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The Guide to Construction Arbitration - Fifth Edition

Organisation of the Proceedings in Construction Arbitrations: General Considerations and Special Issues

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Organisation of the Proceedings in Construction Arbitrations: General Considerations and Special Issues

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Introduction

This chapter addresses the general question of how to conduct arbitration proceedings for construction disputes, with a particular focus on organisational issues that commonly arise in this type of dispute.

The chapter is in two parts. The first part ('Organisation of the proceedings') addresses those organisational issues to be dealt with in the initial stages of an arbitration, prior to the first submissions on the merits, such as the first case management conference and the setting of the terms of reference (when this document is required; particularly for arbitral proceedings under the Rules of Arbitration of the International Chamber of Commerce (the ICC Rules)). The second part ('Conduct of the proceedings') addresses the typical issues that arise during the course of arbitral proceedings, for instance in regard to document disclosure, evidentiary hearings and the drafting of an award.

From the authors' experience, most construction arbitrations are referred to international arbitration institutions, which can be explained by the truly international nature of the underlying contracts that concern large and high-profile construction projects and often involve contracting parties – including subcontractors, insurers, reinsurers and financial institutions, as well as states and state entities – from multiple foreign jurisdictions. In addition to the arbitration law applicable at the seat of the arbitration (the ***lex arbitri***), attention should always be given to any institutional rules that the parties have chosen to govern their arbitration. According to a survey of international arbitration users in the construction industry carried out by Queen Mary University of London in 2019, the ICC arbitration institute is the most widely used arbitral institution for international construction disputes,[2] without doubt owing to the fact that the standard International Federation of Consulting Engineers contract forms refer to the ICC Rules. Indeed, the authors' experience that forms the basis for this chapter is derived mainly from construction arbitrations under the ICC Rules, but also draws on experience from international arbitrations under other leading arbitration institutions (the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR), the Stockholm Chamber of Commerce, the Swiss Chambers' Arbitration Institution, the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre, to name a few), and can also be applied in the context of ***ad hoc*** arbitral proceedings.

Organisation of the proceedings

Construction arbitrations typically entail highly technical issues, large amounts of evidence and complex series of claims and counterclaims. For this reason, early and robust case management is essential to achieving an efficient resolution of the dispute. In this section, the authors address the initial organisational steps to be undertaken by the arbitral tribunal to ensure the proper and efficient resolution of the dispute. Most of these practices are common to all international commercial arbitrations but may require additional attention in the context of a construction dispute owing to the volume and complexity of the parties' claims.

Once it has received the preliminary written submissions (such as the request for arbitration and the answer to the request for arbitration), the arbitral tribunal must carry out an initial review of the file to gain an understanding of the nature of the parties' claims, as well as to identify any preliminary issues that may need to be dealt with, such as jurisdictional objections, compliance with pre-arbitral steps, notice requirements, requests for interim measures and the consideration of parallel proceedings (before dispute adjudication boards (DABs), other arbitral tribunals or even state courts).

The arbitral tribunal should then contact the parties in view of organising a first case management conference (CMC).[3] The main purpose of this first CMC will be to agree to the terms of reference (when this document is required; in particular, for arbitral proceedings under the ICC Rules), the procedural timetable and any specific procedural rules to be applicable to the proceedings for practical issues not addressed in the applicable arbitration rules. It will also provide an opportunity for the parties and the arbitral tribunal to discuss the need for any special procedures, such as the bifurcation of the arbitration into multiple phases (i.e., jurisdiction and merits or liability and quantum).

If the arbitration is being heard by an arbitral tribunal (as opposed to a sole arbitrator), the members of the tribunal should identify the earliest possible dates on which all members would be available for the CMC so that these dates can be proposed to the parties. The arbitral tribunal should also prepare a proposed agenda for the CMC and invite the parties to amend the agenda with any additional issues that they consider appropriate for discussion at this stage.

Although it is preferable to hold the first CMC in person, as this allows for better interaction and can facilitate agreement (for instance, by making it possible for the parties and the arbitrators to break out to separate rooms and discuss before taking a final position), it can also be held by telephone or videoconference, which is a more cost-effective solution when parties, their counsel and the members of the arbitral tribunal are located in different continents. Of course, as experienced during the global coronavirus pandemic and thanks to developments in online videoconferencing platforms, it is possible and even rather convenient to hold procedural hearings virtually. It is even possible to hold merits hearings virtually, although experience shows that users – in particular, parties' counsel – are more reluctant to do so than the arbitrators.

From the authors' experience, it is preferable, where possible, to have the parties' representatives attend the first CMC. This allows for the parties to have a better understanding of the process and the particular time constraints that were taken into account when adopting the procedural timetable. For instance, although it is one of the arbitral tribunal's duties to conduct the arbitral proceedings expeditiously, it happens rather frequently that the counsel themselves request long time limits for the filing of the written submissions, in light of the complexity of construction arbitration cases. Having the parties take part in these discussions permits them to have a better understanding of the process. Also, having the party representatives present for the CMC can further facilitate discussions aimed at narrowing the issues in dispute and agreeing on the arbitral procedures.

Terms of reference

As mentioned, one of the main goals of the first CMC should be to agree the terms of reference for the arbitration (if not already agreed prior to the CMC). Terms of reference are

required under Article 23 of the ICC Rules, and are sometimes adopted even for cases that are not conducted under the ICC Rules. They are a particularly helpful case management tool in large and complex cases, as they allow the parties' agreement as to the scope of the issues to be decided in the arbitration to be clearly established and, therefore, are advisable in all construction arbitrations. In short, the terms of reference is a document prepared by the tribunal setting out essential aspects of the case, such as the parties' representatives, the arbitration agreement, the applicable law and a summary of the parties' claims, counterclaims (if any) and defences. To this end, the arbitral tribunal should first request that each party submit a summary of its position (usually consisting of two to three pages of text) for inclusion in the terms of reference, and should then circulate the draft terms of reference to the parties prior to the CMC, fixing a deadline for the parties to submit their comments or suggested amendments to the draft. This allows for a streamlined discussion during the CMC that focuses only on any points of disagreement between the parties, so that agreement on the terms of reference can be reached more easily.

In complex construction arbitrations, provision may also need to be made in the terms of reference for the fact that the parties are not, at that stage, able to fully quantify their claims or counterclaims. This being said, arbitration institutions such as the ICC usually expect the parties to make some assessment of the claims and counterclaims so as to fix the amount of the advances on costs. The parties may also wish to refer to related claims that are still in the process of being determined by a DAB but that the parties may eventually wish to refer to arbitration. This aspect also needs to be taken into account when drafting the procedural timetable. The ICC Commission Report, 'Construction Industry Arbitrations', states in this respect:

> [i]n the case of large construction projects which may extend over a considerable period of time and give rise to numerous disputes, a party may not be in a position to refer all its claims to arbitration at one and the same time. In such cases, it should be acceptable to allow the party to include in the Terms of Reference a list of the claims which it would have the right to submit into the arbitration in future, for example those which are proposed to be, or have been, submitted to a [dispute board]. This would allow the tribunal and the other party to be aware of, and to prepare for, claims that may still be introduced into the arbitration. A time limit for the submission of additional claims could also be included, as ICC arbitrations may not be completely open-ended.[4]

Due attention must be given, however, to the applicable procedural rules concerning the introduction of new claims at later stages of the arbitration or amendments to existing claims, which can be limited by the arbitration rules.[5]

As to the content of the terms of reference, Article 23(1) of the ICC Rules sets out the required content to be included in ICC arbitrations, which can also be useful as a guideline in non-ICC arbitrations. For ICC arbitration cases, due consideration must be paid by the arbitral tribunal to the 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration', dated 1 January 2021, which also contains elements to be taken into account and is more frequently updated than the ICC Rules themselves. More specifically, the arbitral tribunal may wish to include a provision setting out a data protection protocol (in line with any applicable data protection laws, such as the General Data Protection Regulation),[6]

as well as a provision concerning the confidentiality of the proceedings and award (if not addressed in the applicable arbitration rules).

Specific procedural rules

At the same time as the terms of reference are being prepared, the arbitral tribunal – in consultation with the parties – should also prepare draft procedural rules on specific issues, in particular practical issues, not addressed in the applicable institutional arbitration rules nor in the applicable rules of the ***lex arbitri***, such as:

- the format of the parties' written submissions, including the supporting exhibits, legal authorities, witness statements and expert reports;
- the translation of documents;
- the exhibit number references;
- the proper notification of filings and communications;
- the procedures to be followed for document production requests, as well as the requirements to be met, the use of Redfern Schedules,[7] etc.;
- the setting of time limits and extensions;
- a cut-off date prior to the merits hearing after which no new evidence should be filed without prior authorisation;
- the rules applicable at the hearing (order of appearance, direct examination or cross-examination of witnesses and experts); and
- the application of any soft law procedural guidelines such as the 2020 International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules).

Most arbitration rules allow for these specific procedural rules to be established by the arbitral tribunal either explicitly[8] or impliedly through the wide discretion granted to the arbitral tribunal to conduct the proceedings as it deems fit (within the usual limits of procedural fairness, cost-effectiveness and efficiency).[9]

One organisational aspect to be addressed early on in the proceedings, and that is particularly important in construction arbitrations, is document management. As the international arbitration community becomes increasingly comfortable with the use of various computer and online applications, efforts should be made to rely solely on electronic filings whenever possible to avoid the costs – both financial and environmental – that result from requiring hard copies of the parties' submissions. One possible solution is to have the parties' main submissions (such as their main brief, witness statements and expert reports) filed electronically on a secure file share platform at the time of the deadline (i.e., by midnight on the day the filing is due) and to have the full submission (including exhibits and legal authorities) provided on an external hard drive or USB key within one or two days. Software such as ExhibitManager can also be used so that submissions are filed as eBriefs (i.e., in a PDF file in which references are directly hyperlinked to the supporting document). In construction arbitrations with large volumes of exhibits, eBriefs can be a convenient way to consolidate all the information for the tribunal's use.

Case management software that allows for hyperlinking and annotating documents, creating factual chronologies and searching document content, as well as uploading real-time hearing transcripts, and that is accessible to users through an online platform, can also be a helpful document management tool in complex construction arbitrations. If the parties wish to use such a platform, it is best that this be agreed at the outset of the proceedings and that it be regularly updated with the parties' filings so that each user can access, search and make notes on the case file throughout the course of the proceedings, including at hearings. The protocol to be followed for using such software should be set out in the specific procedural rules.

Procedural timetable

Another essential document to be established during the first CMC is the procedural timetable. To increase the efficiency of the first CMC, it is advisable to have the parties liaise and attempt to agree on a joint draft procedural timetable to be submitted to the arbitral tribunal prior to the CMC.

The procedural timetable should indicate each filing or event in the course of the proceedings, the person or persons involved, and the date. The usual steps to be included are:

- the statement of claim;
- the statement of defence (and counterclaim, if any);
- document production (requests, objections and the decision of the arbitral tribunal);
- the statement of reply;
- the statement of rejoinder and reply to counterclaim (if any);
- the rejoinder to counterclaim (if any);
- a cut-off date for evidence;
- pre-hearing conference;
- hearing on the merits;
- post-hearing briefs or closing arguments;
- submissions on costs; and
- the date of deposit of the draft award with the arbitration institution or the date of issuance of the award.

In large construction disputes, it is also advisable to eventually hold a second CMC to take account of the progress of the proceedings and any evolution of the parties' dispute. This is a step that is most logically inserted after the first round of written submissions but before the filing of document production requests, because the parties' positions will be fully set out at that point. This will allow the parties to ensure that the arbitral tribunal has properly understood the issues and will allow the arbitral tribunal to draw the attention of the parties to any issues to be clarified or developed in the second round of written submissions. A similar case management tool that could be inserted between the two stages of written submissions is the 'Kaplan Opening',[10] which consists of oral pleadings held after the first round of submissions in which the parties provide the tribunal with an overview of their

respective cases. Although it is not commonly seen in practice, in the authors' view it could be beneficial in large construction disputes to have the parties' case summarised and set out for the tribunal at this stage, allowing the tribunal to raise any issues it considers relevant and the parties to understand which issues require further attention in their subsequent submissions.

Another consideration that may have an effect on the steps to be included in the procedural timetable is bifurcation of the proceedings.[11] Bifurcation is most common where jurisdictional objections have been raised and the parties agree to have a first partial award on the issue of the arbitral tribunal's jurisdiction, but can also be used where a preliminary decision on certain legal issues (e.g., risk allocation under the contract, liability for defects or time-bar defences) would render the remainder of the issues (i.e., damages) moot. Bifurcation, where appropriate, therefore has the potential of saving the parties significant time and money by disposing of unmeritorious, inadmissible or time-barred claims at an early stage;[12] however, bifurcation must be used judiciously, as certain issues may be so intertwined with others that their separation would be problematic. This can happen, for example, if the arbitral tribunal's jurisdiction over a third party to the contract may be intimately connected with the party's conduct that also forms the basis for alleged liability, or when issues of causation are essential to both liability and quantum, such that it would make more sense for the arbitral tribunal to hear the parties' full position on those issues before making a decision on the merits of the claim or claims. It should also be borne in mind that, in complex construction disputes concerning many claims and multiple parties, it is also possible to separate the proceedings by grouping certain claims and then hearing each group of claims in sequence.

In light of the highly technical nature of many construction disputes, it also makes sense to discuss at the outset of the proceedings whether the arbitral tribunal should participate in a site visit or whether any testing will be necessary, and where those activities should be set in the procedural timetable. Depending on the issues at stake and the status of the project, site visits or testing may need to be carried out quickly before construction progresses. In the context of these discussions on the technical evidence that will be presented in support of the claims, some arbitrators, at the first CMC, will raise the issue of expert evidence and potential joint meetings between the parties' experts. From experience, however, the possible utility of joint expert meetings can be better assessed after the first round of submissions, and thus this is a discussion better left for a second CMC. In the authors' opinion, joint expert meetings and joint expert reports are more useful before than after the merits hearing.

The first CMC is also the ideal time to discuss whether the parties should create a schedule of claims (commonly referred to as a Scott Schedule,[13] after the model proposed by UK surveyor and official referee George Alexander Scott) or any agreed working documents (such as a list of key persons, a basic factual chronology, a glossary of terms or diagrams, such as those depicting the site layout). As there can be a high number of claims in construction disputes, a Scott Schedule can be a very useful tool for the arbitrators when drafting their decision.[14] Agreed working documents can also save a lot of time on uncontentious factual issues, allowing the parties to focus their arguments on the true issues in dispute.

Finally, although the issue of costs and the parties' submissions in this respect usually come at the final stage of the proceedings, the question of whether the parties intend to claim reimbursement of their internal costs incurred for the arbitration should be raised at an early

stage (such as at the first CMC) so that the parties are aware of the need to keep careful internal records of their costs throughout the course of the proceedings.

Conduct of the proceedings

This section addresses common issues that arise in the course of construction arbitration proceedings, after the first CMC has been held and the terms of reference have been signed by the parties.

Document production

Large construction and infrastructure projects generate large amounts of data in the form of design drawings, daily activity logs, transport records, invoices, photos and videos of the project site and other sorts of planning, supply and building records. These projects also tend to entail voluminous records of contemporaneous correspondence at all levels, namely between the employer and the contractor, with subcontractors and suppliers, and internally within the employer's and contractor's teams.

The large volume of contemporaneous data that is often available in relation to a construction project means that document disclosure requests are an important procedural step in construction arbitrations and can be extensive. Good planning and efficient management of the document production process is therefore key to ensuring the effective use of document production requests in construction arbitrations.

It should first be noted that parties (and their lawyers) may have differing expectations of the scope of permissible discovery, depending on whether they come from a common law or civil law jurisdiction, as document production is a practice that has its roots traditionally in the United States and the United Kingdom and, therefore, is used more extensively by those with common law backgrounds, whereas parties and counsel from civil law jurisdictions tend to have a more restrictive view. For this reason, it is a good idea to agree on the use of guidelines specifically tailored to international arbitration, such as the IBA Rules, at the outset of the proceedings. Indeed, Article 3 of the IBA Rules, which contains the guidelines concerning document production, was specifically drafted to reflect the accepted document production practice in international arbitration that strikes a balance between US-style discovery and the more restrictive civil law approach.[15]

It is common practice to have the parties submit their document production requests in the form of a Redfern Schedule,[16] setting out a description of the individually identified documents or a specific and narrow category of documents being requested and the reasons for the request (more specifically, why the requested documents are relevant and material to the issues in dispute). The Redfern Schedule also provides space for the opposing party to set out any objections it has to the requests, and for the arbitral tribunal's decision.

As mentioned above, the dates and modalities of the document production phase should be discussed at the first CMC and be set out in the procedural timetable and specific procedural rules (for instance, that requests first be made on a party-to-party basis, following which the party being requested to produce documents can either produce them or object to the request, and, finally, that the outstanding requests are submitted to the arbitral tribunal). In setting the dates for each step, it is important to keep in mind that large construction disputes

can involve tens, if not hundreds, of disclosure requests; therefore, the arbitral tribunal will need sufficient time to review and analyse them before issuing a decision.

As a final note on document disclosure, technological advancements that are being adopted in the construction industry will certainly have an effect on the types of disclosure requests that are made in construction arbitrations. Increased capacities for data storage and innovative means of handling data, for instance in building information models or even with the use of blockchain technology, is likely to result in new forms of disclosure requests aimed at gaining access to information about project costs and delays, and also project management and sound record-keeping. Although the technical aspects of these innovations are the domain of experts in the data management field, who will assist the arbitral tribunal in understanding the conclusions ultimately to be drawn from the data, arbitrators are advised to stay up to date and informed on these technological advances to be in a position to properly judge the disclosure requests.

Site visits

Depending on the nature of the claims and the timing of the arbitration, having the members of the arbitral tribunal visit the project site can be very valuable for their understanding of the issues and their fact-finding mission; however, site visits should be carefully planned and follow a strict protocol to avoid any disagreements between the parties on how the visit is carried out. This means that the parties should be required to agree, ahead of time, to a site visit protocol defining, ***inter alia***, what elements of the site will be seen, who will be present (including legal counsel for both sides), whether any technical experts will participate in the visit and what their role should be, in what order the parties will be allowed to speak, and how any questions from the tribunal will be handled.

Expert evidence

As mentioned above, construction disputes are often concerned with highly technical issues of civil engineering, as well as complex quantum calculations and delay analyses. Therefore, it is standard practice for both sides to present evidence by way of technical, quantum and delay experts. In international arbitration more generally, parties also tend to rely on evidence from legal experts as the parties' freedom to choose the law governing their contract means that the applicable substantive law may not be familiar to all of the involved parties.

One problem that arises through the use of party-appointed experts is that the expert evidence in support of either side's respective case can present widely divergent opinions. Requiring the parties' experts to meet and attempt to issue a joint report setting out their points of agreement and disagreement can be useful in this regard, but has the best results when the experts meet without the participation of the parties' legal counsel. Arbitrators should push the experts to agree on as much as possible to make these meetings worthwhile.

Another option available to the arbitral tribunal is to appoint its own expert. This is expressly allowed under the majority of institutional arbitration rules[17] and soft law guidelines[18] but is, in the view of the authors, too infrequently used. It is important to stress that, whereas civil law arbitration practitioners are very familiar with this mechanism, this is not the case with common law arbitration practitioners who consider that the parties' appointment of their

own experts is a fundamental right. Moreover, concerns about tribunal-appointed experts becoming the 'fourth arbitrator' are often cited, but in the authors' view unjustified, as the evidence of tribunal-appointed experts will in all cases be open to scrutiny from the parties, and the tribunal-appointed experts will not take part in the tribunal's deliberations or any party of the decision-making process. To this end, the parties should be included in all communications between the tribunal and the tribunal-appointed expert. One alternative approach that could be of particular use in construction disputes that rely so heavily on expert evidence is the 'expert teaming' protocol proposed by well-known arbitration practitioners Dr Klaus Sachs and Dr Nils Schmidt-Ahrendts.[19] In this approach, the tribunal chooses two experts – from lists of proposed experts submitted by each of the parties – and the two experts work together to submit a joint expert report setting out agreed points. However, the potential drawback of this approach is that the parties are still likely to submit their own expert evidence about the issues on which the expert team is unable to reach agreement, presenting a risk of even more time and costs being incurred.

In complex construction cases, it can also be useful to have the parties file their own party expert reports in the first stage of the proceedings, with a tribunal-appointed expert coming into play in the second stage of the proceedings, namely, after the first round of submissions. There are many arrangements that can be considered when it comes to expert evidence, and the parties, as well as the arbitral tribunal, are encouraged to create the most appropriate expert process for the particular case at hand.

From experience, the arbitral tribunal will be best positioned to ascertain whether it would like to appoint its own expert after at least one round of written submissions has taken place; however, having the tribunal-appointed expert involved as early as possible is ideal. This will allow the tribunal and its expert to identify key technical issues and the specific factual evidence (e.g., additional testing) that the parties should produce as the case proceeds, and not only prior to the hearing. Moreover, if a site visit is foreseen, it can be extremely helpful to the arbitral tribunal to already have its own expert present at that stage.

Impact of parallel proceedings

Owing to the complex web of parties and claims that is characteristic of construction disputes, an issue that arises rather frequently in construction arbitrations is the impact of parallel proceedings concerning the same project. This question can arise in a variety of circumstances, including when the parties are involved in ongoing DAB referrals, in multiple arbitrations or in related proceedings before state courts.

The question may arise at the outset of the arbitration of whether the parties are already involved in other arbitration proceedings, in which case they may wish to consolidate the arbitrations. Under the ICC Rules, consolidation is dealt with by the ICC Court and not the arbitral tribunal,[20] whereas under other arbitration rules a request for consolidation can be made to the arbitral tribunal itself.[21] Whether it is the institution or the tribunal deciding on a request for consolidation, the most relevant factors to consider will be whether the arbitrations are being conducted under the same rules, between the same parties and concern the same legal relationship, and whether the arbitrations can be consolidated without derailing the progress of the ongoing proceedings.

Another issue that can arise in the context of parallel proceedings, and in particular where there are ongoing DAB referrals, is whether additional claims can be added to the arbitration

once any pre-arbitral steps have been completed. In an ICC arbitration, the question of adding new claims to the arbitration is governed by Article 23(4) of the ICC Rules and will largely depend on the scope of the terms of reference. Therefore, if the parties foresee at the beginning of the arbitration that they may wish to add claims that will become ripe for arbitration at a later stage, this should be taken into account in the terms of reference either through an express reservation of rights to add certain, identifiable claims at a later stage, or through a broader statement as to the scope of the arbitration that leaves open the possibility of additional claims. In either case, there should be some limits imposed on the scope of the arbitration to avoid the introduction of new claims in an abusive and dilatory manner.

Finally, where claims under related contracts (for instance, payment guarantees or construction bonds) are being heard before state courts, a party might request a stay of the arbitration proceedings until those related claims are resolved. However, in most cases a stay of the arbitration can be avoided as long as the parties keep the tribunal informed as to any developments in the court proceedings that may have an impact on the arbitration.

Procedural incidents and interim measures

As part of their wide discretion over the conduct of the proceedings, arbitral tribunals have the power to issue procedural orders on procedural questions that may arise for which the parties seek the tribunal's guidance. Procedural orders should contain a reference to the relevant correspondence or applications submitted by the parties, a brief summary of the issue to be decided and the parties' positions, and an operative part setting out the tribunal's order.

In certain cases, the arbitral tribunal may be seized with a request for interim or provisional measures. These requests may relate to, for example, the need to preserve evidence, to secure payment pending the final outcome of the arbitration, or to block a party from calling upon a payment guarantee. The power of an arbitral tribunal to order interim measures is widely accepted[22] and provided for under most arbitration rules,[23] and the arbitral tribunal must always be prepared to receive urgent requests for provisional measures that may arise at any point in the course of the arbitration and will have to be dealt with expeditiously. This is particularly true if the arbitration is being conducted prior to the completion of the project, in which case the question of progressing the project to completion is an ongoing concern for the parties.

As the aim of interim measures is the preservation of a party's interests pending the outcome of the arbitral proceedings, the party requesting interim relief typically has to show that: (1) a risk of serious or irreparable harm exists; (2) this risk outweighs any prejudice to the other party; (3) the risk of harm is imminent; (4) the party seeking interim measures has a (prima facie) likelihood of success on the merits of the dispute; and (5) granting the interim relief will not amount to a prejudgment of the merits of the dispute.[24] These requirements may vary slightly depending on the jurisdiction, but are notably reflected in Article 26(3) of the UNCITRAL Arbitration Rules.

Depending on the nature of the interim measures being requested, the power of the arbitral tribunal to order these measures might not always suffice to resolve the issue, as arbitral tribunals do not have power over third parties, and their power to enforce a decision against a party that does not comply voluntarily is limited. In such cases, state court assistance may be required. For the same reason, special attention should be paid to whether the interim

relief is requested and decided in the form of a procedural order or an award, as this may have an effect on the enforceability of the decision by a national court if it is not complied with voluntarily.

Preparation for hearings and pre-hearing conference

When setting the procedural timetable, a date should be chosen a few weeks prior to the hearings for the exchange of the parties' lists of witnesses and experts that they wish to have appear at the hearing, as well as their proposed hearing agenda. The parties should be encouraged to make a joint proposal for the hearing agenda, even if this is not always possible in reality.

Shortly thereafter, a pre-hearing conference call should be planned. While the dates and location of the merits hearing will have already been set at the outset of the proceedings, this pre-hearing conference will be used to discuss any organisational issues such as the hearing agenda, the possible need for video conferencing with witnesses, witness translation issues and the use of demonstrative exhibits. Best practice for the conduct of the hearings themselves is discussed further, below.

In addition to these pre-hearing organisational matters, arbitrators hearing construction disputes should set aside a substantial period of time before the hearings to review the case file, as the submissions and supporting documents are more often than not extremely voluminous. It is also advisable for the members of the arbitral tribunal to exchange preliminary views regarding the issues to be decided and to identify the specific questions that they may have for the witnesses and experts that will appear. In this regard, even if the parties have declined to call a witness or expert to appear at the hearings, the arbitral tribunal has the power under the ICC Rules to call any person that it wishes to hear.[25] Thus, the arbitral tribunal should consider notifying the parties of any additional witnesses it wishes to hear in advance to ensure that parties are able to make the necessary arrangements for that person to be present at the hearing. From experience, counsel from common law countries are usually much less in favour of arbitral tribunals calling witnesses not called by the parties than counsel from civil law countries. However, it is sometimes very useful for a tribunal to do so to be fully briefed before deciding the case.

Hearings on the merits

The merits hearing (or hearings, in some cases) give the opportunity to the arbitral tribunal to hear the parties' factual witnesses and experts, and for the parties to test the witness and expert evidence through cross-examination.

For the hearings to progress smoothly, a clear agreement as to the hearing schedule should be set during the pre-hearing conference call. This will include not only the actual hours that the tribunal will sit each day, but also the order of appearance of witnesses and the time set aside for opening statements, questions from the arbitral tribunal and possibly even for closing arguments. In large construction disputes that concern multiple claims, it is usually best to have the hearing agenda organised claim-by-claim or issue-by-issue (i.e., the applicable law, alleged breaches of contract, delay and quantum), rather than having the claimant present its full case on all of the claims and issues followed by the respondent's pleadings and evidence on all of the claims and issues. Organising the hearing on an

issue-by-issue basis instead allows for each party to give their opening statement on the claim or issue, followed by the examination of the relevant witnesses and experts and questions from the arbitral tribunal on that particular claim or issue, before moving to the next topic. The parties may still wish to make brief opening statements setting out their full case and present closing arguments summarising all of the relevant issues to ensure that the arbitral tribunal also has a view on the case as a whole.

When conducting hearings related to international construction projects, it is not uncommon to have witnesses or experts that wish to testify in a language other than the language of the arbitration. In such circumstances, arrangements will have to be made for translators to be present in the hearing room. For efficiency's sake, simultaneous translation should be preferred to subsequent translation, with both the original and the translation being recorded for later verification by the parties.

Another issue that requires attention during the hearing is that of time-keeping. Parties will usually agree to use the 'chess-clock approach', meaning that each party is granted equal time and the time spent by each party in presenting its arguments and conducting witness examinations will be kept track of (usually by an administrative secretary to the arbitral tribunal) and added up at the end of each hearing day. When using the chess-clock system, attention should be given to the question of additional time used when a hearing day goes beyond the scheduled end time, to ensure that each party does end up having an equal amount of time to present its case over the full course of the hearings.

Organised and efficient document management at the merits hearing is a particularly important consideration in construction arbitrations in light of the volume of documents typically submitted on the record. The use of hearing bundles – which are a compilation of all of the written submissions and evidence that is then specially organised in numbered volumes for the hearing – is common practice (in particular, for counsel coming from common law countries), but not always necessary (even in complex construction arbitrations) if the submissions have been clearly labelled and the exhibits properly numbered throughout the course of the proceedings. This is where agreeing to the use of online case management software at the outset of the proceedings can prove beneficial, especially as hearings usually require the use of some form of document management software to allow for documents to be displayed and accessible to all of the hearing participants. Thus, having the submissions and supporting evidence already organised and accessible electronically saves time in preparing the hearing.

This goes hand in hand with the increased use of virtual hearing software in international arbitrations, which is a trend that will likely increase with time, even in the context of construction arbitrations, as users become more comfortable with the virtual setting. The parties and the arbitral tribunal should discuss at the outset of the case whether they have a preference for holding the merits hearing in person or virtually, as this might have an impact on the timing and duration of the hearing.

Finally, whether the hearing is being held in person or virtually, the arbitral tribunal is advised to verify – on record – at the end of the hearing whether the parties have any objections to the way in which the hearings were conducted, and whether there are any outstanding procedural requests. Having this information on record in the hearing transcript allows for any objections or procedural issues to be dealt with before a final award is issued.

Closing submissions

Closing submissions can be presented either by way of closing oral arguments (at the end of the merits hearing or at a separate hearing session), post-hearing briefs or – in very large cases – both.

Regardless of the form in which they are presented, the parties' closing arguments should not be a repetition of their entire case, but rather should highlight the evidence that was heard during the hearings, with references made, as necessary, to the positions already set out in the parties' written submissions. To encourage the parties to focus on the new evidence, page or word limits should be imposed on any written closing submissions (i.e., post-hearing briefs and, if requested, rebuttal post-hearing briefs).

It is also recommended to have the arbitral tribunal provide the parties with a list of questions or specific points that they wish to have addressed in the closing submissions, as this ensures that the tribunal has all of the information that it needs to render a decision and also aids the parties in focusing on the salient issues. Where the parties have chosen to make oral closing arguments at the end of the merits hearing, it will be more difficult for the arbitral tribunal to provide a list of questions or issues to the parties prior to the closing arguments, but it is nevertheless helpful for the arbitral tribunal to give some instructions or guidance to the parties at the close of the evidence so that the parties are aware of the issues on which the tribunal would like them to focus. Otherwise, where the parties choose to present post-hearing briefs or closing arguments at a later date, the arbitral tribunal will have time to compile its list and provide it to the parties in advance of the final submissions.

Moreover, it can be extremely helpful, especially in complex and voluminous cases, to have the parties agree on a list of the key documents in the file that the parties consider to be the most important, to the extent that these documents have not already been identified by the parties (for example, in a joint hearing bundle).

Deliberations and award

In complex construction arbitrations, the members of the arbitral tribunal are encouraged to actively discuss the case and exchange preliminary views throughout the course of the arbitration, as this allows for more efficient decision-making as to the proper course of the proceedings. Deliberations on the parties' claims are, however, reserved for after the close of evidence-taking.[26] Although it is rare that in large construction disputes the parties present their closing submissions at the end of the merits hearing, if this is the case the arbitral tribunal should set aside time directly after the close of the hearings to carry out its deliberations.

It is more likely that the parties will choose to have post-hearing briefs or closing oral arguments at a later date. The arbitral tribunal should be prepared to carry out its deliberations in any case as soon as possible after the final submission on the merits or final closing arguments, in accordance with its duty to conduct the proceedings efficiently. Indeed, it is always best that deliberations be held when the issues and evidence are fresh in the minds of the arbitrators.

In complex arbitrations, it is helpful to draw up a deliberations road map that can be followed by the arbitrators during their deliberations session to logically assess the parties' claims and counterclaims. As a general rule, issues of law and contract interpretation should be dealt with first, and only once these issues have been decided should the facts be assessed within the applicable legal and contractual framework, followed by the calculation of delay and costs. It may be necessary to hold multiple deliberation sessions depending on the number and complexity of the issues, and if this is the case the deliberations sessions should be held close enough in time to ensure that the deliberations can be easily picked up where they were left off. However, it is also possible in very complex cases that the arbitrators deliberate on foundational issues, then the president of the arbitral tribunal drafts a first portion of the award on those issues before proceeding to the next session of deliberations. This approach can assist in identifying which issues remain to be resolved and which issues may have already been dismissed.

The drafting of the award is indeed usually led by the president of the arbitral tribunal, who will present a first draft to the co-arbitrators. The co-arbitrators will then take turns reviewing and commenting on the draft. However, where one of the co-arbitrators is specialised either in certain legal or technical matters that are to be addressed in the award, it can make sense for that person to provide the first draft of the tribunal's decision on those specific issues with which the co-arbitrator is more familiar.

It is always possible that the members of the arbitral tribunal are unable to agree on the proper outcome of the dispute. The decision will follow that of the majority position on any particular issue, and it is possible for the minority arbitrator to include a dissenting opinion at the end of the award. However, where the arbitrators all agree on the outcome of the case but perhaps disagree on certain discrete issues, it should suffice to indicate in the award that the tribunal's position on that particular issue is a majority position. From experience, arbitrators taking a minority position and who are appointed by states or state entities, or come from certain jurisdictions, have a greater tendency to request the issuance of a separate dissenting opinion.

Finally, in ICC arbitrations, arbitral tribunals are in theory expected to render their awards within six months of the signing of the terms of reference. In practice, however, this is almost inevitably impossible in construction arbitrations, and thus this deadline will be regularly extended by the ICC Court.

A related but separate issue is the time limit expected by the ICC for the issuance of the draft award, following the filing of the last procedural step on the merits (namely, the final hearing if there are no post-hearing submissions or the post-hearing briefs or closing oral arguments). Pursuant to Paragraph 153 of the 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration', dated 1 January 2021, a three-member arbitral tribunal is expected to file the draft award within three months, whereas a sole arbitrator is expected to do so within two months, failing which the ICC Court may decide to reduce the fees of the arbitrators. Whereas the ICC Court is usually very reasonable and understands the constraints of voluminous and complex construction cases, it is strongly advised for the arbitral tribunal to attempt to agree with the parties (for instance, at the end of the merits hearing) a longer time limit (within a reasonable period) for the issuance of the draft award and to inform the ICC accordingly. This agreement should be reflected in an updated procedural timetable. From experience, the parties understand that in construction arbitration it is extremely difficult for an arbitral tribunal to comply with

the above-mentioned time limits, in the same way that the arbitral tribunal understands the need for the parties to have sufficient time to prepare their submissions, in particular their post-hearing submissions.

Footnotes

[1] This chapter was authored by Pierre-Yves Gunter and Anya Marinkovich, formerly at Bär & Karrer Ltd. The information in this chapter was accurate as at September 2021.

[2] Of the survey respondents, 71 per cent reported having seen the International Chamber of Commerce (ICC) used for international construction disputes, with the second most common institution being the London Court of International Arbitration (LCIA), at 32 per cent. See 'International Arbitration Survey – Driving Efficiency in International Construction Disputes' (Queen Mary University, 2019), p. 11.

[3] An initial case management conference is required under certain arbitration rules (see, e.g., Rules of Arbitration of the International Chamber of Commerce (ICC Rules), Article 24 and Stockholm Chamber of Commerce Arbitration Rules (SCC Rules), Article 28.1), and encouraged under others (see, e.g., LCIA Arbitration Rules, Article 14.3). Such a meeting is advisable in all cases, even where not provided for in the applicable arbitration rules, as it allows the arbitral tribunal to become familiar with the parties and their counsel, to raise any preliminary issues and to set up an organisational framework for the arbitration.

[4] ICC Commission Report, 'Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management' (2019), pp. 14–15 (-https://cdn.iccwbo.org/content/uploads/sites/3/2019/02/icc-arbitration-adr-commission-report-on-construction-industry-arbitrations.pdf (last accessed in 2021)).

[5] See, e.g., ICC Rules, Article 23(4). See also LCIA Rules, Article 22.1(i) and Swiss Rules of International Arbitration (Swiss Rules), Article 22.

[6] See ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration' (1 January 2021), para. 119 (-https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf (accessed 24 August 2023)).

[7] Redfern Schedules are a common method for managing documentary discovery in arbitration. In particular, they provide a framework for the production of documents to counterparties (see also footnote 16, below).

[8] See, e.g., ICC Rules, Article 19.

[9] See, e.g., Swiss Rules, Article 19(1); LCIA Rules, Article 14.2; and United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, Article 17(1).

[10] See Kaplan, 'If It Ain't Broke, Don't Change It', in Risse, Pickrahn, et al. (eds), ***German Arbitration Journal***, Vol. 12, Issue 6, pp. 278–80.

[11] The term 'bifurcation' is here referring to any separation of the proceedings into multiple phases, which can in fact be three or more phases (trifurcation, etc.).

[12] In this sense, bifurcation is synonymous with summary disposition or early determination, by which the tribunal disposes of certain claims on legal or factual grounds. This is a powerful case management tool that should be used where appropriate to reduce the number of claims in complex construction disputes where, for example, the contractual claim procedures have not been complied with. Early determination is specifically provided for in Article 23 of the Rules of the International Centre for Dispute Resolution (ICDR), as well as in Article 22.1(viii) of the LCIA Rules, but should be within an arbitral tribunal's general powers to resolve the dispute efficiently and fairly, even if not specifically provided for under the applicable rules.

[13] In short, a table setting out a description of the claim, the amount in dispute and each party's position on that claim. For a thorough overview of the format and content of Scott Schedules and their use in international construction arbitration, see Welser and Stoffl, 'The Arbitrator and the Arbitration Procedure, The Use and Usefulness of Scott Schedules' in Klausegger, Klein, et al. (eds), ***Austrian Yearbook on International Arbitration 2017***, Vol. 2017, pp. 161–73.

[14] Helpful examples can be found in the Annex to the ICC Commission Report, 'Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management' (op. cit. note 4).

[15] Zuberbühler, Hofmann, Oetiker and Rohner, ***IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*** (Schultess, 2010), Article 3, para. 83. The newly issued Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) take a very different approach, stating in Article 4.2 that '[g]enerally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery', subject to some exceptions. In construction arbitrations, where access to the opposing party's project records is essential, the use of the Prague Rules might therefore be inappropriate, or at least require some adjustments. However, the proactive approach to case management by the arbitral tribunal advocated for in the Prague Rules could be very well suited to other procedural aspects in a construction arbitration, such as the tribunal's active involvement in fact-finding described in Article 2.4.

[16] For more details as to the typical contents and format of a Redfern Schedule, see Girsberger and Voser, ***International Arbitration: Comparative and Swiss Perspectives*** (3rd Edition, Schulthess, 2016), pp. 242–43.

[17] See, e.g., ICC Rules, Article 25(3); UNCITRAL Arbitration Rules, Article 29; SCC Rules, Article 34; LCIA Rules, Article 21; and Swiss Rules, Article 27.

[18] See, e.g., International Bar Association's Rules on the Taking of Evidence in International Arbitration (2020), Article 6 and Prague Rules, Articles 6.1 to 6.4.

[19] Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in A J van den Berg (ed.), ***Arbitration Advocacy in Changing Times, ICCA Congress Series, No. 15*** (Kluwer Law International, 2011), pp. 135–48.

[20] See ICC Rules, Article 10.

[21] See, e.g., LCIA Rules, Article 22.7.

[22] See, generally, Born, ***International Commercial Arbitration*** (3rd Edition, Kluwer Law International, 2021), pp. 2607–25.

[23] See ICC Rules, Article 28; Swiss Rules, Article 29; LCIA Rules, Article 25; UNCITRAL Arbitration Rules, Article 26; and SCC Rules, Article 37.

[24] Magliani, Chapter 3, Part II: 'Commentary on the Swiss Rules', Article 26 [Interim measures of protection], in Arroyo (ed), ***Arbitration in Switzerland: The Practitioner's Guide*** (2nd Edition, Kluwer Law International, 2018), p. 709 (and cited references).

[25] See ICC Rules, Article 25(2), which allows the arbitral tribunal to call 'witnesses, experts appointed by the parties ***or any other person***' to give testimony (emphasis added) (cf. LCIA Rules, Article 20.5, which is more restrictive and allows only the arbitral tribunal to call 'a witness, on whose written testimony a party relies').

[26] Some arbitration rules require that the arbitral tribunal announce the close of the proceedings once the evidence-taking phase is complete. See, e.g., ICC Rules, Article 27.

INTRODUCTION

This chapter addresses the general question of how to conduct arbitration proceedings for construction disputes, with a particular focus on organisational issues that commonly arise in this type of dispute.

The chapter is in two parts. The first part ('Organisation of the proceedings') addresses those organisational issues to be dealt with in the initial stages of an arbitration, prior to the first submissions on the merits, such as the first case management conference and the setting of the terms of reference (when this document is required; particularly for arbitral proceedings under the Rules of Arbitration of the International Chamber of Commerce (the ICC Rules)). The second part ('Conduct of the proceedings') addresses the typical issues that arise during the course of arbitral proceedings, for instance in regard to document disclosure, evidentiary hearings and the drafting of an award.

From the authors' experience, most construction arbitrations are referred to international arbitration institutions, which can be explained by the truly international nature of the underlying contracts that concern large and high-profile construction projects and often involve contracting parties – including subcontractors, insurers, reinsurers and financial institutions, as well as states and state entities – from multiple foreign jurisdictions. In addition to the arbitration law applicable at the seat of the arbitration (the ***lex arbitri***), attention should always be given to any institutional rules that the parties have chosen to govern their arbitration. According to a survey of international arbitration users in the construction industry carried out by Queen Mary University of London in 2019, the ICC arbitration institute is the most widely used arbitral institution for international construction disputes,[2] without doubt owing to the fact that the standard International Federation of Consulting Engineers contract forms refer to the ICC Rules. Indeed, the authors' experience that forms the basis for this chapter is derived mainly from construction arbitrations under the ICC Rules, but also draws on experience from international arbitrations under other leading arbitration institutions (the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR), the Stockholm Chamber of Commerce, the Swiss Chambers' Arbitration Institution, the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre, to name a few), and can also be applied in the context of *ad hoc* arbitral proceedings.

ORGANISATION OF THE PROCEEDINGS

Construction arbitrations typically entail highly technical issues, large amounts of evidence and complex series of claims and counterclaims. For this reason, early and robust case management is essential to achieving an efficient resolution of the dispute. In this section, the authors address the initial organisational steps to be undertaken by the arbitral tribunal to ensure the proper and efficient resolution of the dispute. Most of these practices are common to all international commercial arbitrations but may require additional attention in the context of a construction dispute owing to the volume and complexity of the parties' claims.

Once it has received the preliminary written submissions (such as the request for arbitration and the answer to the request for arbitration), the arbitral tribunal must carry out an initial review of the file to gain an understanding of the nature of the parties' claims, as well as to identify any preliminary issues that may need to be dealt with, such as jurisdictional objections, compliance with pre-arbitral steps, notice requirements, requests for interim measures and the consideration of parallel proceedings (before dispute adjudication boards (DABs), other arbitral tribunals or even state courts).

The arbitral tribunal should then contact the parties in view of organising a first case management conference (CMC).[3] The main purpose of this first CMC will be to agree to the terms of reference (when this document is required; in particular, for arbitral proceedings under the ICC Rules), the procedural timetable and any specific procedural rules to be applicable to the proceedings for practical issues not addressed in the applicable arbitration rules. It will also provide an opportunity for the parties and the arbitral tribunal to discuss the need for any special procedures, such as the bifurcation of the arbitration into multiple phases (i.e., jurisdiction and merits or liability and quantum).

If the arbitration is being heard by an arbitral tribunal (as opposed to a sole arbitrator), the members of the tribunal should identify the earliest possible dates on which all members would be available for the CMC so that these dates can be proposed to the parties. The arbitral tribunal should also prepare a proposed agenda for the CMC and invite the parties to amend the agenda with any additional issues that they consider appropriate for discussion at this stage.

Although it is preferable to hold the first CMC in person, as this allows for better interaction and can facilitate agreement (for instance, by making it possible for the parties and the arbitrators to break out to separate rooms and discuss before taking a final position), it can also be held by telephone or videoconference, which is a more cost-effective solution when parties, their counsel and the members of the arbitral tribunal are located in different continents. Of course, as experienced during the global coronavirus pandemic and thanks to developments in online videoconferencing platforms, it is possible and even rather convenient to hold procedural hearings virtually. It is even possible to hold merits hearings virtually, although experience shows that users – in particular, parties' counsel – are more reluctant to do so than the arbitrators.

From the authors' experience, it is preferable, where possible, to have the parties' representatives attend the first CMC. This allows for the parties to have a better understanding of the process and the particular time constraints that were taken into account when adopting the procedural timetable. For instance, although it is one of the arbitral tribunal's duties to conduct the arbitral proceedings expeditiously, it happens rather frequently that the counsel themselves request long time limits for the filing of the written submissions, in light of the complexity of construction arbitration cases. Having the parties

take part in these discussions permits them to have a better understanding of the process. Also, having the party representatives present for the CMC can further facilitate discussions aimed at narrowing the issues in dispute and agreeing on the arbitral procedures.

TERMS OF REFERENCE

As mentioned, one of the main goals of the first CMC should be to agree the terms of reference for the arbitration (if not already agreed prior to the CMC). Terms of reference are required under Article 23 of the ICC Rules, and are sometimes adopted even for cases that are not conducted under the ICC Rules. They are a particularly helpful case management tool in large and complex cases, as they allow the parties' agreement as to the scope of the issues to be decided in the arbitration to be clearly established and, therefore, are advisable in all construction arbitrations. In short, the terms of reference is a document prepared by the tribunal setting out essential aspects of the case, such as the parties' representatives, the arbitration agreement, the applicable law and a summary of the parties' claims, counterclaims (if any) and defences. To this end, the arbitral tribunal should first request that each party submit a summary of its position (usually consisting of two to three pages of text) for inclusion in the terms of reference, and should then circulate the draft terms of reference to the parties prior to the CMC, fixing a deadline for the parties to submit their comments or suggested amendments to the draft. This allows for a streamlined discussion during the CMC that focuses only on any points of disagreement between the parties, so that agreement on the terms of reference can be reached more easily.

In complex construction arbitrations, provision may also need to be made in the terms of reference for the fact that the parties are not, at that stage, able to fully quantify their claims or counterclaims. This being said, arbitration institutions such as the ICC usually expect the parties to make some assessment of the claims and counterclaims so as to fix the amount of the advances on costs. The parties may also wish to refer to related claims that are still in the process of being determined by a DAB but that the parties may eventually wish to refer to arbitration. This aspect also needs to be taken into account when drafting the procedural timetable. The ICC Commission Report, 'Construction Industry Arbitrations', states in this respect:

> [i]n the case of large construction projects which may extend over a considerable period of time and give rise to numerous disputes, a party may not be in a position to refer all its claims to arbitration at one and the same time. In such cases, it should be acceptable to allow the party to include in the Terms of Reference a list of the claims which it would have the right to submit into the arbitration in future, for example those which are proposed to be, or have been, submitted to a [dispute board]. This would allow the tribunal and the other party to be aware of, and to prepare for, claims that may still be introduced into the arbitration. A time limit for the submission of additional claims could also be included, as ICC arbitrations may not be completely open-ended.[4]

Due attention must be given, however, to the applicable procedural rules concerning the introduction of new claims at later stages of the arbitration or amendments to existing claims, which can be limited by the arbitration rules.[5]

As to the content of the terms of reference, Article 23(1) of the ICC Rules sets out the required content to be included in ICC arbitrations, which can also be useful as a guideline in non-ICC arbitrations. For ICC arbitration cases, due consideration must be paid by the arbitral tribunal to the 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC

Rules of Arbitration', dated 1 January 2021, which also contains elements to be taken into account and is more frequently updated than the ICC Rules themselves. More specifically, the arbitral tribunal may wish to include a provision setting out a data protection protocol (in line with any applicable data protection laws, such as the General Data Protection Regulation),[6] as well as a provision concerning the confidentiality of the proceedings and award (if not addressed in the applicable arbitration rules).

SPECIFIC PROCEDURAL RULES

At the same time as the terms of reference are being prepared, the arbitral tribunal – in consultation with the parties – should also prepare draft procedural rules on specific issues, in particular practical issues, not addressed in the applicable institutional arbitration rules nor in the applicable rules of the ***lex arbitri***, such as:

- the format of the parties' written submissions, including the supporting exhibits, legal authorities, witness statements and expert reports;
- the translation of documents;
- the exhibit number references;
- the proper notification of filings and communications;
- the procedures to be followed for document production requests, as well as the requirements to be met, the use of Redfern Schedules,[7] etc.;
- the setting of time limits and extensions;
- a cut-off date prior to the merits hearing after which no new evidence should be filed without prior authorisation;
- the rules applicable at the hearing (order of appearance, direct examination or cross-examination of witnesses and experts); and
- the application of any soft law procedural guidelines such as the 2020 International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules).

Most arbitration rules allow for these specific procedural rules to be established by the arbitral tribunal either explicitly[8] or impliedly through the wide discretion granted to the arbitral tribunal to conduct the proceedings as it deems fit (within the usual limits of procedural fairness, cost-effectiveness and efficiency).[9]

One organisational aspect to be addressed early on in the proceedings, and that is particularly important in construction arbitrations, is document management. As the international arbitration community becomes increasingly comfortable with the use of various computer and online applications, efforts should be made to rely solely on electronic filings whenever possible to avoid the costs – both financial and environmental – that result from requiring hard copies of the parties' submissions. One possible solution is to have the parties' main submissions (such as their main brief, witness statements and expert reports) filed electronically on a secure file share platform at the time of the deadline (i.e., by midnight on the day the filing is due) and to have the full submission (including exhibits and legal authorities) provided on an external hard drive or USB key within one or two days. Software such as ExhibitManager can also be used so that submissions are filed as eBriefs (i.e., in a PDF file in which references are directly hyperlinked to the supporting document).

In construction arbitrations with large volumes of exhibits, eBriefs can be a convenient way to consolidate all the information for the tribunal's use.

Case management software that allows for hyperlinking and annotating documents, creating factual chronologies and searching document content, as well as uploading real-time hearing transcripts, and that is accessible to users through an online platform, can also be a helpful document management tool in complex construction arbitrations. If the parties wish to use such a platform, it is best that this be agreed at the outset of the proceedings and that it be regularly updated with the parties' filings so that each user can access, search and make notes on the case file throughout the course of the proceedings, including at hearings. The protocol to be followed for using such software should be set out in the specific procedural rules.

PROCEDURAL TIMETABLE

Another essential document to be established during the first CMC is the procedural timetable. To increase the efficiency of the first CMC, it is advisable to have the parties liaise and attempt to agree on a joint draft procedural timetable to be submitted to the arbitral tribunal prior to the CMC.

The procedural timetable should indicate each filing or event in the course of the proceedings, the person or persons involved, and the date. The usual steps to be included are:

- the statement of claim;
- the statement of defence (and counterclaim, if any);
- document production (requests, objections and the decision of the arbitral tribunal);
- the statement of reply;
- the statement of rejoinder and reply to counterclaim (if any);
- the rejoinder to counterclaim (if any);
- a cut-off date for evidence;
- pre-hearing conference;
- hearing on the merits;
- post-hearing briefs or closing arguments;
- submissions on costs; and
- the date of deposit of the draft award with the arbitration institution or the date of issuance of the award.

In large construction disputes, it is also advisable to eventually hold a second CMC to take account of the progress of the proceedings and any evolution of the parties' dispute. This is a step that is most logically inserted after the first round of written submissions but before the filing of document production requests, because the parties' positions will be fully set out at that point. This will allow the parties to ensure that the arbitral tribunal has properly understood the issues and will allow the arbitral tribunal to draw the attention of the parties to any issues to be clarified or developed in the second round of written submissions. A similar case management tool that could be inserted between the two stages of written submissions is the 'Kaplan Opening',[10] which consists of oral pleadings held after the first

round of submissions in which the parties provide the tribunal with an overview of their respective cases. Although it is not commonly seen in practice, in the authors' view it could be beneficial in large construction disputes to have the parties' case summarised and set out for the tribunal at this stage, allowing the tribunal to raise any issues it considers relevant and the parties to understand which issues require further attention in their subsequent submissions.

Another consideration that may have an effect on the steps to be included in the procedural timetable is bifurcation of the proceedings.[11] Bifurcation is most common where jurisdictional objections have been raised and the parties agree to have a first partial award on the issue of the arbitral tribunal's jurisdiction, but can also be used where a preliminary decision on certain legal issues (e.g., risk allocation under the contract, liability for defects or time-bar defences) would render the remainder of the issues (i.e., damages) moot. Bifurcation, where appropriate, therefore has the potential of saving the parties significant time and money by disposing of unmeritorious, inadmissible or time-barred claims at an early stage;[12] however, bifurcation must be used judiciously, as certain issues may be so intertwined with others that their separation would be problematic. This can happen, for example, if the arbitral tribunal's jurisdiction over a third party to the contract may be intimately connected with the party's conduct that also forms the basis for alleged liability, or when issues of causation are essential to both liability and quantum, such that it would make more sense for the arbitral tribunal to hear the parties' full position on those issues before making a decision on the merits of the claim or claims. It should also be borne in mind that, in complex construction disputes concerning many claims and multiple parties, it is also possible to separate the proceedings by grouping certain claims and then hearing each group of claims in sequence.

In light of the highly technical nature of many construction disputes, it also makes sense to discuss at the outset of the proceedings whether the arbitral tribunal should participate in a site visit or whether any testing will be necessary, and where those activities should be set in the procedural timetable. Depending on the issues at stake and the status of the project, site visits or testing may need to be carried out quickly before construction progresses. In the context of these discussions on the technical evidence that will be presented in support of the claims, some arbitrators, at the first CMC, will raise the issue of expert evidence and potential joint meetings between the parties' experts. From experience, however, the possible utility of joint expert meetings can be better assessed after the first round of submissions, and thus this is a discussion better left for a second CMC. In the authors' opinion, joint expert meetings and joint expert reports are more useful before than after the merits hearing.

The first CMC is also the ideal time to discuss whether the parties should create a schedule of claims (commonly referred to as a Scott Schedule,[13] after the model proposed by UK surveyor and official referee George Alexander Scott) or any agreed working documents (such as a list of key persons, a basic factual chronology, a glossary of terms or diagrams, such as those depicting the site layout). As there can be a high number of claims in construction disputes, a Scott Schedule can be a very useful tool for the arbitrators when drafting their decision.[14] Agreed working documents can also save a lot of time on uncontentious factual issues, allowing the parties to focus their arguments on the true issues in dispute.

Finally, although the issue of costs and the parties' submissions in this respect usually come at the final stage of the proceedings, the question of whether the parties intend to claim

reimbursement of their internal costs incurred for the arbitration should be raised at an early stage (such as at the first CMC) so that the parties are aware of the need to keep careful internal records of their costs throughout the course of the proceedings.

CONDUCT OF THE PROCEEDINGS

This section addresses common issues that arise in the course of construction arbitration proceedings, after the first CMC has been held and the terms of reference have been signed by the parties.

DOCUMENT PRODUCTION

Large construction and infrastructure projects generate large amounts of data in the form of design drawings, daily activity logs, transport records, invoices, photos and videos of the project site and other sorts of planning, supply and building records. These projects also tend to entail voluminous records of contemporaneous correspondence at all levels, namely between the employer and the contractor, with subcontractors and suppliers, and internally within the employer's and contractor's teams.

The large volume of contemporaneous data that is often available in relation to a construction project means that document disclosure requests are an important procedural step in construction arbitrations and can be extensive. Good planning and efficient management of the document production process is therefore key to ensuring the effective use of document production requests in construction arbitrations.

It should first be noted that parties (and their lawyers) may have differing expectations of the scope of permissible discovery, depending on whether they come from a common law or civil law jurisdiction, as document production is a practice that has its roots traditionally in the United States and the United Kingdom and, therefore, is used more extensively by those with common law backgrounds, whereas parties and counsel from civil law jurisdictions tend to have a more restrictive view. For this reason, it is a good idea to agree on the use of guidelines specifically tailored to international arbitration, such as the IBA Rules, at the outset of the proceedings. Indeed, Article 3 of the IBA Rules, which contains the guidelines concerning document production, was specifically drafted to reflect the accepted document production practice in international arbitration that strikes a balance between US-style discovery and the more restrictive civil law approach.[15]

It is common practice to have the parties submit their document production requests in the form of a Redfern Schedule,[16] setting out a description of the individually identified documents or a specific and narrow category of documents being requested and the reasons for the request (more specifically, why the requested documents are relevant and material to the issues in dispute). The Redfern Schedule also provides space for the opposing party to set out any objections it has to the requests, and for the arbitral tribunal's decision.

As mentioned above, the dates and modalities of the document production phase should be discussed at the first CMC and be set out in the procedural timetable and specific procedural rules (for instance, that requests first be made on a party-to-party basis, following which the party being requested to produce documents can either produce them or object to the request, and, finally, that the outstanding requests are submitted to the arbitral tribunal). In setting the dates for each step, it is important to keep in mind that large construction disputes can involve tens, if not hundreds, of disclosure requests; therefore, the arbitral tribunal will need sufficient time to review and analyse them before issuing a decision.

As a final note on document disclosure, technological advancements that are being adopted in the construction industry will certainly have an effect on the types of disclosure requests that are made in construction arbitrations. Increased capacities for data storage and innovative means of handling data, for instance in building information models or even with the use of blockchain technology, is likely to result in new forms of disclosure requests aimed at gaining access to information about project costs and delays, and also project management and sound record-keeping. Although the technical aspects of these innovations are the domain of experts in the data management field, who will assist the arbitral tribunal in understanding the conclusions ultimately to be drawn from the data, arbitrators are advised to stay up to date and informed on these technological advances to be in a position to properly judge the disclosure requests.

SITE VISITS

Depending on the nature of the claims and the timing of the arbitration, having the members of the arbitral tribunal visit the project site can be very valuable for their understanding of the issues and their fact-finding mission; however, site visits should be carefully planned and follow a strict protocol to avoid any disagreements between the parties on how the visit is carried out. This means that the parties should be required to agree, ahead of time, to a site visit protocol defining, ***inter alia***, what elements of the site will be seen, who will be present (including legal counsel for both sides), whether any technical experts will participate in the visit and what their role should be, in what order the parties will be allowed to speak, and how any questions from the tribunal will be handled.

EXPERT EVIDENCE

As mentioned above, construction disputes are often concerned with highly technical issues of civil engineering, as well as complex quantum calculations and delay analyses. Therefore, it is standard practice for both sides to present evidence by way of technical, quantum and delay experts. In international arbitration more generally, parties also tend to rely on evidence from legal experts as the parties' freedom to choose the law governing their contract means that the applicable substantive law may not be familiar to all of the involved parties.

One problem that arises through the use of party-appointed experts is that the expert evidence in support of either side's respective case can present widely divergent opinions. Requiring the parties' experts to meet and attempt to issue a joint report setting out their points of agreement and disagreement can be useful in this regard, but has the best results when the experts meet without the participation of the parties' legal counsel. Arbitrators should push the experts to agree on as much as possible to make these meetings worthwhile.

Another option available to the arbitral tribunal is to appoint its own expert. This is expressly allowed under the majority of institutional arbitration rules[17] and soft law guidelines[18] but is, in the view of the authors, too infrequently used. It is important to stress that, whereas civil law arbitration practitioners are very familiar with this mechanism, this is not the case with common law arbitration practitioners who consider that the parties' appointment of their own experts is a fundamental right. Moreover, concerns about tribunal-appointed experts becoming the 'fourth arbitrator' are often cited, but in the authors' view unjustified, as the evidence of tribunal-appointed experts will in all cases be open to scrutiny from the parties, and the tribunal-appointed experts will not take part in the tribunal's deliberations or any party of the decision-making process. To this end, the parties should be included in all

communications between the tribunal and the tribunal-appointed expert. One alternative approach that could be of particular use in construction disputes that rely so heavily on expert evidence is the 'expert teaming' protocol proposed by well-known arbitration practitioners Dr Klaus Sachs and Dr Nils Schmidt-Ahrendts.[19] In this approach, the tribunal chooses two experts – from lists of proposed experts submitted by each of the parties – and the two experts work together to submit a joint expert report setting out agreed points. However, the potential drawback of this approach is that the parties are still likely to submit their own expert evidence about the issues on which the expert team is unable to reach agreement, presenting a risk of even more time and costs being incurred.

In complex construction cases, it can also be useful to have the parties file their own party expert reports in the first stage of the proceedings, with a tribunal-appointed expert coming into play in the second stage of the proceedings, namely, after the first round of submissions. There are many arrangements that can be considered when it comes to expert evidence, and the parties, as well as the arbitral tribunal, are encouraged to create the most appropriate expert process for the particular case at hand.

From experience, the arbitral tribunal will be best positioned to ascertain whether it would like to appoint its own expert after at least one round of written submissions has taken place; however, having the tribunal-appointed expert involved as early as possible is ideal. This will allow the tribunal and its expert to identify key technical issues and the specific factual evidence (e.g., additional testing) that the parties should produce as the case proceeds, and not only prior to the hearing. Moreover, if a site visit is foreseen, it can be extremely helpful to the arbitral tribunal to already have its own expert present at that stage.

IMPACT OF PARALLEL PROCEEDINGS

Owing to the complex web of parties and claims that is characteristic of construction disputes, an issue that arises rather frequently in construction arbitrations is the impact of parallel proceedings concerning the same project. This question can arise in a variety of circumstances, including when the parties are involved in ongoing DAB referrals, in multiple arbitrations or in related proceedings before state courts.

The question may arise at the outset of the arbitration of whether the parties are already involved in other arbitration proceedings, in which case they may wish to consolidate the arbitrations. Under the ICC Rules, consolidation is dealt with by the ICC Court and not the arbitral tribunal,[20] whereas under other arbitration rules a request for consolidation can be made to the arbitral tribunal itself.[21] Whether it is the institution or the tribunal deciding on a request for consolidation, the most relevant factors to consider will be whether the arbitrations are being conducted under the same rules, between the same parties and concern the same legal relationship, and whether the arbitrations can be consolidated without derailing the progress of the ongoing proceedings.

Another issue that can arise in the context of parallel proceedings, and in particular where there are ongoing DAB referrals, is whether additional claims can be added to the arbitration once any pre-arbitral steps have been completed. In an ICC arbitration, the question of adding new claims to the arbitration is governed by Article 23(4) of the ICC Rules and will largely depend on the scope of the terms of reference. Therefore, if the parties foresee at the beginning of the arbitration that they may wish to add claims that will become ripe for arbitration at a later stage, this should be taken into account in the terms of reference either through an express reservation of rights to add certain, identifiable claims at a later stage, or

through a broader statement as to the scope of the arbitration that leaves open the possibility of additional claims. In either case, there should be some limits imposed on the scope of the arbitration to avoid the introduction of new claims in an abusive and dilatory manner.

Finally, where claims under related contracts (for instance, payment guarantees or construction bonds) are being heard before state courts, a party might request a stay of the arbitration proceedings until those related claims are resolved. However, in most cases a stay of the arbitration can be avoided as long as the parties keep the tribunal informed as to any developments in the court proceedings that may have an impact on the arbitration.

PROCEDURAL INCIDENTS AND INTERIM MEASURES

As part of their wide discretion over the conduct of the proceedings, arbitral tribunals have the power to issue procedural orders on procedural questions that may arise for which the parties seek the tribunal's guidance. Procedural orders should contain a reference to the relevant correspondence or applications submitted by the parties, a brief summary of the issue to be decided and the parties' positions, and an operative part setting out the tribunal's order.

In certain cases, the arbitral tribunal may be seized with a request for interim or provisional measures. These requests may relate to, for example, the need to preserve evidence, to secure payment pending the final outcome of the arbitration, or to block a party from calling upon a payment guarantee. The power of an arbitral tribunal to order interim measures is widely accepted[22] and provided for under most arbitration rules,[23] and the arbitral tribunal must always be prepared to receive urgent requests for provisional measures that may arise at any point in the course of the arbitration and will have to be dealt with expeditiously. This is particularly true if the arbitration is being conducted prior to the completion of the project, in which case the question of progressing the project to completion is an ongoing concern for the parties.

As the aim of interim measures is the preservation of a party's interests pending the outcome of the arbitral proceedings, the party requesting interim relief typically has to show that: (1) a risk of serious or irreparable harm exists; (2) this risk outweighs any prejudice to the other party; (3) the risk of harm is imminent; (4) the party seeking interim measures has a (prima facie) likelihood of success on the merits of the dispute; and (5) granting the interim relief will not amount to a prejudgment of the merits of the dispute.[24] These requirements may vary slightly depending on the jurisdiction, but are notably reflected in Article 26(3) of the UNCITRAL Arbitration Rules.

Depending on the nature of the interim measures being requested, the power of the arbitral tribunal to order these measures might not always suffice to resolve the issue, as arbitral tribunals do not have power over third parties, and their power to enforce a decision against a party that does not comply voluntarily is limited. In such cases, state court assistance may be required. For the same reason, special attention should be paid to whether the interim relief is requested and decided in the form of a procedural order or an award, as this may have an effect on the enforceability of the decision by a national court if it is not complied with voluntarily.

PREPARATION FOR HEARINGS AND PRE-HEARING CONFERENCE

When setting the procedural timetable, a date should be chosen a few weeks prior to the hearings for the exchange of the parties' lists of witnesses and experts that they wish to

have appear at the hearing, as well as their proposed hearing agenda. The parties should be encouraged to make a joint proposal for the hearing agenda, even if this is not always possible in reality.

Shortly thereafter, a pre-hearing conference call should be planned. While the dates and location of the merits hearing will have already been set at the outset of the proceedings, this pre-hearing conference will be used to discuss any organisational issues such as the hearing agenda, the possible need for video conferencing with witnesses, witness translation issues and the use of demonstrative exhibits. Best practice for the conduct of the hearings themselves is discussed further, below.

In addition to these pre-hearing organisational matters, arbitrators hearing construction disputes should set aside a substantial period of time before the hearings to review the case file, as the submissions and supporting documents are more often than not extremely voluminous. It is also advisable for the members of the arbitral tribunal to exchange preliminary views regarding the issues to be decided and to identify the specific questions that they may have for the witnesses and experts that will appear. In this regard, even if the parties have declined to call a witness or expert to appear at the hearings, the arbitral tribunal has the power under the ICC Rules to call any person that it wishes to hear.[25] Thus, the arbitral tribunal should consider notifying the parties of any additional witnesses it wishes to hear in advance to ensure that parties are able to make the necessary arrangements for that person to be present at the hearing. From experience, counsel from common law countries are usually much less in favour of arbitral tribunals calling witnesses not called by the parties than counsel from civil law countries. However, it is sometimes very useful for a tribunal to do so to be fully briefed before deciding the case.

HEARINGS ON THE MERITS

The merits hearing (or hearings, in some cases) give the opportunity to the arbitral tribunal to hear the parties' factual witnesses and experts, and for the parties to test the witness and expert evidence through cross-examination.

For the hearings to progress smoothly, a clear agreement as to the hearing schedule should be set during the pre-hearing conference call. This will include not only the actual hours that the tribunal will sit each day, but also the order of appearance of witnesses and the time set aside for opening statements, questions from the arbitral tribunal and possibly even for closing arguments. In large construction disputes that concern multiple claims, it is usually best to have the hearing agenda organised claim-by-claim or issue-by-issue (i.e., the applicable law, alleged breaches of contract, delay and quantum), rather than having the claimant present its full case on all of the claims and issues followed by the respondent's pleadings and evidence on all of the claims and issues. Organising the hearing on an issue-by-issue basis instead allows for each party to give their opening statement on the claim or issue, followed by the examination of the relevant witnesses and experts and questions from the arbitral tribunal on that particular claim or issue, before moving to the next topic. The parties may still wish to make brief opening statements setting out their full case and present closing arguments summarising all of the relevant issues to ensure that the arbitral tribunal also has a view on the case as a whole.

When conducting hearings related to international construction projects, it is not uncommon to have witnesses or experts that wish to testify in a language other than the language of the arbitration. In such circumstances, arrangements will have to be made for translators

to be present in the hearing room. For efficiency's sake, simultaneous translation should be preferred to subsequent translation, with both the original and the translation being recorded for later verification by the parties.

Another issue that requires attention during the hearing is that of time-keeping. Parties will usually agree to use the 'chess-clock approach', meaning that each party is granted equal time and the time spent by each party in presenting its arguments and conducting witness examinations will be kept track of (usually by an administrative secretary to the arbitral tribunal) and added up at the end of each hearing day. When using the chess-clock system, attention should be given to the question of additional time used when a hearing day goes beyond the scheduled end time, to ensure that each party does end up having an equal amount of time to present its case over the full course of the hearings.

Organised and efficient document management at the merits hearing is a particularly important consideration in construction arbitrations in light of the volume of documents typically submitted on the record. The use of hearing bundles – which are a compilation of all of the written submissions and evidence that is then specially organised in numbered volumes for the hearing – is common practice (in particular, for counsel coming from common law countries), but not always necessary (even in complex construction arbitrations) if the submissions have been clearly labelled and the exhibits properly numbered throughout the course of the proceedings. This is where agreeing to the use of online case management software at the outset of the proceedings can prove beneficial, especially as hearings usually require the use of some form of document management software to allow for documents to be displayed and accessible to all of the hearing participants. Thus, having the submissions and supporting evidence already organised and accessible electronically saves time in preparing the hearing.

This goes hand in hand with the increased use of virtual hearing software in international arbitrations, which is a trend that will likely increase with time, even in the context of construction arbitrations, as users become more comfortable with the virtual setting. The parties and the arbitral tribunal should discuss at the outset of the case whether they have a preference for holding the merits hearing in person or virtually, as this might have an impact on the timing and duration of the hearing.

Finally, whether the hearing is being held in person or virtually, the arbitral tribunal is advised to verify – on record – at the end of the hearing whether the parties have any objections to the way in which the hearings were conducted, and whether there are any outstanding procedural requests. Having this information on record in the hearing transcript allows for any objections or procedural issues to be dealt with before a final award is issued.

CLOSING SUBMISSIONS

Closing submissions can be presented either by way of closing oral arguments (at the end of the merits hearing or at a separate hearing session), post-hearing briefs or – in very large cases – both.

Regardless of the form in which they are presented, the parties' closing arguments should not be a repetition of their entire case, but rather should highlight the evidence that was heard during the hearings, with references made, as necessary, to the positions already set out in the parties' written submissions. To encourage the parties to focus on the new evidence, page or word limits should be imposed on any written closing submissions (i.e., post-hearing briefs and, if requested, rebuttal post-hearing briefs).

It is also recommended to have the arbitral tribunal provide the parties with a list of questions or specific points that they wish to have addressed in the closing submissions, as this ensures that the tribunal has all of the information that it needs to render a decision and also aids the parties in focusing on the salient issues. Where the parties have chosen to make oral closing arguments at the end of the merits hearing, it will be more difficult for the arbitral tribunal to provide a list of questions or issues to the parties prior to the closing arguments, but it is nevertheless helpful for the arbitral tribunal to give some instructions or guidance to the parties at the close of the evidence so that the parties are aware of the issues on which the tribunal would like them to focus. Otherwise, where the parties choose to present post-hearing briefs or closing arguments at a later date, the arbitral tribunal will have time to compile its list and provide it to the parties in advance of the final submissions.

Moreover, it can be extremely helpful, especially in complex and voluminous cases, to have the parties agree on a list of the key documents in the file that the parties consider to be the most important, to the extent that these documents have not already been identified by the parties (for example, in a joint hearing bundle).

DELIBERATIONS AND AWARD

In complex construction arbitrations, the members of the arbitral tribunal are encouraged to actively discuss the case and exchange preliminary views throughout the course of the arbitration, as this allows for more efficient decision-making as to the proper course of the proceedings. Deliberations on the parties' claims are, however, reserved for after the close of evidence-taking.[26] Although it is rare that in large construction disputes the parties present their closing submissions at the end of the merits hearing, if this is the case the arbitral tribunal should set aside time directly after the close of the hearings to carry out its deliberations.

It is more likely that the parties will choose to have post-hearing briefs or closing oral arguments at a later date. The arbitral tribunal should be prepared to carry out its deliberations in any case as soon as possible after the final submission on the merits or final closing arguments, in accordance with its duty to conduct the proceedings efficiently. Indeed, it is always best that deliberations be held when the issues and evidence are fresh in the minds of the arbitrators.

In complex arbitrations, it is helpful to draw up a deliberations road map that can be followed by the arbitrators during their deliberations session to logically assess the parties' claims and counterclaims. As a general rule, issues of law and contract interpretation should be dealt with first, and only once these issues have been decided should the facts be assessed within the applicable legal and contractual framework, followed by the calculation of delay and costs. It may be necessary to hold multiple deliberation sessions depending on the number and complexity of the issues, and if this is the case the deliberations sessions should be held close enough in time to ensure that the deliberations can be easily picked up where they were left off. However, it is also possible in very complex cases that the arbitrators deliberate on foundational issues, then the president of the arbitral tribunal drafts a first portion of the award on those issues before proceeding to the next session of deliberations. This approach can assist in identifying which issues remain to be resolved and which issues may have already been dismissed.

The drafting of the award is indeed usually led by the president of the arbitral tribunal, who will present a first draft to the co-arbitrators. The co-arbitrators will then take turns reviewing

and commenting on the draft. However, where one of the co-arbitrators is specialised either in certain legal or technical matters that are to be addressed in the award, it can make sense for that person to provide the first draft of the tribunal's decision on those specific issues with which the co-arbitrator is more familiar.

It is always possible that the members of the arbitral tribunal are unable to agree on the proper outcome of the dispute. The decision will follow that of the majority position on any particular issue, and it is possible for the minority arbitrator to include a dissenting opinion at the end of the award. However, where the arbitrators all agree on the outcome of the case but perhaps disagree on certain discrete issues, it should suffice to indicate in the award that the tribunal's position on that particular issue is a majority position. From experience, arbitrators taking a minority position and who are appointed by states or state entities, or come from certain jurisdictions, have a greater tendency to request the issuance of a separate dissenting opinion.

Finally, in ICC arbitrations, arbitral tribunals are in theory expected to render their awards within six months of the signing of the terms of reference. In practice, however, this is almost inevitably impossible in construction arbitrations, and thus this deadline will be regularly extended by the ICC Court.

A related but separate issue is the time limit expected by the ICC for the issuance of the draft award, following the filing of the last procedural step on the merits (namely, the final hearing if there are no post-hearing submissions or the post-hearing briefs or closing oral arguments). Pursuant to Paragraph 153 of the 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration', dated 1 January 2021, a three-member arbitral tribunal is expected to file the draft award within three months, whereas a sole arbitrator is expected to do so within two months, failing which the ICC Court may decide to reduce the fees of the arbitrators. Whereas the ICC Court is usually very reasonable and understands the constraints of voluminous and complex construction cases, it is strongly advised for the arbitral tribunal to attempt to agree with the parties (for instance, at the end of the merits hearing) a longer time limit (within a reasonable period) for the issuance of the draft award and to inform the ICC accordingly. This agreement should be reflected in an updated procedural timetable. From experience, the parties understand that in construction arbitration it is extremely difficult for an arbitral tribunal to comply with the above-mentioned time limits, in the same way that the arbitral tribunal understands the need for the parties to have sufficient time to prepare their submissions, in particular their post-hearing submissions.

Endnotes

1 This chapter was authored by Pierre-Yves Gunter and Anya Marinkovich, formerly at Bär & Karrer Ltd. The information in this chapter was accurate as at September 2021. ^
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2 Of the survey respondents, 71 per cent reported having seen the International Chamber of Commerce (ICC) used for international construction disputes, with the second most common institution being the London Court of International Arbitration (LCIA), at 32 per cent. See 'International Arbitration Survey – Driving Efficiency in International Construction Disputes' (Queen Mary University, 2019), p. 11. Back to section

3 An initial case management conference is required under certain arbitration rules (see, e.g., Rules of Arbitration of the International Chamber of Commerce (ICC Rules), Article 24 and Stockholm Chamber of Commerce Arbitration Rules (SCC Rules), Article 28.1), and encouraged under others (see, e.g., LCIA Arbitration Rules, Article 14.3). Such a meeting is advisable in all cases, even where not provided for in the applicable arbitration rules, as it allows the arbitral tribunal to become familiar with the parties and their counsel, to raise any preliminary issues and to set up an organisational framework for the arbitration. Back to section

4 ICC Commission Report, 'Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management' (2019), pp. 14–15 (https://cdn.iccwbo.org/content/uploads/sites/3/2019/02/icc-arbitration-adr-commission-report-on-construction-industry-arbitrations.pdf (last accessed in 2021)).- Back to section

5 See, e.g., ICC Rules, Article 23(4). See also LCIA Rules, Article 22.1(i) and Swiss Rules of International Arbitration (Swiss Rules), Article 22. Back to section

6 See ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration' (1 January 2021), para. 119 (https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf (accessed 24 August 2023)). Back to section

7 Redfern Schedules are a common method for managing documentary discovery in arbitration. In particular, they provide a framework for the production of documents to counterparties (see also footnote 16, below). Back to section

8 See, e.g., ICC Rules, Article 19. Back to section

9 See, e.g., Swiss Rules, Article 19(1); LCIA Rules, Article 14.2; and United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, Article 17(1). Back to section

10 See Kaplan, 'If It Ain't Broke, Don't Change It', in Risse, Pickrahn, et al. (eds),***German Arbitration Journal***, Vol. 12, Issue 6, pp. 278–80. Back to section

11 The term 'bifurcation' is here referring to any separation of the proceedings into multiple phases, which can in fact be three or more phases (trifurcation, etc.). Back to section

12 In this sense, bifurcation is synonymous with summary disposition or early determination, by which the tribunal disposes of certain claims on legal or factual grounds. This is a powerful case management tool that should be used where appropriate to reduce the number of claims in complex construction disputes where, for example, the contractual claim procedures have not been complied with. Early determination is specifically provided for in Article 23 of the Rules of the International Centre for Dispute Resolution (ICDR), as well as in Article 22.1(viii) of the LCIA Rules, but should be within an arbitral tribunal's general powers to resolve the dispute efficiently and fairly, even if not specifically provided for under the applicable rules. ^ Back to section

13 In short, a table setting out a description of the claim, the amount in dispute and each party's position on that claim. For a thorough overview of the format and content of Scott Schedules and their use in international construction arbitration, see Welser and Stoffl, 'The Arbitrator and the Arbitration Procedure, The Use and Usefulness of Scott Schedules' in Klausegger, Klein, et al. (eds),***Austrian Yearbook on International Arbitration 2017***, Vol. 2017, pp. 161–73. ^ Back to section

14 Helpful examples can be found in the Annex to the ICC Commission Report, 'Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management' (op. cit. note 4). ^ Back to section

15 Zuberbühler, Hofmann, Oetiker and Rohner,***IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*** (Schultess, 2010), Article 3, para. 83. The newly issued Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) take a very different approach, stating in Article 4.2 that '[g]enerally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery', subject to some exceptions. In construction arbitrations, where access to the opposing party's project records is essential, the use of the Prague Rules might therefore be inappropriate, or at least require some adjustments. However, the proactive approach to case management by the arbitral tribunal advocated for in the Prague Rules could be very well suited to other procedural aspects in a construction arbitration, such as the tribunal's active involvement in fact-finding described in Article 2.4. ^ Back to section

16 For more details as to the typical contents and format of a Redfern Schedule, see Girsberger and Voser,***International Arbitration: Comparative and Swiss Perspectives*** (3rd Edition, Schulthess, 2016), pp. 242–43. ^ Back to section

17 See, e.g., ICC Rules, Article 25(3); UNCITRAL Arbitration Rules, Article 29; SCC Rules, Article 34; LCIA Rules, Article 21; and Swiss Rules, Article 27. ^ Back to section

18 See, e.g., International Bar Association's Rules on the Taking of Evidence in International Arbitration (2020), Article 6 and Prague Rules, Articles 6.1 to 6.4. ^ Back to section

19 Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in A J van den Berg (ed.),***Arbitration Advocacy in Changing Times, ICCA Congress Series, No. 15*** (Kluwer Law International, 2011), pp. 135–48. ^ Back to section

20 See ICC Rules, Article 10. Back to section

21 See, e.g., LCIA Rules, Article 22.7. Back to section

22 See, generally, Born,***International Commercial Arbitration*** (3rd Edition, Kluwer Law International, 2021), pp. 2607–25. Back to section

23 See ICC Rules, Article 28; Swiss Rules, Article 29; LCIA Rules, Article 25; UNCITRAL Arbitration Rules, Article 26; and SCC Rules, Article 37. Back to section

24 Magliani, Chapter 3, Part II: 'Commentary on the Swiss Rules', Article 26 [Interim measures of protection], in Arroyo (ed),***Arbitration in Switzerland: The Practitioner's Guide*** (2nd Edition, Kluwer Law International, 2018), p. 709 (and cited references). Back to section

25 See ICC Rules, Article 25(2), which allows the arbitral tribunal to call 'witnesses, experts appointed by the parties***or any other person***' to give testimony (emphasis added) (cf. LCIA Rules, Article 20.5, which is more restrictive and allows only the arbitral tribunal to call 'a witness, on whose written testimony a party relies'). Back to section

26 Some arbitration rules require that the arbitral tribunal announce the close of the proceedings once the evidence-taking phase is complete. See, e.g., ICC Rules, Article 27. Back to section

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