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Arbitrators and Counsel Can Drive Efficiency in International Construction Arbitration

Results of the Queen Mary University 2019 Survey on International Construction Disputes

The Queen Mary University 2019 survey on international construction disputes shows arbitration is the most popular process for resolving those disputes. The data support trends we observed back in 2017 of user satisfaction but also the consistent yearning for improvements. Our analysis reveals that users continue to demand arbitration strike a balance between flexibility and informality on the one hand, and efficiency, economy and finality on the other.

Key Takeaways

1 Arbitration is the most popular dispute resolution process for international construction disputes (ICD).

2 Users want more efficiency and flexibility to deal with obstructive party tactics, poor case management, large amounts of evidence, arbitrators' and counsel's inexperience in ICD, and the factual and technical complexity of ICD.

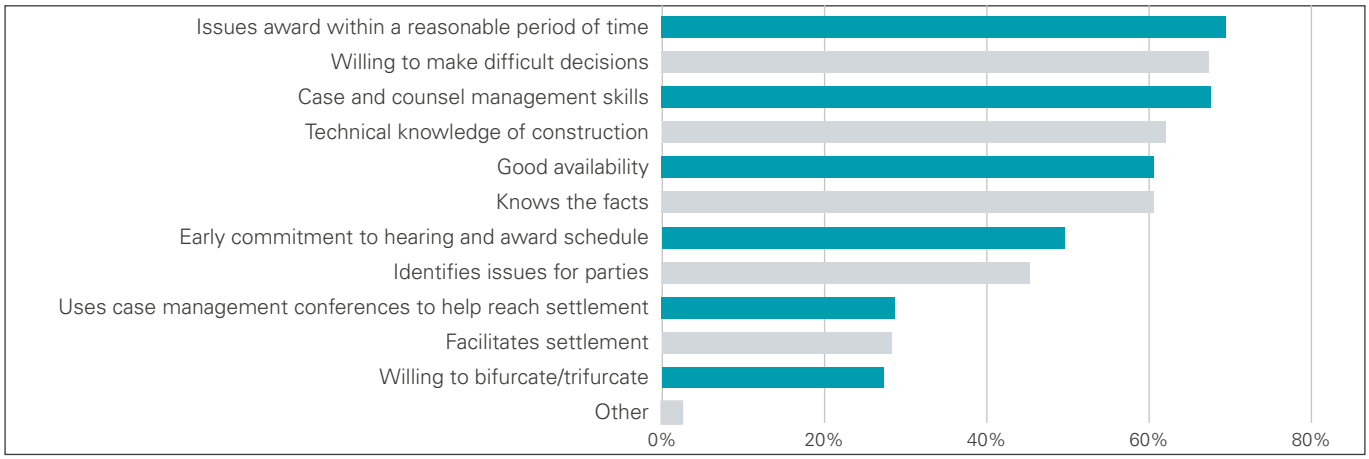
3 Users value specialist construction dispute knowledge and proactive efforts by arbitrators and counsel to adjust case management to the specific needs of each case.

Our Analysis

Conflicting messages emerge from the survey, mainly regarding qualities and conduct of arbitrators. The overriding message is that parties want arbitrators to take control of proceedings but, at the same time, preserve flexibility and informality in arbitration. They want arbitrators to:

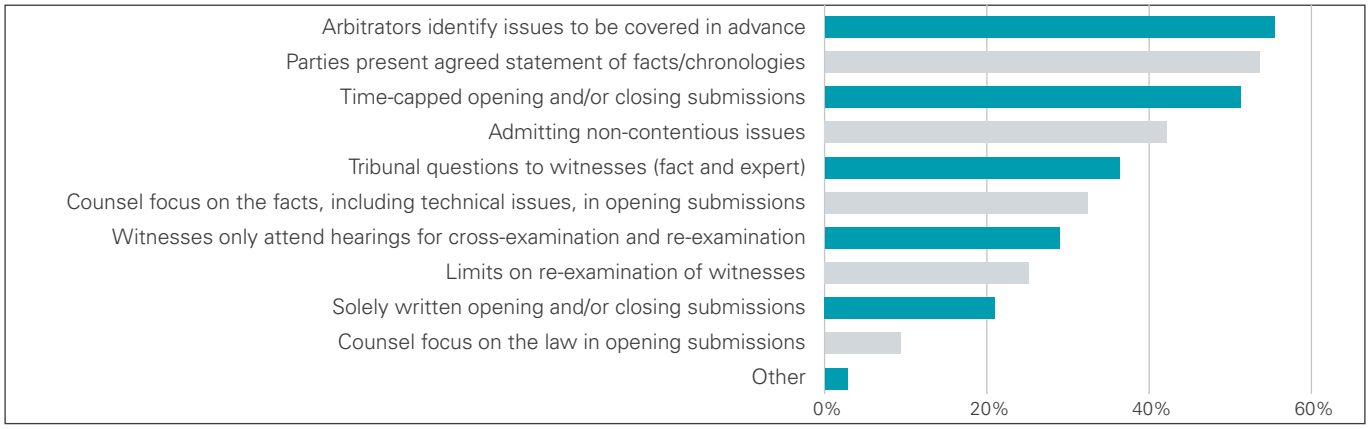
- Be expert in construction
- Exert more control over the proceedings
- Prevent delaying tactics
- Be involved in identifying the decisive issues
- Dismiss rubbish claims and defences early with cost sanctions (93% of participants)
- Be involved in discovery
- Facilitate settlement
- Make the award in a reasonable time (Fig 1)

Fig 1: Characteristics of an Efficient International Construction Arbitrator



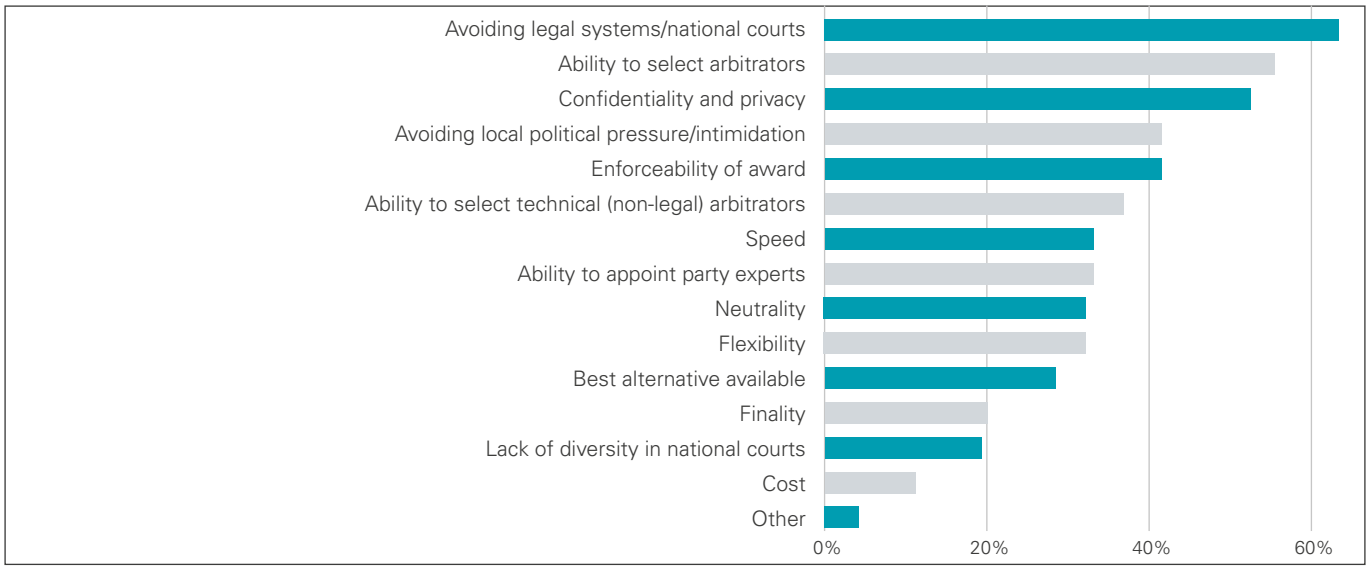
Participants are prepared to surrender some control to the tribunal along with some traditional rights of being heard (Fig 2). What does that type of arbitrator look like to you – one who knows construction and manages the case closely, applying sanctions when necessary? It looks to us very much like a judge in one of the specialised construction courts in Singapore, Australia or England.

Fig 2: Improving ICD Arbitration



But at the same time, the desire to avoid local legal systems and courts was the main reason for choosing arbitration at 62%, with the ability to choose arbitrators and maintain confidentiality and privacy being next at 55% and 52% (see Fig 3). Had participants been asked, they probably would have wanted to retain the relaxed evidentiary and procedural rules of arbitration too, contributing to its flexibility and economy. Only 41% regarded enforcement as a reason to choose arbitration, unlike the 64% for international commercial arbitration.[1] This reflects our view expressed some time ago that arbitration cannot rely on enforceability to entice parties from other forms of dispute resolution.[2] It needs something more.

Fig 3: Reasons Arbitration Chosen Over Litigation for ICD in Last Five Years



Therefore, parties want to be able to choose an arbitrator who acts like a construction court judge but does not belong to a national court, with relaxed rules of evidence and procedure, while maintaining confidentiality. Sound familiar? It sounds to us like the Singapore International Commercial Court, with the only real difference being court-assigned judges.

The irony is that the one thing credited with giving arbitration the ascendancy is the very thing restraining its efficiency – the New York Convention.[3] Enforceability of awards under the convention is said to be the feature that made arbitration so popular, but enforceability depends on the loser having been able to present its case.[4] Arbitrators can be fearful that being proactive, as users seem to want, gives the loser an argument against enforcement, being that it was unable to present its case. Survey participants felt that this phenomenon, known as "due process paranoia", was part of the reason for arbitrators not grasping the nettle and making difficult procedural decisions. However, if enforcement is not seen as a major concern in ICD, arbitrators can have greater confidence in being more active in case management.

1 The Queen Mary University 2018, "International Arbitration Survey: The Evolution of International Arbitration". http://www.arbitration.qmul.ac.uk/research/2018/.
2 Cameron Ford, "The Enforcement Chimera", http://arbitrationblog.kluwerarbitration.com/2018/05/10/the-enforcement-chimera/.
3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
4 Art V(1)(b) of the New York Convention.

All blame for inefficiency is not laid at the feet of arbitrators. Counsel are expected to lift their game, as well, by:

- Concentrating on winning the case rather than dealing with every point 63%
- Distilling complex facts and technical issues into bite-size pieces and drafting succinct submissions 61%
- Technical knowledge and experience in both international arbitration and construction 60%
- Case management skills 59%
- Full engagement with client teams 58%

Related results of the survey, adding colour to the findings above, were:

Factual, Technical and Document Complexity Key Characteristics of ICD

ICD were seen by users as having:

- Factual and technical complexity 73%
- A large volume of evidence 66%
- Multiple claims and parties 49%
- Non-lawyers as arbitrators 27%

Arbitration Preferred for ICD

Users said the popularity of ways of resolving ICD were:

- International commercial arbitration 71%
- Negotiation or intervention of senior representatives 34%
- Mediation 32%
- *Ad hoc* dispute boards 22%
- Expert determination 17%
- Statutory adjudication 17%
- Standing dispute boards 14%
- Investor-state arbitration 13%

ICD Experience Most Important in Arbitrator Selection

Factors considered in the selection of arbitrators for ICD are:

- Experience in international construction arbitration 76%
- A combination of legal and technical expertise 60%
- Construction industry experience 57%[5]
- Availability 46%
- Familiarity with the applicable substantive law 44%

Tactics and Case Management Main Causes of Inefficiencies

Time and costs of ICD are the main sources of dissatisfaction among users, with efficiency and flexibility of the process being key areas for improvement.

Users saw the top five causes of inefficiency as:

- Party tactics 53%
- Poor case management by arbitrators 51%
- Large amounts of evidence 42%
- Arbitrators and/or counsel inexperienced in handling construction disputes 42%
- Factual and technical complexity 36%

We will continue to monitor how arbitration evolves and offer suggestions on how it can be improved to maintain its position as the premier dispute resolution process for ICD.

We are currently ranked 18 in G*lobal Arbitration Review*'s (*GAR*'s) annual rankings of the top 30 international arbitration firms. With a team of more than 130 lawyers in our International Dispute Resolution Practice Group, we are a leader in international commercial and investment treaty arbitrations and have participated in many of the world's largest international cases.

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5 This accords with the Survey's finding that factual and technical complexity constitutes the most characteristic feature of international arbitration in the construction sector.

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