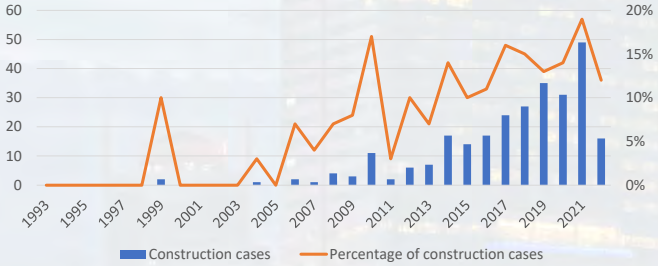
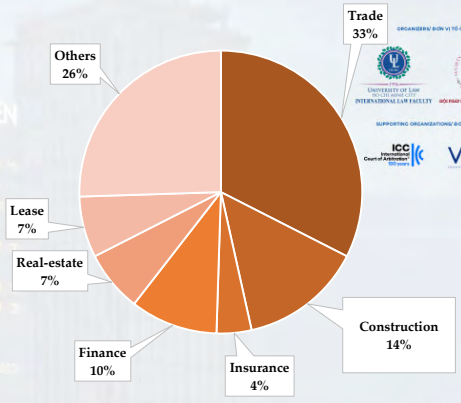
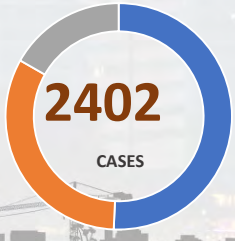
CONSTRUCTION DISPUTES AT VIAC





16.8%
Foreign-element disputes

32.5%
FDI-element Disputes (with a Vietnamese party)



50.7%
Domestic disputes "mere Vietnamese"

2022

~ 83 Mil USD
81% total amount value in dispute at VIAC

~ 908 Mil USD
39% total amount value in dispute at VIAC

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CONSTRUCTION DISPUTES AT VIAC (Cont)

- Energy, Mining Projects
- Real Estate Projects (Office Building, Apartment Building, Factories)
- Infrastructure Projects (Express way, Bridge, Seaport, Airport, Hospital, etc.)
- Civil Construction projects

Disputing issues

- Contract management
  - Multi-tiered dispute resolution procedure
  - Applicable Law
- Contractor's Violations
  - Quality (Construction methods, Acceptance test)
  - Construction Schedule & Time of Completion
  - Cost overrun (variations, change of law, etc)
- Employer's Violations
  - Construction Site Management
  - Delays in approval
  - Payment
- Others (retention, unilateral termination of the contract, compensation…)

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SOME OBSERVATIONS

Negotiation → Mediation → Expert Determination → Adjudication Board → Arbitration /Litigation

SOPHISTICATED MULTI-TIERED DISPUTE RESOLUTION CLAUSE

FIDIC Model Dispute resolution clauses

PRIMARILY MULTI-TIERED DISPUTE RESOLUTION CLAUSE

Exp: If any dispute arises in connection with this agreement, the parties shall first negotiate in a good faith effort to resolve the dispute. Where the Parties failed to negotiate, any Parties can initiate an Arbitration at Vietnam International Arbitration Centre (VIAC) to resolve the dispute

→2 tiers dispute resolution clause

Parties **must** go through all the way as agreed in the Multi-tiered dispute resolution clause until they settle the dispute**?**

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PROS AND CONS OF MUTIL-TIERED DISPUTE RESOLUTION CLAUSE

Advantages	Disadvantages	Opinions of Court and Arbitration
• Preserve the business relationship • Time and cost efficiency • Can be ultilised as a filter	• Waste of time and resources without an expecting outcome • Procedural abuse (Eg: time-barred issues) • Interim measure? • Additional request at pre-condition steps of arbitration proceedings?	• Condition Precedent or procedural condition? • Would there be any significant obligation? • Words choice? Shall/must vs. could/may • Consequence for violation of MTDR?

Some notes:

- *Parties should set out clear preconditions as to the process of MTDR, whether it would be a two-tiered process or a multi-tiered process if any dispute arises.*
- *Parties should agree on the commencement of time limits to arbitration, whether it would include the duration of prior steps, if any dispute arises.*
- *Article 192.1 Code of Civil Procedure + Article 3.1 in Resolution 04/2017/NQ-HDTP: The Courts shall return the lawsuit petitions if a party does not fully satisfy the conditions to initiate a lawsuit prescribed by the Code of Civil Procedure and other laws.*

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SOME OBSERVATIONS (Cont)

MULTI-PARTY ARBITRATION

Types

Multiple parties to the same contract <Consortium contracts, SHAs>

Multiple contracts with different parties <Financing documentation>

Signing contracts among the employer with the main contractor and sub-contractors

Procedure Issues

Incongruous dispute resolution clauses in multiple contracts

Additional parties to arbitration once tribunal has been constituted.

Consolidation of cases in an Arbitral Tribunal for contracts.

Confidentiality

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SOME OBSERVATIONS (Cont)

PARTICIPATION OF EXPERTS IN CONSTRUCTION ARBITRATION AT VIAC

❖ **Experts have participated in VIAC Procedures including:**

Legal Expert, Expert of Damages, Delay Expert; Financial expert, Expert of construction quality.

❖ **Procedures of Expert Participation at VIAC:**

- Expert report/ Joint expert report
- Hot-tubbing

Relatively common, both in Vietnamese and International arbitration courts.

❖ **Experts' advice/opinion is highly considered in construction Arbitration due to:**

- The complex & technical issues in the case
- Credibility and weighing of the evidence presented to Tribunal

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THE LEGAL COSTS IN ARBITRATION AT VIAC

Lawyer's fees are recoverable upon request of party

Foreign lawyers can practice at VIAC

Favorable policy of waiving arbitration fees for the legal costs claim

85% claims on recovery of legal costs **granted** (partially or wholly)

15% cases where supporting evidence for recovery of legal costs determined **insufficient**

5% cases where Respondent **only** claims for recovery of legal costs

26 cases where a legal team consisting of 2 or more law firms (collab) to defend a party

Highest granted amount of lawyer's fees:

~109.8 Bil VND
[~4.5 Mil USD]

In a case of value in dispute:

~ 5,600 Bil VND
[~236 Mil USD]

Cases with Lawyer's participation

2017	2018	2019	2020	2021	2022
47,8%	52%	60%	60.6%	59.7%	62.4%

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VIETNAM INTERNATIONAL ARBITRATION CENTRE
AT THE CHAMBER OF COMMERCE AND INDUSTRY
ABITRATE IN VIETNAM
– CHOOSE VIAC
VIETNAM INTERNATIONAL ARBITRATION CENTRE
Head-quarter
VCCI Tower, 9 Dao Duy Anh, Dong Da Dist, Hanoi
Phone: (84.24) 3 574 4001 - Fax: (84.24) 3 574 3001
Website: www.viac.vn - Email: info@viac.org.vn
Hồ Chí Minh Branch
VCCI Tower, 171 Vo Thi Sau, District No. 3, HCM
Phone: (84.28) 3 9321632 - Fax: (84.28) 3 932 0119
Website: www.viac.vn - Email: info@viac.org.vn
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NCAC'S EXPERIENCE IN DEALING WITH COMPLEX CONSTRUCTION ARBITRATION

Fanita Math
Secretary General of National Commercial Arbitration Centre
(NCAC, Kingdom of Cambodia)

Fanita MATH is a young, dynamic Cambodian legal professional who has gained a wealth of experience in various roles within the education and legal sectors.

Fanita MATH began working as a legal officer at the National Commercial Arbitration Centre (NCAC) in the Kingdom of Cambodia in 2018. She was also responsible for the organization of training and events for the NCAC. In 2021, she got promoted to Deputy Secretary General and subsequently Secretary General at the end of 2022, where she oversees the NCAC's day-to-day operations, manages staff recruitment, and is responsible for all financial management and reporting.

Prior to her involvement in the world of arbitration, she was appointed as a school director at the age of 24 years old, where she got the opportunity to manage the whole school and deal with complaints. This management experience has served her greatly in her current position at the NCAC.

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NCAC's Experience in dealing with complex construction arbitration

Fanita MATH
Secretary General, NCAC

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Content:

I. About NCAC
II. Construction Sector in Cambodia
III. Construction Arbitration in NCAC

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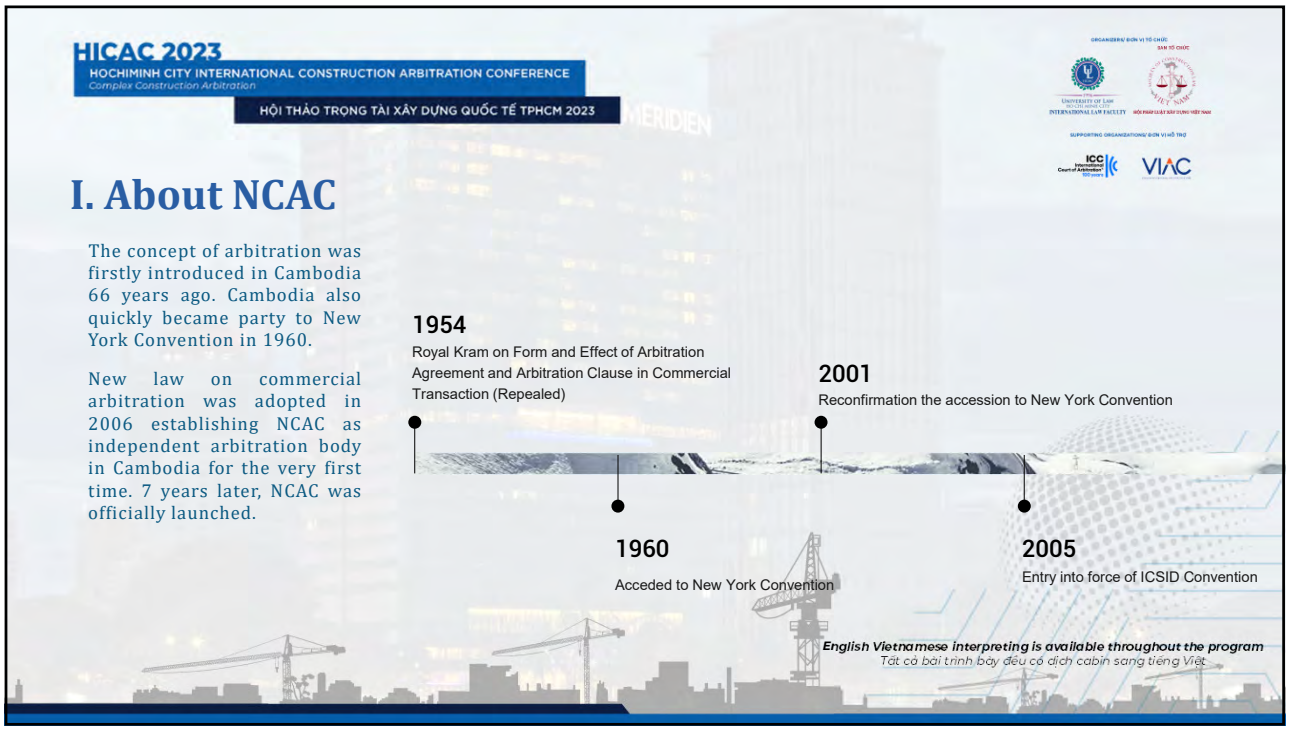
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I. About NCAC
The concept of arbitration was firstly introduced in Cambodia 66 years ago. Cambodia also quickly became party to New York Convention in 1960.
New law on commercial arbitration was adopted in 2006 establishing NCAC as independent arbitration body in Cambodia for the very first time. 7 years later, NCAC was officially launched.
1954
Royal Kram on Form and Effect of Arbitration Agreement and Arbitration Clause in Commercial Transaction (Repealed)
1960
Acceded to New York Convention
2001
Reconfirmation the accession to New York Convention
2005
Entry into force of ICSID Convention
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BACKGROUND
2006
Law on Commercial Arbitration
2009
Sub-decree 124 on Organization and Functioning of the NCAC
2010
Sub-decree 182 on Establishment of Arbitrator Selection Committee
2013
OFFICIAL LAUNCH OF NCAC
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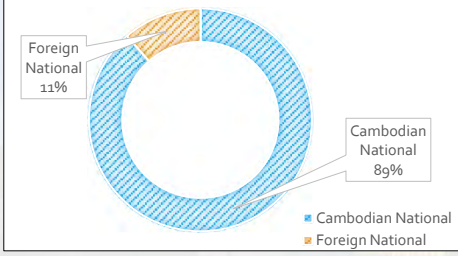
NCAC PANEL OF ARBITRATOR

NATIONALITIES OF ARBITRATORS



- As of January 2023, there are 70 arbitrators in panel of arbitrators of NCAC.
  - ➢ 61 Cambodian national
  - 9 Foreign national
    - American
    - French
    - Japanese
    - Singaporean
    - Chinese
    - Canadian

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- As of January 2023, NCAC has administered 31 cases with total amount in dispute approx. USD 90 Million.
- The NCAC has administered disputes involves:
  - ✓ Banking & finance
  - ✓ Real estate
  - ✓ **Construction**
  - ✓ Corporate & commercial
  - ✓ International trade

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023
7
Sectors in dispute
Construction
20%
Trade
12%
Corporate
12%
Banking & Finance
18%
Real Estate
38%
Sectors
In dispute
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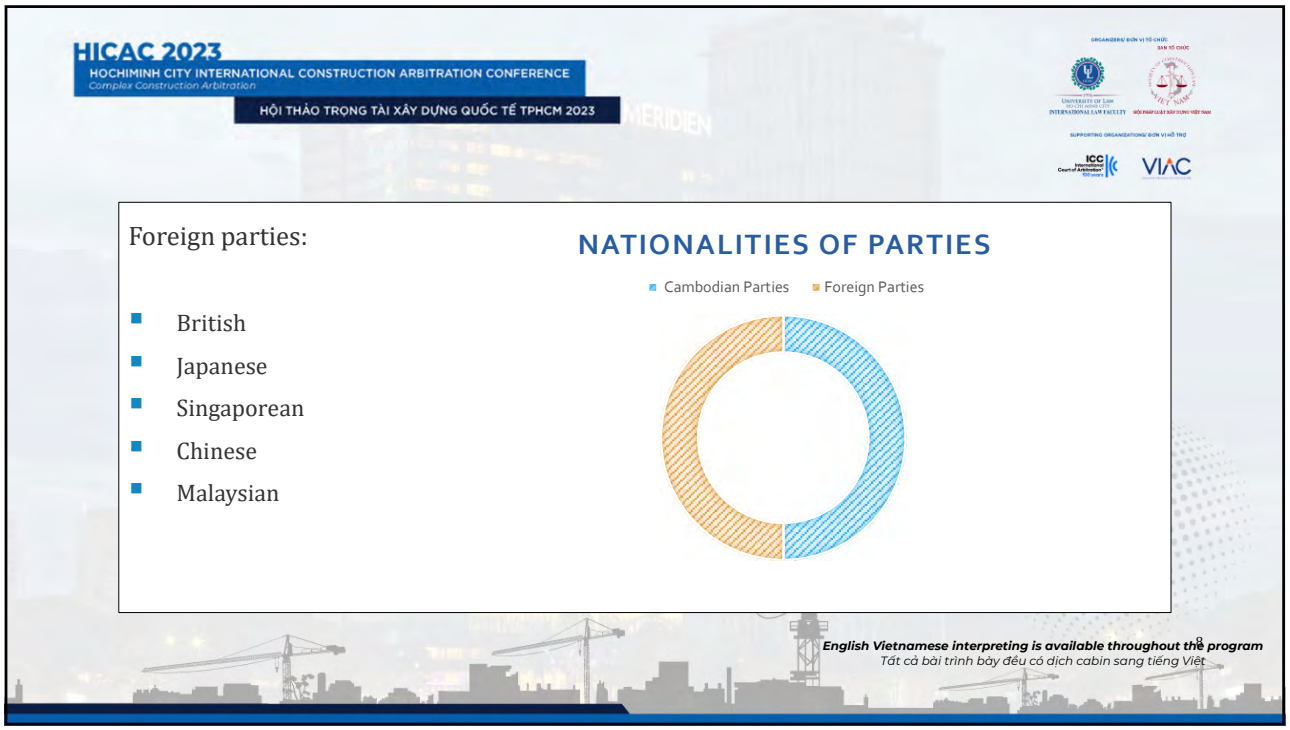
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Foreign parties:
British
Japanese
Singaporean
Chinese
Malaysian
NATIONALITIES OF PARTIES
Cambodian Parties
Foreign Parties
8
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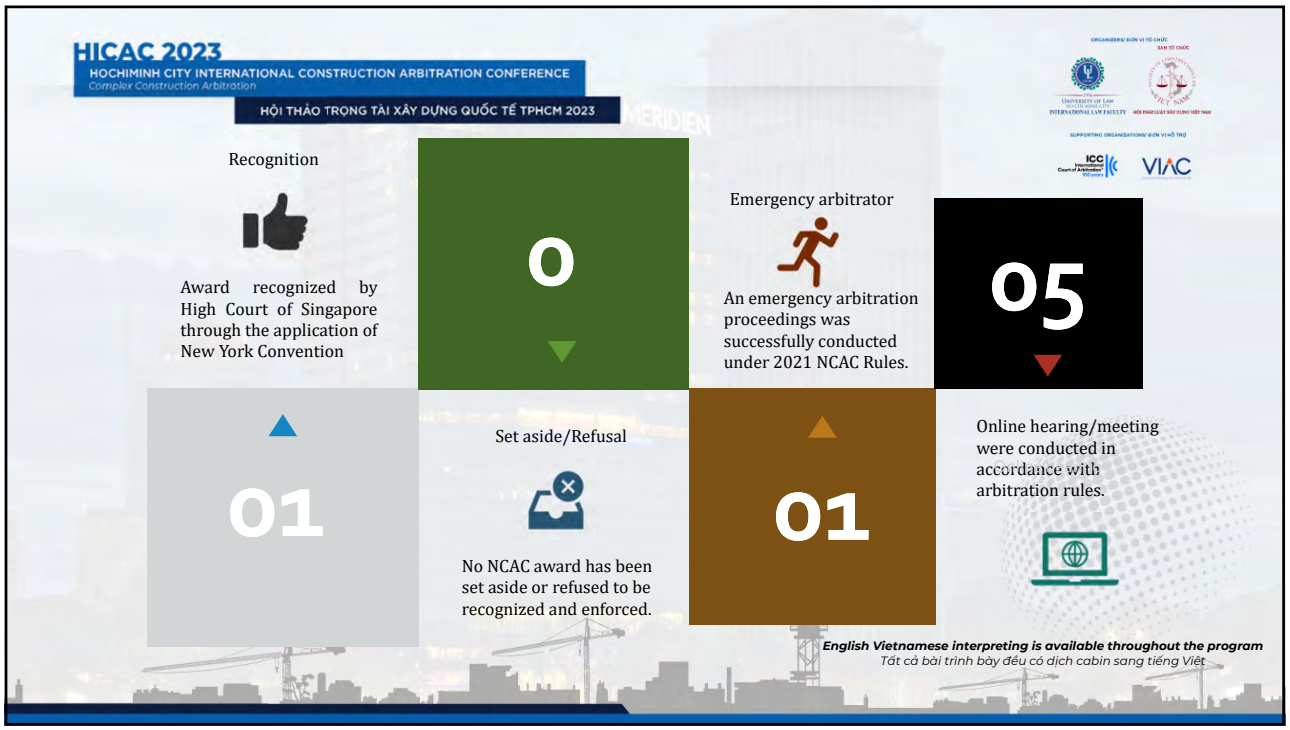
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Recognition
Award recognized by High Court of Singapore through the application of New York Convention
0
Emergency arbitrator
An emergency arbitration proceedings was successfully conducted under 2021 NCAC Rules.
05
01
Set aside/Refusal
No NCAC award has been set aside or refused to be recognized and enforced.
01
Online hearing/meeting were conducted in accordance with arbitration rules.
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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023
II. Construction in Cambodia
2021
• 3,925 construction projects nationwide\
• 12,684,102 square meters
2022
• 3,827 construction projects nationwide
• 6,596,936 square meters
USD 5,210,359,509 Investment value
USD 2,634,992,100 Investment value
Since 2000, until 2022 Ministry of has issued construction permits for 61,418 projects with total area of 173, 213, 756 square meters with the total estimated investment cost of USD 68, 837, 543, 805.
*Ministry of Land Management, Urban Planning and Construction General Assembly Report.
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II. Construction in Cambodia

2003

2019

Photos Credit: Reddit

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II. Construction in Cambodia

2010

2019

Photos Credit: Reddit

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III. Construction Arbitration in NCAC

According to Ministry of Land Management, Urban Planning and Construction General Assembly Report in 2022, there more then 60 thousand construction permits has been issued since 2000.

There are 20 percents of NCAC cases were construction related disputes, some of the cases are very complex in both factual and legal issue.

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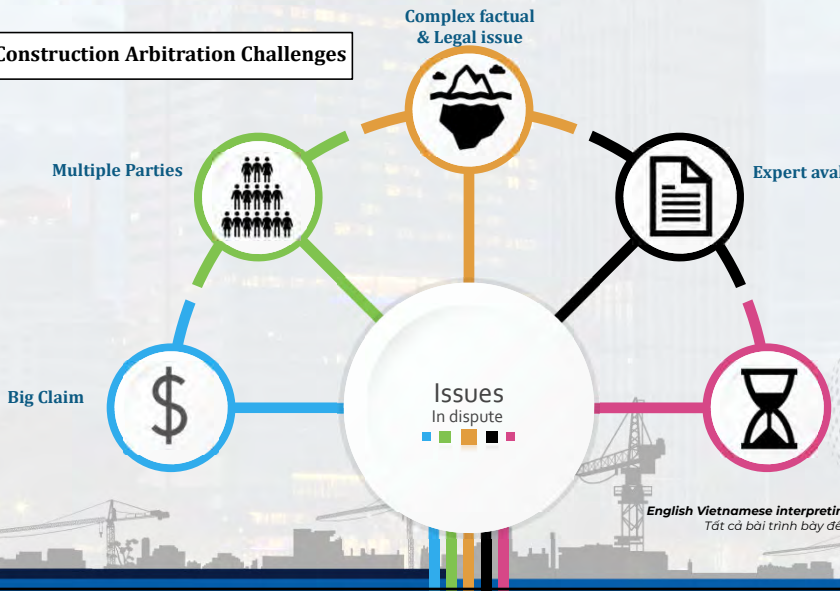
Complex Construction Arbitration Challenges



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EXPERIENCES FROM SECRETARIAT OF REGIONAL INSTITUTIONS IN DEALING WITH COMPLEX CONSTRUCTION ARBITRATION

Albert Zaw Min

President of Myanmar International Arbitration Centre (MIAC)

Albert Zaw Min is Founder and President of Myanmar International Arbitation Centre (MIAC). He is currently participating as Joint-Secretary of Intellectual Property Proprietors Association of Myanmar (IPPAM) and General Secretary of Myanmar Bar Association (MBA)

Experienced in various legal consultant services for more than 30 years, he have practiced the all type of cases in both maritime and aviation fields, general insurance and reinsures claims including those arising under professional indemnity and personal accident policies, subrogation and product liability claims, P & I Club disputes and crew personal injury cases in maritime industry, various IP rights such trademarks, copyrights and etcs…,

Albert Zaw Min also participated in drafting various Myanmar Laws drafting as free legal service for Union and Regional/State Government. He participated as Legal Consultant Team member of Union of Myanmar Federation for Chamber of Commerce and Industry (UMFCCI)

Johnny obtained his first degree in Architecture from the University of Western Australia. He was a founding partner of LT&T Architects where he practised for almost 30 years. Johnny practises as an independent arbitrator. He is a Past President of the Singapore Institute of Arbitrators (SIArb), having served two terms as President from 2007 to 2011.

Johnny is on the panel of several arbitration centres including SIAC, AIAC, HKIAC, DIAC, SCIA, and LCIA. He is a member of the Advisory Council to the National Commercial Arbitration Centre, Cambodia.

An accredited mediator with SIMI, Johnny is a Principal Mediator with several mediation centres including the SMC, CCPIT/CCOIC Mediation Centre, MHJMC, JIMC (Kyoto), IDDRMI, and SCMC.

An accredited adjudicator, Johnny also sits on the Construction Adjudicator Accreditation Committee (CAAC) and the Singapore Infrastructure Dispute Protocol Advisory Committee.

Johnny has held various positions in the Singapore Institute of Architects (SIA) and served as its Vice-President from 1998 to 2000.

Johnny has been appointed as arbitrator in both institutional and ad hoc arbitration cases. He has also been appointed as adjudicator as well as review adjudicator in several adjudication applications.

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Experiences from Secretariat of regional institutions in dealing with complex construction arbitration

Presented by

Albert Zaw Min
LL.B., P.M.G. LL.B., P.M.G.2nd Class, GMDSS G.O.C. (U.K), MPA.
DL 1 DL-01 & DL-201 (Distinction), DL-450 (WIPO)
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Map of ASEAN Member States

On 8 August 1967, five leaders – the Foreign Ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand – sat down together in the main hall of the Department of Foreign Affairs building in Bangkok, Thailand and signed a document. By virtue of that document, the Association of Southeast Asian Nations (ASEAN) was born. The five signers are Adam Malik of Indonesia, Narciso R. Ramos of the Philippines, Tun Abdul Razak of Malaysia, S. Rajaratnam of Singapore, and Thanat Khoman of Thailand – would subsequently be hailed as the Founding Fathers of probably the most successful inter-governmental organization in the developing world today. And the document that they signed would be known as the ASEAN Declaration.

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Flags of ASEAN member states

Brunei Darussalam

Cambodia

Indonesia

Lao PDR

Malaysia

Myanmar

Philippines

Singapore

Thailand

Vietnam

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THE SECRETARIAT OF REGIONAL INSTITUTIONS

- The Secretariat is a key player in any institution, Secretariat is a global independent expert services and litigation consulting firm. Distinguished for the depth and breadth of our experienced experts, today people serve international law firms and corporations, addressing a broad range of disputes and economic challenges.
- Any institution may operate in commercial and arbitration such as delivering a broad range of services, including economic damages, valuations, forensic accounting and quantum and delay analysis in construction disputes. Its knowledge and expertise span all major industries, and we have given testimony in the most complex arbitration, mediation and trial formats around the globe.
- Its work and culture are driven by passion, pride, and performance. This powerful mix from its distinct approach to making the complex simple to the way we mentor our up-and-coming talent to become trusted experts early in their careers, its cohesive team performs time and again in the most challenging situations. Together, this forms the foundation of its experience above all' character that is woven into every aspect of work.

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- The Secretariat should keep contact with South Asian Association for Regional Cooperation (SAARC), Regional Cooperation and Integration (RCI), Regional Cooperation and Program (RCSP), South Asia Subregional Economic Cooperation Program (SASEC), Bay of Bengal Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), Council of Regional Organizations of the Pacific (CROP) and Middle East and North Africa (MNEA) Region.

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Seven Steps to Success in Complex Construction Arbitration

- In business and especially the engineering and construction industry, time is money. Its conversations with general counsel from engineering and construction companies of all sizes consistently reinforced the ongoing need to improve the construction arbitration experience for these users. The General Counsels (GCs) are looking for arbitrators and advocates who understand business realities and will streamline the process and make it more cost-effective. The following advice will help construction arbitrators and counsel provide GCs the dispute resolution results they expect.

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1. Thinking outside the box: Is there a streamlined alternative to arbitrating all issues?

- Many construction disputes involve competing claims. **Consider whether there is an issue (or issues) that needs to be adjudicated in order to permit the rest of the claims to be resolved without going through a full-blown arbitration. If the parties have a tiered dispute resolution clause and have gone through mediation or executive negotiations before filing arbitration, they may be able to identify such an issue.**
- **If a preliminary determination can resolve a roadblock to settlement, see if the parties can agree to resolve that issue first**. Even better: See if the preliminary determination can be made on a streamlined basis with limited briefing and a one-day hearing.

➢ A success story inspired this tip. It comes from in-house experience and concerns a construction dispute between an owner and a contractor. At mediation, eg. the parties were able to negotiate a value for the contractor's $40 million primary claim but could not agree on the validity or value of the owner's $20 million counterclaims. Instead of proceeding with a full arbitration of that counterclaim, the parties agreed to a settlement that provided for an adjustment to the payment due the contractor, an amount between $0 and $8 million, based on how an agreed-upon neutral valued the counterclaims. We chose a neutral and agreed to limited (in time and length) briefing and a one-day hearing. The neutral, who was not informed about the settlement, was simply tasked with assessing the validity of the counterclaims and providing a dollar value for those found valid. The award was due within a week of the hearing, with no supporting explanation or reasoning. The settlement agreement provided that a $20 million valuation would add nothing to the settlement amount and a $0 valuation would add $8 million to the settlement amount. The percentage of $20 million of anything in between would add a like percentage of $8 million to the award. So that case may be resolved in few months, and the clients will be thrilled.

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2. Streamline hearings and reduce discovery costs by using written witness statements

- In complex construction arbitrations, particularly in multiparty disputes, attorneys' fees can approach—and sometimes exceed—the amount at issue. The last thing GCs, on any side of a dispute, want is for attorneys' fees to dwarf the actual award. Depositions, particularly in multiparty construction disputes, can send discovery costs soaring. Parties are reluctant in arbitration to limit depositions because lawyers understandably hate to be unprepared.
- At the preliminary case management conference, arbitrators and counsel should encourage the use of written witness statements in lieu of direct testimony. The beauty of written witness statements is that they often eliminate the need for depositions of those witnesses. All counsel will know what the direct testimony of a witness will be. They will be able to cost- effectively plan their cross-examination without incurring the expense of deposing the witness and without any of the other parties incurring the expense of attending. At the evidentiary hearing, the witness can quickly affirm the contents of their witness statement and then be turned over for cross- examination. In experience as in-house counsel, which was confirmed by the GCs interviewed, using written witness statements can save as much as 30% of the time and cost of an evidentiary hearing.

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3. Encourage the effective use of experts through presentations and the joint examination of experts

Expert testimony, while crucial, can be incredibly costly in complex construction arbitrations. To help GCs value-engineer the use and extent of expert evidence, offer the following suggestions:

a. At the preliminary management conference, arbitrators should encourage the experts to provide their opinions through PowerPoint or another type of visual presentation instead of in a written report. Because such presentations can be more effective at persuasively conveying the experts' opinions to the tribunal, experts may be asked to prepare such presentations in addition to the usual lengthy, written reports. Although some written appendices may be needed, suggesting at the beginning that as much of an expert's testimony as possible come in a more persuasive, digestible (shorter) format will increase its effectiveness and hold down costs.
b. Have the experts from the same discipline/on the same topic meet and confer without counsel and prepare a joint report setting out what they agree upon and where they differ, instead of creating individual reports. Then the hearing can be streamlined and focus on how and why they disagree. To increase efficiency even more, the experts should be present and examined together at the hearing. GCs are fans of this practice, which is often known as "hot-boxing" or "hot-tubbing." Such an approach is common in international arbitrations, and GCs would like to see it used more in domestic construction arbitrations. Now that we're used to hybrid and virtual hearings, this should be easy to achieve.

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4. Be prepared

Remember that companies choose arbitration in large part because they want to make sure that their disputes are decided by someone with the expertise and the ability to understand the issues. While understanding the issues requires an investment of time that state and federal trial court judges don't have, there should be no such excuse for arbitrators. Yet the GCs I interviewed expressed frustration at attending an evidentiary hearing and discovering their arbitrators were not familiar with the record or had not read all the documents and exhibits that had been submitted. To deliver what GCs expect from arbitration, practitioners and arbitrators should make sure they understand the record and the issues.

5. Remind the parties to focus on damages.

The lion's share of the parties' submissions and hearing time often is spent on liability issues. To help GCs get what they want from the process, prioritize discussing damages. Making sure that the parties devote enough time to damages will improve the quality of awards, regardless of the decision.

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6. Cue the chess clock.

Encourage shorter hearings and more efficient use of hearing time by using a chess clock. The use of a chess clock and the amount of time each party will be allotted should be discussed and decided at the preliminary conference. The hearing time does not have to be evenly divided and should depend on the number of witnesses and particular issues for each party. Charging the time each party spends asking questions against its predetermined and limited time allocation encourages all parties to take a more concise approach to the introduction of evidence.

7. Keep the endgame in mind.

Limit and define post-hearing briefing. Discuss early on what will happen at the end of the evidentiary hearing. Pre-hearing briefs laying out the facts and legal issues can be very helpful to the arbitrator's preparation. But after the evidence has come in, repeating the arguments in post-hearing briefs can be a high-cost, low-value exercise. Under such circumstances, if the parties want post-hearing briefs, consider limiting submissions to a list of issues on which the arbitrator says they need more information or analysis, after they have heard the evidence. This will better focus post-hearing briefing, consistent with clients' goal of cost-effectiveness.

Consider discussing the operative rules on attorneys' fees awards at the preliminary conference. If there is no contractual or statutory basis for an attorneys' fees award, GCs and their clients may want to know the arbitrator's views on whether fee shifting is available under the applicable rules. Particularly in multiparty, complex construction cases, it is not always obvious how the arbitrator should determine when someone is a prevailing party.

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Enhancing Efficiency in Complex Construction Arbitration with a Focus on the MENA Region

Due to the acceleration of infrastructure projects I the MENA region, construction disputes rank first among the disputes arbitrated before arbitral institutions. Construction arbitrations are known to be complex and thus costly and time-consuming. Given the importance of the construction industry in the MENA region, this article will examine the various mechanisms, which can be used either in the pre-arbitration phase or during the arbitration procedure itself, to streamline the arbitration process and help manage the time and costs of such disputes.

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1. Pre-arbitral mechanisms: filtering the issues prior to the commencement of arbitration:

(a) In construction projects, parties have helped to elaborate a series of dispute prevention and resolution measures, such as expertise, arbitration, expedited arbitration, fast-track arbitration and mediation, insofar as commercial imperatives command that disputes be resolved rapidly, efficiently and cost-effectively;

(b) For instance, the Dubai Court of Cassation in Case No. 204/2008 ruled that contractually prescribed amicable dispute resolution procedures must be completed before arbitration can be commenced. These procedures include notably mediation and or adjudication;

(c) The scope of available means for the effective resolution of construction and infrastructure disputes in the MENA region has never been more varied, nor has there ever been a better opportunity to apply innovation and creative techniques.

eg. The Federation Internationale Des Ingenieurs Conseils(FIDIC) contracts, and in particular the FIDIC Red, Yellow and silver books issued in 2017, highlight the role of dispute boards and recommend the use of Dispute Avoidance and Adjudication Boards. (DAABs).

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2. Institutional rules: and efficient and time-saving framework

a) First, for the administration of large –scale construction disputes and arbitrations in the MENA region, parties most commonly chose the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA);

b) Other notable regional institutions include the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA), the Dubai International Arbitration Centre (DIAC), the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), Qatar International Centre for conciliation and Arbitration (QICCA), the new Casablanca International Mediation and Arbitration Centre (CIMAC), and the Bahrain Chamber for Dispute Resolution (BCDR).

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3. Tools generated by the practice:

3.1. Pre-arbitration tools related to evidentiary documents and ensuring the efficiency of an upcoming construction arbitration:

- In the construction field, disputes are known to be fact and document-heavy, as well as long-running.
- Because of the large quantity of documents an arbitration may require, it is recommended that the parties, before the commencement of an arbitration, agree upon an efficient document management system.

(a) Building a "Paper Trail":

To ensure the efficient organization of an upcoming construction arbitration, the parties should cautiously gather the documents which were used during the life of a construction project, extracting potential evidence from a large and unorganized quantity of documents:

- **Pre-contractual and contractual documentation:** these documents primarily include specifications, drawings, geotechnical data or clarifications of the tender requirements provided by the owner, on one side, and the contractor's calculations, labor productivity assumptions, internal reports and worksheets, on the other side.
- **Different versions of the schedules**: this type of document may be used to demonstrate the liability for delays and/or the entitlement to an extension of time.
- **All correspondence between the parties (technical. Legal, etc.) and all records:** every meeting, negotiation and transaction, and follow-up on any oral conversation with e-mails and notes.
- **Cost documentation:** these include all the invoices, receipts and proofs of payment. They serve to evidence the quantum of a potential cost claim.

(b) Use of EDMS:

(i) **Electronic document management software (EDMS)** is key to facilitating the sorting and analysis of voluminous documents. EDMS allows its user to filter out irrelevant documents in the early stages of the dispute and therefore extensively reduce the number of documents that need to be reviewed;

(ii) Moreover, the documents stored in the EDMS can be accessed by various users at the same time and from multiple devices. The information from the EDMS can also be quickly transferred to external users, including the other party or the arbitrators;

(iii) With such new technology, parties can search and analyze documents based on chronology or subject matter, which can be helpful when it comes to crafting and developing a convincing thesis of the facts that will help a party win its case.

3.2. Practical tools for the arbitration proceedings:

The following tools are recommended to both arbitrators and parties.

(a) Electronic tools during documents production:

(i) Construction arbitrations are often won or lost depending on the availability and relevance of documents generated at the time of the events giving rise to the dispute;

(ii) during the arbitration proceedings, and usually within the context of a specific phase on document production, also known as discovery, a party may request all types of documents. Some arbitrators may view this process as a finishingexpedition. Tribunals generally prefer the traditional method of document production, i.e. the production of specific documents, notably as defined in the IBA Rules on the Taking of Evidence in International Arbitration and the Rules of the International Centre for Dispute Resolution (ICDR).

(b) The Scott Schedule:

i. Most construction disputes are multi-faceted, dealing with various causes of action and heads of claim;

ii. The Scott Schedules is referred to by some scholars as nothing less than the antitheses of pleadings consist in the parties formulating their basic positions and claims, together with the most important arguments supporting their assertions, indifferent columns according to the following sequence.

They are:

(aa) the claimant enumerates its allegations first;

(bb) the respondent replies to each of the issues, normally by including a statement on whether the respective allegations are agreed or denied;

(cc) the tribunal rules upon the claims are dined by the respondent.

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CONCLUSION:

- The Secretariat is key player as well as principal role in any institution so that its experiences were relied on enhancing the activities of the institution.
- Its experiences may share in dealing to settle down amicably with construction disputes in complex construction arbitration.
- Its experiences also required steps to success in complex construction arbitration.

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Motto of Myanmar International Arbitration Centre (MIAC)

Transparency Honesty Righteousness

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Dear All Honourable Attendees,

- On behalf of the People of Myanmar, I do hereby Cordially said that
- Warmly welcome to visit Myanmar ;
- Warmly welcome to do business in Myanmar;
- Warmly welcome to invest various manufacturing and various services in Myanmar

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BUỔI CHIỀU - PHÒNG KHÁNH HỘI - NHÀ RỒNG

PHẦN D: TIẾN HÀNH THỦ TỤC TỐ TỤNG VÀ QUẢN LÝ VỤ VIỆC TRỌNG TÀI XÂY DỰNG PHỨC TẠP

AFTERNOON - ROOM KHANH HOI- NHA RONG

SECTION D: CONDUCT OF PROCEEDINGS AND CASE MANAGEMENT FOR COMPLEX CONSTRUCTION ARBITRATION

PHIÊN D1: CHIẾN LƯỢC DÀNH CHO NGUYÊN ĐƠN VÀ BỊ ĐƠN ĐỐI VỚI VỤ VIỆC TRỌNG TÀI XÂY DỰNG

PANEL D1: CASE STRATEGY IN CONSTRUCTION ARBITRATION FOR CLAIMANTS AND RESPONDENTS

Moderator

Dr. Net Le
Partner at LNT & Partners

Le Net is a paneled arbitrator of Singapore International Arbitration Centre (SIAC) and Vietnam International Arbitration Centre (VIAC) where he either chaired or co-arbitrated in many construction cases, many of them are complex ones. As a counsel he led many cases at ICC, SIAC, VIAC and Swiss Cham. Many of the cases involved major infrastructure or real estate development. Net is also the first who introduced UNIDROIT Principles of Commercial Contracts to Vietnam in 1999. He earned LLB at Warsaw University, LLM at Katholieke Universiteit Leuven and PhD at London School of Economics. He is a partner at LNT & Partners.

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CASE STRATEGY FROM ARBITRATOR'S VIEWPOINT

Dr. Net Le
SIAC / VIAC Arbitrator
LNT & Partners

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The importance of case strategy for international arbitration

The Claimant	The Respondent
Wants to prepare the case thoroughly and move ahead while making the presentation very simple	
	Must have its own story to convince the Tribunal why it should prevail, as simply as possible
	Needs to answer line by line of the Statement of Claims, so that the dispute does not lose track
So does the Claimant in the Reply	

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Other important issues

Each of the steps needs a strategy that matches the whole case strategy.
It is usually crystallized in the Procedural Order and the Terms of Reference.

1 | Selection (or challenge) of the arbitrator(s)
2 | Appointment of chairman
3 | Mode of submission: pleading or memorial
4 | Jurisdiction challenge
5 | Settlement or negotiation
6 | Time management
7 | Disclosure of evidence
8 | Witnesses and Experts
9 | Hearing and cross-examination
10 | Cost submission and allocation

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The case is as follow:

- The Government of Utopia borrowed money from an international cooperation fund from Gov of Delta, so-called DICA ("Loan") of US$500 Million.
- Utopia assigned the Loan to the Ministry of Finance, who allocate to the State Treasury, and establish a Project Management Unit (PMU) to launch a bid for construction of an expressway, using the state budget ("Project"). Star Construction from Delta won it and the Engineer from Delta also won it. Both signed contracts in 2016.
- The construction contract followed FIDIC form 2010, red book ("Contract"). For payment, under Clause 14, Contractor would send interim payment application (IPA) to the Engineer, who then issue interim payment certificate (IPC) to the Employer, who then approved it and send to State Treasury. The Contractor receives payment from the State Treasury who were allocated money from DICA.

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The case is as follow:

- Then the construction is delayed by ABC reasons alleged by Star and DEF reasons alleged by PMU. Meantime the Loan expired. It takes 6 months to sign extension for the Loan.
- Star takes legal action against PMU at SIAC, claiming for prolongation cost, variation, price adjustment.
- PMU wants to counterclaim but there is no mechanism to seek the fund and bureaucracy stops them from doing so. Meantime, they have problem finding fund to pay for solicitors, because the Loan does not have money for it.

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Discuss the following points:

1. How to interview client and advise them to take steps?	**2.** When to say things and not to say things?	**3.** Pleading style or memorial style and why?	**4.** Should use witness or not?
5. How turn their witness/expert to your advantage	**6.** What if you don't have money to do arbitration (because of strict government regulation)?	**7.** How to prepare opening statement and closing statement?	**8.** How to conduct cross examination?

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Anita Natalia

Senior Associate at Herbert Smith Freehills

Anita acts for clients in various industries in a broad range of commercial disputes involving company law and shareholders' disputes, joint venture disputes, minority oppression actions, construction, and insolvency matters. She also has a broad civil litigation experience in land law, reinsurance, securities, trusts and partnership disputes. She also has an active arbitration practice.

Her portfolio of dispute resolution work involves a wide variety of commercial and corporate disputes and litigation including domestic and international arbitrations. Anita has worked closely with clients across Asia, China, Europe, Middle East and UK in their cross-border disputes. She has appeared at all tiers of the Malaysian Courts. Anita is a Fellow of the Chartered Institute of Arbitrators and the Malaysian Institute of Arbitrators. She is also empaneled as an arbitrator with the Asian International Arbitration Centre.

CASE STRATEGY IN CONSTRUCTION ARBITRATION – ARBITRATOR'S PERSPECTIVE

Pardeep Khosa

Partner at Morgan, Lewis & Bockius LLP

Pardeep Khosa is a partner at Morgan, Lewis & Bockius LLP and also a director at Morgan Lewis Stamford LLC, a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Pardeep has a broad practice focusing on international arbitration, commercial and civil litigation and corporate crime and investigations. Pardeep regularly appears before the Singapore courts and arbitral tribunals in international arbitrations under various institutional arbitration regimes, including the Singapore International Arbitration Centre (SIAC), the International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA). He is also a member of the Chartered Institute of Arbitrators.

Pardeep has acted for companies, high-net worth individuals, governments and statutory boards in complex and multijurisdictional disputes and arbitrations across various sectors, including energy, construction, engineering, and infrastructure. Pardeep also handles corporate, shareholder and joint venture disputes, as well as disputes involving contractual disputes and civil fraud.

Pardeep has received recognition for his disputes work in several legal publications and directories including the Legal 500 and Who's Who Legal. He was also recently listed as a National Leader, Southeast Asia for Commercial Litigation by Who's Who Legal and Best Young Lawyer Under 40 by Asian Legal Business.

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CASE STRATEGY IN CONSTRUCTION ARBITRATION – ARBITRATOR'S PERSPECTIVE

PARDEEP SINGH KHOSA
MORGAN, LEWIS & BOCKIUS LLP

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KEY ISSUES

Part 1: The Central Issues in This Case
Part 2: The Presentation of the Parties' Cases
Part 3: The Presentation of the Parties' Evidence

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Part 1: The Central Issues in this Case - What was the cause of the Delay?

- Contractor seeking additional payment because of the delay, on the basis of prolongation costs, variations and price adjustment
- Contractor's case: employer's actions have delayed the project
- Delay analysis: identifying root causes, allocation of risk and responsibility, and identifying impact or consequence

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Part 2: The Presentation of the Parties' Cases

- Pleadings vs Memorials
  - Pleadings - Avoid parties preparing unnecessary evidence
  - Memorials – Forces parties to properly evaluate strengths of case up front
- Preference depends on legal tradition of representatives and whether claimant or respondent
- Parties must serve relevant documents with their statements of case and should be directed to prepare a Scott Schedule

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Part 3: The Presentation of the Parties' Evidence

- Construction arbitration is expert-heavy
  - Experts on relevant aspects of project, local law, quantum, engineering, programming
- Suggested steps to narrow the issues in dispute
  - Agreement between parties on facts, issues, documents
  - Experts to identify issues on which they disagree
  - Hot-tubbing

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Q&A

Thank you!

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TO START OR NOT TO START: WHAT IS THE RIGHT STRATEGY FOR CLAIMANT

Seung Min Lee

Partner at Peter & Kim

SeungMin Lee is a partner at Peter & Kim (Singapore office). Ms Lee has represented and provided advocacy for major Korean and international clients in arbitrations under a wide range of institutional rules. She is dual-qualified as a Korean lawyer, and a solicitor in England and Wales. She has previously served as the South Korean national representative of the IBA young lawyers' committee, and has served as regional representative for Korea to the LCIA young international arbitration group.

Ms Lee was a registered foreign lawyer in Singapore in 2016, and counsel to the LCIA in 2010. A graduate of Seoul National University and member of the Korean bar, Ms Lee completed an LLM at the National University of Singapore in 2016.

Ms Lee was selected as a ranked lawyer in the jurisdiction of Korea from 2016 to 2021 by Chambers and Partners and was "recognized as a Future leader under 45-Partner in Arbitration" by Who's Who Legal from 2018 to 2021.

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To Start or Not to Start:

What is the right strategy for Claimant

SeungMin Lee

Peter & Kim (Singapore)

PETER & KIM
ATTORNEYS AT LAW

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The Claim? The questions you need to ask.

- Failing to follow the contract.
  - What is the nature of the claim event – is the claim being brought for payment regarding work done, for variations, for damages for breach of contract or for an extension of time and prolongation costs?
  - Is the claim event within the risks to be borne by the other party under the applicable contract?
  - Regarding the prospects of the claim, what are the (1) pessimistic, (2) optimistic and (3) probable outcomes?
- Over-optimistic schedules and unrealistically low profit margins at the outset.
- Failing to submit the requisite notice.
- Asserting poorly substantiated claims.
- Implementing variations before time and costs are agreed.
- Failing to mitigate delays and disruption.
  - Can potential negative consequences of bringing the claim be mitigated by other measures?

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How to move swiftly

- How to deal with lengthy multi-tiered pre-dispute protocol
- Using expedited procedures provided by arbitral institutions
- Using Interim relief to maintain status quo pending final resolution of the dispute

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Cost: Would the Claimant be able to withstand a sustained war of attrition?

- Cashflow challenges in the construction industry and thin profit margins.
- Large quantum of construction claims will increase costs.
- Practical questions to ask:
  - What is the likely amount that of damages or losses that can be recovered? To what extent can the claimed amount actually be recovered? Are the respondents in fact able to pay it?
  - Does the amount of the claim justify the effort and costs of bringing the claim?
  - Is the cost of arbitration greater than the claimed amount? If so, then it may be senseless pursuing arbitration unless the claim is a matter of principle.

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Strategic use of Fact Witnesses, Experts and Technology

- Fact witness evidence
  - Which facts can only be established by witness evidence? As witness evidence is generally less probative than documentary evidence, how crucial is this evidence?
  - Who can serve as a witness? How many of the witnesses are likely to be available at the time of the arbitration hearing?
  - Who will the other party likely call as their witnesses? Will their witnesses be credible?
- Expert evidence
  - Which issues are highly technical and should be established through expert evidence?
  - Who are the best candidates available to serve as an expert? Will there be any conflict of interest with their appearance as experts?
- Technology

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- **Bar Admissions:** South Korea (2007), England & Wales (2018)
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- Counsel, London Court of International Arbitration (2010)
- Partner, Peter & Kim (2020–present)
- Panel of arbitrators (KCAB)
- Ranked Lawyer, Chambers Asia Pacific (2016–2022)
- Future Leader, Who's Who Legal (2018–2022)

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ROADMAP TO VICTORY FOR PMU SOME PRACTICAL TIPS

K. Luan Tran

Partner at King & Spalding LLP

K. Luan Tran is partner in King & Spalding's international arbitration practice, and splits his time between the firm's Los Angeles and Singapore offices. He has 25 years of experience in international arbitration. He is among the few first-chair trial and arbitration lawyers with active U.S. and Southeast Asia practices. He has handled complex disputes relating to construction, energy, real estate, and other investment projects before the major arbitral institutions. A frequent speaker and author on Southeast Asia, particularly his native Vietnam, he was recently recognized as a "Legal Visionary" by the Los Angeles Times and "Trailblazer" by the Recorder for his work in the region. Luan was a member of the Board of Directors and is a current member of the Council of the AAA/ICDR. He is also currently on the ICC's U.S. Arbitrator Nominations Committee. He is a graduate of Harvard Law School..

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Roadmap to Victory for PMU

Some Practical Tips

K. Luan Tran
Xiaomao Min
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Build Your Case Around the Evidence, Not the Reverse

- The case should be built around the existing evidence, not on evidence counsel hopes to obtain during the course of the arbitration.
- Many counsel are forced to change their case narrative or drop some of the claims during the arbitration—and lose credibility—when they realized that the evidence that came out did not support the original claims.
- Therefore, it is crucial that a party's case is thought through carefully from the beginning of the arbitration.

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The First Side that Figures Out What Matters In the Case Usually Wins

- You are at a huge advantage when you realize, before the other side does, what will ultimately matter in the case: what are the key issues/evidence that the arbitrators will likely focus on to issue their award.
- To do so, you need to do some hard thinking and analysis early on: getting deep into the documentary evidence, researching applicable laws, interviewing key project employees and third-party witnesses, retaining expert consultants (delay experts...) to get their advice and assistance in building the case.
- Consider early mock arbitration hearing to test themes, arguments and/or documents.

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The Importance of Documentation In Construction Arbitration

- Construction disputes are document-intensive. To prove claims or establish defenses regarding inefficiencies, costs, and delays to the project, parties must rely on documents created and maintained during the construction.
- In this case, the contractor seeking damages for a compensable delay to the project schedule would have to establish: (1) the delay occurred; (2) PMU caused the delay; (3) the contractor was not responsible for any concurrent delay; (4) the delay caused damages to the contractor; and (5) damages amount. Without contemporaneous documentation (project schedules tracing the delay events or correspondence noting the delay and anticipating the resulting potential damages), the contractor is in the difficult position of relying on witness testimony to establish the facts and expert testimony to re-create the project history.

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The Importance of Documentation In Construction Arbitration (cont'd)

- Contemporaneous documentation is also important in refuting waiver, estoppel, or release arguments (that PMU did not provide proper notice of its complaints or PMU accepted changed terms or work defects).
- Good documentation also helps to enhance the credibility of experts witnesses and their expert reports.
- Lack of normal project documentation may subject the offending party to evidentiary sanctions including adverse inference.
- Hire outside vendor to help with document management.

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Preserve The "Paper Trail"

- PMU should circulate a litigation hold notification to its employees, instructing them to retain and not to destroy existing documents, including both electronically stored information and hardcopy documents.
  - This is to ensure that PMU and its legal counsel will have access to all the documents and information needed to best pursue its defenses and counterclaims (e.g., change orders, scope amendments, project schedules, weekly/monthly reports, drawings and plans, emails correspondence, etc.).
  - This is also critical to document production in the arbitration, where PMU may have to disclose the relevant documents to Star.

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Take Care When Creating New Documents

- PMU should circulate documents and communications guidelines to its employees, as well as the relevant State agencies, on creating new internal and external documents.
  - Draft internal communications (including emails and meeting notes internal to PMU) with care on the assumption that they will be disclosed to Star during document production.
  - Emails and other documents addressed to Star related to the dispute should be vetted by the legal team/external counsel before they are sent.
  - Don't have conversations with Star regarding the dispute and the arbitration, except in a formal settlement situation where the discussion is conducted on a "without prejudice" basis.

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No Money? No Problem

- PMU should consider litigation funding.
- PMU could also try to reach a contingency fee arrangement with external counsel.

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Retaining the Right Experts

- Experts cannot win your case alone, but they can sink it! So need extensive due diligence (be ware of those who have reputation of acting as advocates).
- Cases should not be driven by experts. Counsel need to manage them, including spending many hours with the experts to figure out how best to articulate and transform the experts' points into written and oral form.
- Counsel is responsible for the analysis and development of client's case, including undertaking the relevant factual and legal investigations that form the basis and scope of expert analysis.
- In this delay case, the experts need to look into issues such as contract and document analysis, schedule review, delay and disruption identification and qualification, causation analysis, apportionment, critical path analysis.

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Early Memorials Are Preferred

- Counsel should adopt the continental practice of memorial-stye pleading in which the parties exchange as early as possible memorials that are accompanied by all the evidence replied upon by the parties (as opposed to exchanging pleadings prior to producing the evidence).
- Given the complexity of construction arbitrations, this will enable the parties: (1) to know as early as possible the other side's case so they can prepare accordingly; and (2) to define precisely the nature and scope of the issues between the parties.

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General Guidance on Opening Statements

- Opening is a **Roadmap**: Make sure you lay out claims, elements, and what the evidence shows.
- Make sure that evidence slides are marked with exhibit references.
- It is a chance to reiterate and highlight themes, and also difficult issues (legally/factually).
- Are there vulnerabilities of witnesses on the other side? -- Highlight those vulnerabilities.
- Address our side's vulnerabilities upfront.

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Ten Commandments of Cross Examination

- Be brief.
- Use plain words.
- Ask only leading questions.
- Be prepared.
- Listen.
- Don't get into a quarrel.
- Avoid repetition.
- Avoid allowing witness explanations.
- Limit questionings.
- Save main points for closing.

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General Guidance on Closing Statements

- First, Ask Yourself: Should you do closings? Do you have enough time? Can your closing come a few weeks after the hearing? (Often Post Hearing Briefs are most useful)
- If there are closings right after presentation of evidence, bring in a supplemental team to help create the closing slides long before you conclude your hearing so your core team is not distracted
  - These other lawyers should be updating your proof outline every day, reviewing the rough transcripts, etc. and creating slides so you can come in and show that your case is even stronger now (via crosses, new testimony, etc.)

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Q&A

Xin trân trọng cám ơn Quý vị đã chú ý lắng nghe!
Thank you!

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PHIÊN D2: ĐIỀU TIẾT THỜI GIAN VÀ CHI PHÍ TRONG TRỌNG TÀI XÂY DỰNG

PANEL D2: CONTROLLING TIME AND COSTS IN CONSTRUCTION ARBITRATION

Moderator

Paul Sandosham
Partner, Clifford Chance Asia

Paul is a partner in the Litigation and Dispute Resolution practice of Clifford Chance and heads the Energy, Infrastructure and Resources (Disputes) practice for Southeast Asia.

Paul acts as counsel in court and international arbitration proceedings for various parties (under ICC, SIAC, DIAC, LCIA, ADCCAC, UNCITRAL, ICSID Rules) in disputes arising out of large-scale construction, infrastructure and engineering projects across numerous jurisdictions, including Vietnam. He also has extensive experience in international trade and commodities disputes.

Paul is admitted in England & Wales and Singapore. He is registered in the Dubai International Financial Centre Courts' register of practitioners. He is qualified as a Chartered Arbitrator and is a Fellow of both the Chartered Institute of Arbitrators and Singapore Institute of Arbitrators. Paul is an accredited mediator with the Centre for Effective Dispute Resolution in London.

Paul is on the panel of arbitrators of numerous arbitral institutions including SIAC, BANI, AIAC, DIAC, HKIAC, PIAC, BCDR and CIArb (London). He sits as sole arbitrator and tribunal chairman in international arbitrations relating to various types of cross-border disputes.

Paul is a member of the ICC Singapore National Committee Nominations Commission and a member of the core committee of the ICC Singapore Arbitration Group.

MEASURES INTRODUCED BY ICC TO CONTROL TIME AND COSTS FOR PARTIES IN ARBITRATIONS

Tejus Chauhan

Director, South Asia, ICC Arbitration & ADR,

ICC International Court of Arbitration

As the Regional Director for South Asia based out of Singapore, Tejus focuses on assisting companies, counsels, and investors the region understand how they can resolve commercial disputes by raising their awareness about ICC's Dispute Resolution Services.

In his role, Tejus advises on arbitration proceeding protocol, especially ICC Arbitration, organizing capacity building and informative events, promoting ICC's dispute resolution services, and connecting with regional players to forge relationships that connect ICC with users and businesses. Tejus is also an avid promoter of opportunities for young practitioners and leads ICC's Young Arbitration Forum (YAF) in South Asia.

Tejus earned his law degree in India. Upon graduation, Tejus worked as an associate with a law firm in the disputes and TMT practice. Prior to joining ICC in Singapore, Tejus has also worked as the Deputy Director – Arbitration for ICC in India and with the forensic and dispute advisory services at a Big Four audit firm.

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Measures introduced by ICC to control time and costs for parties in arbitrations

Tejus Chauhan
Director, Arbitration & ADR, South Asia
ICC Dispute Resolution Services

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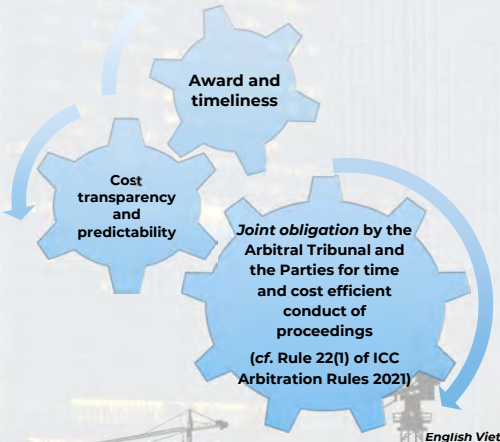
General Obligation and Key Principles



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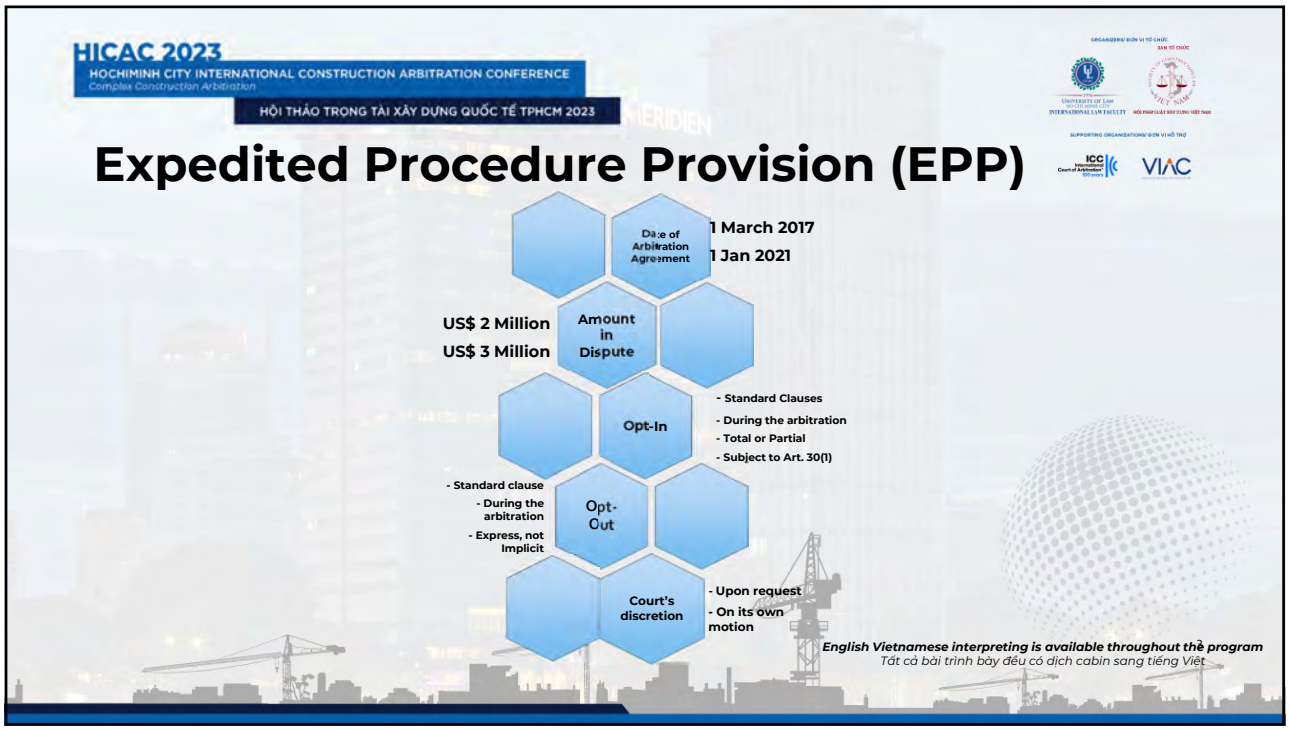
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Expedited Procedure Provision (EPP)
Date of Arbitration Agreement
1 March 2017
1 Jan 2021
US$ 2 Million
US$ 3 Million
Amount in Dispute
Opt-In
- Standard Clauses
- During the arbitration
- Total or Partial
- Subject to Art. 30(1)
- Standard clause
- During the arbitration
- Express, not Implicit
Opt-Out
Court's discretion
- Upon request
- On its own motion
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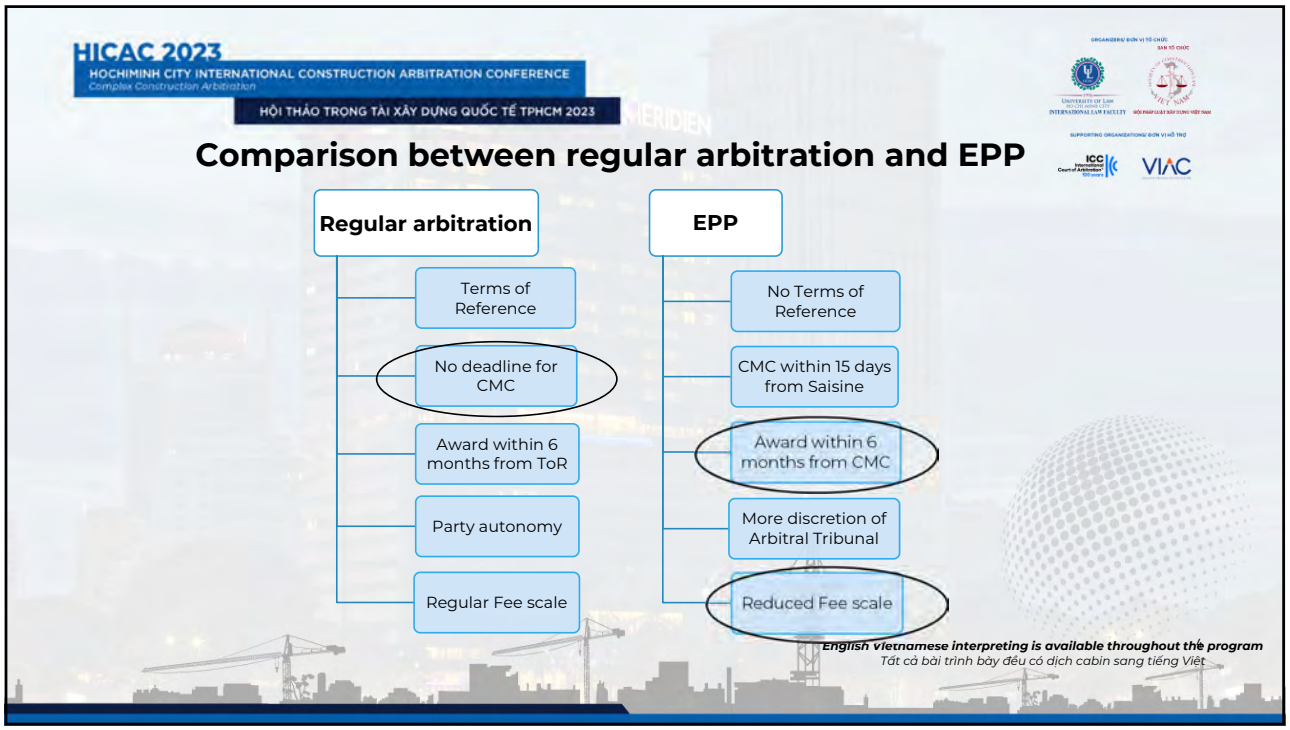
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Comparison between regular arbitration and EPP
Regular arbitration
Terms of Reference
No deadline for CMC
Award within 6 months from ToR
Party autonomy
Regular Fee scale
EPP
No Terms of Reference
CMC within 15 days from Saisine
Award within 6 months from CMC
More discretion of Arbitral Tribunal
Reduced Fee scale
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Applicable timelines for draft awards

Arbitral Tribunal

- Generally, awards must be rendered **within six months** from the establishment of the Terms of Reference or within any other time limit fixed by the ICC Court.
- Draft awards are expected within **two months** from last substantive submissions or hearing, in case of a **sole arbitrator**.
- Draft awards are expected within **three months** from last substantive submissions or hearing, in case of a **three-member arbitral tribunal**.

ICC Court

- In cases involving **dissenting** opinion or a **state entity**, awards will be scrutinised within **five or six weeks** of receipt by the Secretariat.
- In **all other cases**, draft award will be scrutinised within **three to four weeks** of receipt by the Secretariat.
- If the **Expedited Procedure Provisions** apply, any draft award submitted to the Court will be scrutinised as soon as possible, no later than **two to three** weeks.

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Consequences for Arbitrators

Article 15(2) of the ICC Arbitration Rules 2021	• An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented ***de jure* or *de facto*** from fulfilling the arbitrator's functions, or that the arbitrator is **not fulfilling those functions** in accordance with the Rules or within the **prescribed time limits**.
Article 2(2) App.III of the ICC Arbitration Rules 2021	• In setting the arbitrator's fees, the Court shall take into consideration the **diligence and efficiency** of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the **timeliness of the submission of the draft award**, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 38(2) of the Rules), at a figure higher or lower than those limits.
Reduction (Para 155 of the ICC Note to Parties and Arbitral Tribunals)	• Arbitral Tribunal's **fees typically reduced** between 5%-20%, depending on unjustified delay

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Consequences for Parties

Article 38(5) of the ICC Arbitration Rules 2021

- In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the **extent to which each party has conducted the arbitration in an expeditious and cost-effective manner**.

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Accountability of ICC

Par. 170 of ICC Note to Parties and Arbitral Tribunals

- If the scrutiny process is delayed, other than by circumstances that are beyond the Court's control, the **Court's administrative expenses will be reduced** by up to 20%, depending on the length of delay.

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Cost predictability and transparency

- Tribunal fees and institutional fee calculated based on the amount in dispute.
- Parties can predict costs in advance via ICC cost calculator.
- ICC Court oversees financial aspect of each case. Separate fee arrangements **are not** allowed.

- 82% Attorney's Fees and Other Legal Costs
- 16% Arbitrators' Fees
- 2% Arbitral Institution fees

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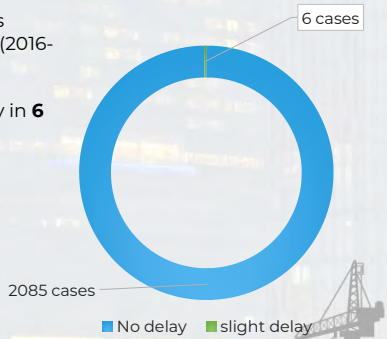
Timeliness of scrutiny of draft final awards by ICC (2006 -2021)

2091 draft *final* awards submitted to scrutiny (2016-2021)

Minor delay in scrutiny in **6 cases (0.003% cases)**



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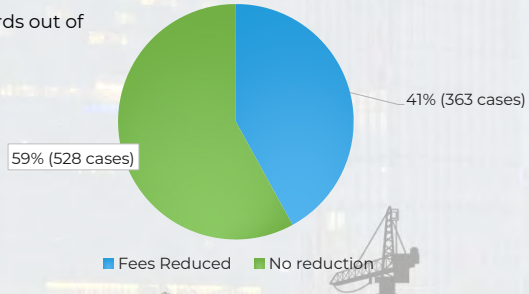
Delayed draft awards submitted by arbitral tribunals (2016 – 2021) **Excluding EPP cases*

891 'late' draft final awards out of **2091**

In 2021, **153** late draft final awards out of **374**



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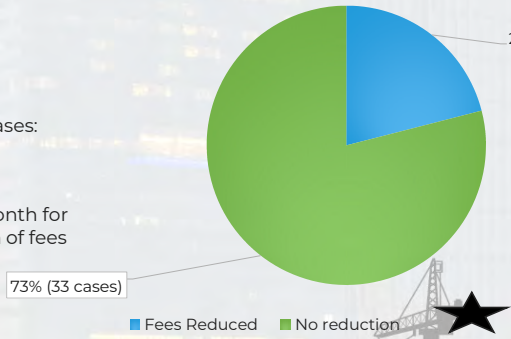
Delayed draft awards (2018 – 2021) for EPP cases

195 FA in total

87 FA in 2021

Delay beyond one month in 45 cases:

- 32 cases justified delay
- 12 cases reduction of fees
- 1 case FA not approved, one-month for SA's commentary, no reduction of fees



Expedited scrutiny = average **14 days**

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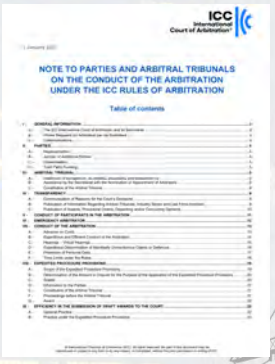
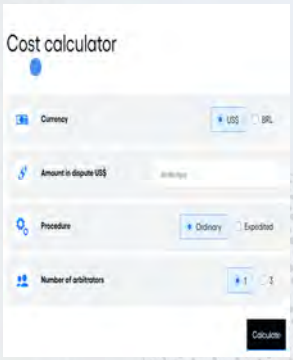
References





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COST – SAVING STEPS:

A) BEFORE ANY DISPUTE IS TRIGGERED;
B) POST-DISPUTE BUT BEFORE ARBITRATION IS COMMENCED

Earl Rivera-Dolera

Head of International Arbitration, Frasers Law Company

Earl Rivera – Dolera has acted as arbitrator, counsel and advocate, international tribunal law clerk (to prominent international arbitrators from major arbitration jurisdictions), and case counsel, in her more than 16 years of experience practising in the area of international commercial arbitration and investor-state treaty arbitration, court litigation and other areas of dispute resolution such as mediation, with particular emphasis on high-value and complex disputes arising from M&A transactions, cross-border sale of goods, construction and engineering (EPCs and multi-party and multi-contract transactions), licensing and distributorship agreements in a wide spectrum of sectors including oil and gas, renewable energy, commodities.

She has been based in Singapore prior to her relocation to Vietnam and has been involved in arbitration matters seated in the Asia-Pacific, Europe, the US, Australia, and Africa.

Earl has been appointed as arbitrator with seats in Japan, India, South Korea, Singapore, Indonesia, the Philippines, and Hong Kong. She has extensive experience in more than 170 international arbitration matters in various capacities.

Earl is a Fellow of the Chartered Institute of Arbitrators, a Fellow of the Singapore Institute of Arbitrators, a Salzburg-Cutler Fellow for International Law and Jean Monnet Fellow for European Union Law, the latter two from Stanford University, USA.

Experience

Earl joined Frasers in 2021 as Head of International Arbitration. Since then, Earl has handled large and complex transactions and sophisticated legal issues in advising and representing clients in their cross-border disputes. Prior to joining Frasers, Earl worked for a leading chamber of international arbitration practitioners based in Singapore for 9 years.

She is also an active advocate in the promotion of international arbitration, intellectual property enforcement, data privacy and protection and speaks on these areas in various events and conferences in Vietnam, Singapore, Japan, Cambodia, Thailand, India, Indonesia, Philippines, California (USA), Taiwan, Malaysia among others.

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COST-SAVING STEPS:
a) Before Any Dispute is Triggered;
b) Post-Dispute but Before Arbitration is Commenced

EARL RIVERA-DOLERA
Head, International Arbitration
Frasers Law Company

FRASERS LAW COMPANY

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Earl Rivera-Dolera, Head of International Arbitration

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Professional Background

Earl is admitted to practice as Solicitor of the Senior Courts of England and Wales, attorney and counselor-at-law of the New York and Texas State Bar, USA, and attorney-at-law, Philippines. Earl is also a certified information privacy professional (IAPP) for the EU's GDPR.

Publications and speaking engagements

Earl has extensively published in the area of international arbitration most notable of which is her being a co-author of Halsbury's Laws of Singapore: Arbitration (2017 and 2020 series). She is also an active advocate in the promotion of international arbitration, mediation and iterations of alternative dispute resolution mechanisms, and data protection and data privacy and speaks on these areas in various events and conferences in Singapore, Vietnam, Hong Kong, Japan, Cambodia, Thailand, Philippines, India, California (USA), Taiwan, Malaysia among others. She had also guest lectured in top-ranking universities such as Stanford Law School in California, and National University of Singapore and a regular judge in mooting competitions in Asia, Europe, and the US.

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COST-SAVING STEPS: When and How?

I. In the Course of Negotiating Contracts
II. Proper Documentation and Robust Contract Management
III. Good Faith Negotiations

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I. In the Course of Negotiating Contracts

Major phases of a construction project:

- Investment phase
- Construction phase
- Operations phase

✓ Proper and well-documented negotiations and contracting

- **Negotiations be made in writing.**
- **Presence of the authorized persons in the course of negotiations and execution of the contract.**
- **Proper signing formalities.**

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I. In the Course of Negotiating Contracts

✓ Avoid "pathological clauses" in arbitration agreements

What is a "pathological clause" ?

Examples:

- *"Any dispute arising from this real estate transaction in Vietnam shall be resolved via arbitration through ICC in Singapore."*
- *"Any and all such disputes shall be finally resolved at the Vietnam Economic Arbitration in Ho Chi Minh City, Vietnam."*

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Example:

"Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore."

ICC INTERNATIONAL CHAMBER OF COMMERCE
The world business organization

SIAC
Singapore International Arbitration Centre

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Example:

"Any dispute shall be resolved in Hanoi International Economic and Trade Arbitration Commission and the arbitration shall take place in Shenzhen, China."

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I. In the Course of Negotiating Contracts
"Nothing is more expensive than cheap counsel."
Case study of a US$ 100 claim:
Costs Saved
Costs Incurred
Contract negotiation and execution guided by online template searches or below market rate counsel rates
30
0-5
Disputes and arbitration stage
0
50
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I. In the Course of Negotiating Contracts
Litigation and/or arbitration insurance
Litigation and/or arbitration funding
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II. Proper Documentation & Robust Contract Management

- A construction project is document/records-intensive.
- All documents must be in good order:
  - Any contracts, sub-contracts, variation orders
  - Plans, drawings, technical specifications
  - Have all agreements **and disagreements** in writing

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III. Good Faith Negotiations

- When a dispute arises, talk and discuss in good faith.

  Any exception? If fraud is involved (e.g. forgery of daily records and/or safety issues at stake).

- Mediation is possible in the course of an arbitration.

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Case study: A construction project in the energy sector:

Claim	Number of arbitrations filed	Number of jurisdictions	Settled by mediation
More than US$ 1 billion	5	3	Less than 4 days

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KEY TAKEAWAYS
In a perfect world, there are no disputes. BUT, we do not live in a perfect world.
What can be undertaken in this imperfect world are:
mitigating the risks and costs of disputes as early as contract negotiations and execution,
properly documenting the performance (or non-performance) of obligations in the contracts, and
engaging in good faith negotiations.
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TIME & COSTS SAVING IN CONSTRUCTION ARBITRATION IN VIETNAM: CLAIMANT PERSPECTIVES

Nguyen Do

Partner at YKVN

Nguyen Do dedicates his practice to construction and international arbitration. He regularly advises on contract review, drafting and negotiation for infrastructure and commercial projects across Vietnam. Clients also seek his representation in complex construction disputes. In recent years, he was invited by the Vietnam Engineering Consultant Association (VECAS) to be the Vietnamese co-editor-in-chief of the FIDIC Second Edition suite. The suite comprises of three principal FIDIC Conditions of Contract (Red, Yellow and Silver books).

Nguyen is also a key member of YKVN's International Arbitration practice. He has been involved in numerous high-profile high-value international arbitration and dispute resolution matters in energy, infrastructure, debt restructuring, shareholder disputes, investment disputes, and professional malpractice & negligence. His articles on Vietnam-related arbitration are published in major arbitration publications including GAR, the International Arbitration Review and the International Comparative Legal Guide to International Arbitration.

Nguyen is qualified in both Washington State and Vietnam. Before joining YKVN, Nguyen worked at the Washington State Court of Appeals and private practices in the U.S.

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Time & costs saving in construction arbitration in Vietnam: Claimant perspectives

Do Khoi Nguyen, YKVN

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ TPHCM 2023

Talking points

1. General tools/tips/techniques for a Claimant to save time/costs
2. Protection of the final award in complex/high-value disputes: Two practical tips for a Claimant to consider

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General tools/tips/techniques

- Commencement stage:
  - Expedited Procedure?
  - Simple NOA/RFA or full SOC?
  - Filing requirements (number of copies, service of process, filing fee, advance of arbitration costs)
- Tribunal constitution
- TOR, PO1 and Procedural Timetable
- Expert evidence
- Hearing

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Vietnam complex construction disputes

- Claimant will likely be the foreign contractor; the Vietnamese owner will likely refuse to pay and/or call on the performance bond but will not likely initiate arbitration
- In major projects using public funds, state-own owners will likely require Vietnamese law as the governing law of the FIDIC contract with Vietnamese seated arbitration (ICC/VIAC)

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Drafting of PO1 – IBA Rules on Evidence

- There are gaps between the IBA Rules on taking of evidence and Vietnamese arbitration law
- Claimant should take the initiative to prepare a detailed PO1 to help the Tribunal navigating through the gaps
- Example: HuaDong vs VSH case – Decision from Hanoi People's Court setting aside VIAC award because the Tribunal relied on the IBA Rules to disregard the Respondent's evidence

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ICC seated in Vietnam: foreign arbitral award?

- Claimant prevails in an ICC seated arbitration in Vietnam, Respondent applies to a Vietnamese Court to set aside the award under Art. 68 of the Vietnamese Law on Commercial Arbitration (LCA)
- What should the Claimant do?
- The Claimant should argue that the award of an ICC arbitration seated in Vietnam is a "foreign arbitral award" under the LCA

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ICC seated in Vietnam: foreign arbitral award?

- Why? Because under Art. 71 of the LCA, the Court's decision to set aside is final and non-appealable.
- On the other hand, if the Respondent applies to not recognize a foreign arbitral award under Art. 459 of the Civil Procedure Code, the Court's decision is not final and subject to appeal.
- Arts. 3.11 & 3.12 of the LCA:

  Foreign arbitration is an arbitration formed under a foreign law on arbitration as agreed by the parties to settle a dispute outside or within the territory of Vietnam.

  Foreign arbitral award is an award issued by a foreign arbitration outside or within the territory of Vietnam to resolve the dispute, as agreed by the parties.

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Q&A

Xin trân trọng cám ơn Quý vị đã chú ý lắng nghe!
Thank you!

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TIME & COSTS SAVING IN CONSTRUCTION ARBITRATION IN VIETNAM: RESPONDENT PERSPECTIVES

Logan Leung

Deputy Managing Partner at Rajan & Tann LCT Lawyers

Logan's field of practice at Rajah & Tann LCT Lawyers is multidisciplinary, with his experience covering contentious and non-contentious matters. He is regarded for his familiarity with Vietnam's regulatory environment. Recognised by The Legal 500 Asia Pacific (2020) as a 'Next Generation Partner' for Corporate and M&A, Arbitration, Logan has been praised of being "responsive, intelligent, well-spoken, prompt, pragmatic, and extremely knowledgeable about the issues in the cases " and "providing workable solutions" across a number of key practice areas.

In the firm's Dispute Resolution practice, Logan specialises in international arbitration. He has advised or acted as counsel in disputes adjudicated under the arbitration rules of the ICC, SIAC, HKIAC, VIAC, CAA and the Swiss Chambers' Arbitration Institution.

Logan also helms the firm's Shipping/Maritime practice. His experience has seen him act for or advise in both wet and dry shipping matters for ship owners/managers, commodities traders, P&I clubs, insurers, and logistics companies.

As a part of Rajah & Tann LCT Lawyers' broader Corporate and M&A practice, Logan has acted for SMEs and MNCs in corporate transactions and greenfield projects across multiple industry sectors.

Logan's domain expertise lies in the technology sphere, and he is active in the firm's Technology, Media and Telecommunications (TMT) practice. His clients have ranged from start-ups to global technology giants, where he has advised on matters covering cybersecurity, e-commerce, IP, gaming, net neutrality, data protection and privacy, entries of disruptive technologies, and policy matters.

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Time & costs saving in construction arbitration in Vietnam: Respondent perspectives

Logan Leung, Rajah & Tann LCT Lawyers

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Response to Request for Arbitration

- How comprehensive should it be?
- Institutional rules can contain short timescales by which a respondent is to respond to the request for arbitration
  - **30 days:** ICC Rules, VIAC Rules, HKIAC Rules, UNCITRAL Rules (ad hoc)
  - **14 days:** SIAC Rules
- Can cost efficiencies be achieved from a shorter response?
- Pursuing extensions of time?

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Early Dismissal

- Dismissal of claims at the outset without considering them in detail – often on manifest lack of merits.
- **SIAC Rules** – Rule 28.1 and Rule 29:
  - **Rule 28.1:** Objection as to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration. Before constitution of the tribunal, Registrar to determine if the objection should be referred to the Court of Arbitration of SIAC. The Court will decide if it is *prima facie* satisfied that the arbitration shall proceed. If not satisfied, arbitration will be terminated.
  - **Rule 29:** Application for early dismissal where a claim (or defence) is manifestly without legal merit or manifestly outside the jurisdiction of the tribunal. If application is allowed, tribunal to give order or award within 60 days of application (unless extended in exceptional circumstances)
- **ICC Rules** – Less prescriptive but subsumed into the tribunal's case management powers under Article 22.
  - **ICC Practice Note (Expeditious Determination of Manifestly Unmeritorious Claims or Defences)**: If application is accepted, the "*arbitral tribunal shall decide the application as promptly as possible, consistent with the nature of the application, and may state the reasons for its decision in as concise a fashion as possible*".

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Preliminary Issues

- To decide (at the early stage of an arbitration) an issue that would dispose of the arbitration or streamline the proceedings before the determination of other issues. For example, matters of **jurisdiction or other relevant matters of law**
  - How about matters of fact?
- **Bifurcation** (or even trifurcation) of proceedings
  - Whether to separate preliminary issues from other matters to be determined

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Other Case Management Matters

- Document production / discovery
- Witness statements
- Experts
- Hearings

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Ending the war

- Arbitration can be expensive and time-consuming
- Settlement is always open to the parties at any time during the arbitral proceedings
- Arb-Med-Arb

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