CONSTRUCTION ARBITRATION IN THE NEW AGE

KEYNOTE SPEECH BY SIR RUPERT JACKSON AT THE SOCIETY OF CONSTRUCTION LAW ASTRA INTERNATIONAL CONFERENCE PARIS ON 28 OCTOBER 2022 (Paris lecture)

1. INTRODUCTION

1.1 Three significant features of the new age are:
(i) Exponential growth of online hearings, including full blown arbitrations (post-Covid)
(ii) Steady move away from arbitration to alternative dispute resolution
(iii) Steady expansion of international commercial courts (progressive over the last ten years)

2. EXPONENTIAL GROWTH OF ONLINE HEARINGS

2.1 In April 2020, just after the Covid pandemic struck, two co-arbitrators and I were in the run-up period to a 5-week hearing. The respondent's counsel applied to adjourn the hearing until an in-person hearing was possible. That would have meant a 2-year adjournment, although he was not to know that at the time. We heard a battery of formidable arguments – lack of confidentiality, impossibility of doing an effective cross-examination, etc. After much angst, we rejected those arguments and ordered that the 5-week hearing should proceed on-line.

2.2 Now, of course, it is universally accepted that online hearings are perfectly feasible for any case. The question becomes 'What sort of hearing does everybody want?" At a level of high generality, my experience is that arbitrators generally favour in-person hearings, whereas parties and advocates often prefer remote hearings.

2.3 The gold standard. The ideal arrangement is an in-person hearing which is live-streamed to the parties. Such a hearing can easily accommodate online evidence from any particular witness who for logistical reasons cannot be present. This enables the parties, and in particular their finance directors, to tune in and watch the proceedings from time to time. This is highly beneficial for the reasons mentioned in the next section.

2.4 The impact of the Covid pandemic extends beyond online hearings. There is also wider use of electronic bundles, wider acceptance of arbitration awards signed electronically and, apparently, the emergence of smart courts using blockchain technology.[1] Artificial intelligence is now used in judicial decision making by certain courts in China and Estonia.

2.5 When I started at the Bar, everyone complained about the advent of photocopiers and their effect on the size of trial bundles. But the advent of electronic bundles magnifies that problem. An electronic bundle may be so large that no-one, however diligent can read it all.

3. STEADY MOVE AWAY FROM ARBITRATION TO ALTERNATIVE DISPUTE RESOLUTION

3.1 The Housing Grants, Construction and Regeneration Act 1996, which came into force in 1998, led rapidly to the demise of domestic construction arbitration in the UK. Taking my own practice as an

[1] See G. Cheng, 'The lasting legacy of the Covid-19 pandemic on the construction industry in the UK', 38 Construction Law Journal (2022), pp 199-205 at 206-207.

example, over the last five years I have dealt with numerous international arbitrations. I have not dealt with a single domestic arbitration.

3.2 Meanwhile international arbitration of construction disputes continues to flourish. But even here, I perceive a move away from arbitration towards mediation. Why is that?

3.4 In my experience, a typical construction arbitration (employer v contractor or contractor v subcontractor) involves a raft of claims and a raft of counterclaims. It is fanciful to expect, and in practice it never happens, that one party wins on all issues and the other party loses on all issues. The normal outcome is that one party (party A) does better than the other (party B), so that a net sum ('the balance'), passes from B to A. The tribunal may then order B to pay a percentage of A's costs, reflecting the extent of B's success. A may end up recovering a modest balance from B, but bearing a significant sum of unrecovered costs. The result sometimes is that A ends up suffering a loss or perhaps making a modest gain from the arbitration. B ends up suffering a massive loss.

3.5 I do not say that every construction arbitration proceeds like that, but some do. In such a case, neither party gains a benefit commensurate with the enormous amount of management time and resources, which it has invested. There often comes a moment in an arbitration when at least one party and sometimes both parties regret that they became involved in formal proceedings. But when that time comes settlement is impossible. That is because of the massive costs which both parties have invested in the case.

3.6 The reason why parties plunge into a full-scale arbitration is that both sides, or at least some individuals on both sides are confident that they will win. But what reason do they have to be so confident? In a typical major construction dispute, no individual or committee has a panoptic view of all the issues and all the evidence. It is only at the end of the merits hearing that the tribunal (and anyone else who has sat through the hearing and read all the submissions) has such a panoptic view.

3.7 In cases of the kind that I have just described, there is a growing realisation that there must be a better way. Hence the progressive expansion of mediation. This provides a forum in which both parties can express their strongly held views (with the other side listening) and then hopefully find a way out of the quagmire which does not involve spending many days or weeks in an arbitration room.

3.8 The ICC, based here in Paris, has produced an excellent set of mediation rules, which – I hear – are widely used. But many mediations proceed without any formal rules. The parties are free to adopt whatever process best suits their dispute.

3.9 Last year the Civil Justice Council in England published a report on compulsory ADR. This report is an example of the ongoing trend away from the full-blown adversarial process and towards consensual resolution. The executive summary reads as follows:
"7. To summarise our responses to the two key questions outlined above:
• The legality question: we have concluded that parties can lawfully be compelled to participate in ADR.
• The desirability question: we think we have identified conditions in which compulsion to participate in ADR could be a desirable and effective development. In doing so we recognise that the compulsory ADR processes which are already part of the civil justice system in England and Wales at a number of points are successful and are accepted.
8. In our view, appropriate forms of compulsory ADR, where a return to the normal adjudicative process is always available, are capable of overcoming the objections voiced in the case law and elsewhere and could be introduced.

9. The rules of civil procedure in England and Wales have already developed to involve compulsory participation in ADR at a number of points. These compulsory processes are both successful and accepted.
10. Provided certain factors are borne in mind in designing the scheme, a procedural rule which requires parties to attempt ADR at a certain point or points, and/or empowers the court to make an order to that effect, is, in our opinion, compatible with Article 6 of the European Convention on Human Rights."

3.10 After considering that report, The UK Government announced (on 22 July 2022) that it would introduce mandatory mediation for lower value cases.

3.11 Whether a mediation should be facilitative or evaluative must be a matter for the parties' choice. I recently conducted a mediation in a combined format which worked well. The procedure was as follows:
(i) The parties set out their respective cases on liability and quantum in their position papers.
(ii) At the mediation, the two opposing advocates each presented their respective cases on liability. Essentially, they developed the points in their position papers and answered my questions/interruptions. 40 minutes allowed to each side.
(iii) 15 minutes coffee break for everyone, during which I considered the parties' submissions.
(iv) I then delivered an oral "indication". This was in effect a reasoned judgment setting out my views on who would win on each issue and why.
(v) 1 hour lunch break during which both parties could digest the "indication" and consider what offers they would make or accept.
(vi) Afternoon and evening: a conventional facilitative mediation to deal with quantum. I relayed offers and counter-offers between the parties, but did not express views on quantum issues.
(vii) Late evening: Figures agreed and settlement agreement drawn up.

3.12 When I was judge in charge of the Technology and Construction Court in London, I carried out a study of mediation in conjunction with King's College London.[2] This attempted to quantify the effects of mediation.

3.13 I recommend that in drawing up dispute resolution clauses parties should consider including a compulsory mediation stage, before either party is entitled to proceed with an arbitration. If mediation fails, it may be better to proceed straight to arbitration. I appreciate that some contracts require adjudication as a preliminary stage, but that may not be cost-effective.

4. STEADY EXPANSION OF INTERNATIONAL COMMERCIAL COURTS

4.1 During the twenty-first century many countries have set up international commercial courts, offering an English language service and applying the common law. They are usually linked to an international arbitration centre. Obvious examples are the Abu Dhabi Global Market Court (ADGM), the Astana International Financial Centre Court (AIFC), the Dubai International Financial Centre Court (DIFC), the Qatar Financial Centre Court (QFC) and the Singapore International Commercial Court (SICC). Judges from England and other jurisdictions serve on all these courts. The London Commercial Court and the London Court of International Arbitration appear to have been the model which has inspired many of these developments. These new courts seem to have been set up with two objectives: first, to provide a judicial system in the background, which will inspire confidence in overseas investors coming to that jurisdiction; secondly, to catch as much international dispute

[2] See Review of Civil Litigation Costs, Preliminary Report, chapter 34

resolution work as possible. In relation to the first (but not the second) objective the size of the caseload is unimportant. What matters is that the court is there.

4.2 I mention international commercial courts because they are, in effect, competitors of international arbitration. They take cases which would otherwise go either to international arbitration or to the local courts. This triangle creates its own dynamic, to which I will return.

4.3 The new international commercial courts fall, broadly, into two categories. Some such as the DIFC Courts sit within a special economic zone. Others do not, the SICC in Singapore being a classic example – it is part of the Singapore High Court. If the court sits within a special economic zone, that fact usually plays a key role in determining the jurisdiction of the court.

4.4 The China International Commercial Court (CICC) was established in 2018. It is somewhat different from the models described above. It is specifically designed to support the Belt and Road Initiative. There are two branches, one in Xian and one in Shenzhen. The court is a branch of the Supreme People's Court of China. It applies the law agreed between the parties, which will sometimes be the common law. The judges can hear cases in English or Chinese. The CICC dealt with its first case, *Guandong Bencao Medicine Group v Bruschettini SRL*, in 2019.

4.5 International commercial courts have recently emerged within the civil law jurisdictions of Europe: in particular, in France, Germany and the Netherlands. Many are waiting to see whether their caseloads will or will not significantly increase after Brexit.

4.6 In 2017 a Standing International Forum of Commercial Courts was established. Its purpose is to promote co-operation and dialogue between these courts.

4.7 With the growth of cross-border transactions between private parties, disputes are inevitable. Very often the parties do not want to entrust dispute resolution to the local courts of one or other party. Hence there has been a massive expansion of international arbitration. International arbitration has huge advantages, in particular the availability of enforcement through the New York Convention. But it also has problems, in particular the inability to join parties who had not signed up to the original arbitration agreement.[3]
Hence, as Brekoulakis and Dimitropoulos state:[4]
"The identified gap in international adjudication has given rise to a new species of courts: international commercial courts".
They are creatures of the domestic legal order, but they are different from the ordinary courts of the jurisdiction in which they sit. The English language is a common feature of international commercial courts. Even the Paris Commercial Court allows the parties to argue their cases in English, although the final judgments must also be issued in French.
Brekoulakis and Dimitropoulos see the new international commercial courts as:
'in a position to bridge the two types of dispute resolution, positioning themselves between the State/formal and private informal justice'.

[3] See H. Lal and B. Casey, 'Third party access to arbitration agreements? Who decides: courts or arbitral tribunals?', 38 Construction Law Journal (2022) pp 297-310. The authors note that third party non-signatories seeking access to an arbitration agreement is an increasing trend. They argue that these issues are best determined by competent courts in the seat of the arbitration.
[4] *International Commercial Courts*, Cambridge University Press, 2022

Coming late in time, international commercial courts have one distinct advantage. They have been designed with the benefit of accumulated experience of both state and private justice systems.

4.8 International commercial courts, because of their experience and because of the nature of their work, are better able and more willing to decide questions of foreign law on the basis of submissions. They have less need for expert evidence from foreign lawyers.[5]

5. THE EMERGENCE OF A NEW BODY OF LAW

5.1 Will a general *Lex Mercatoria* emerge? A form of *lex mercatoria* existed in Europe in the medieval period, but this did not survive the rise of nation states. Whether such a body of law exists now is a matter of debate.[6] CJ Menon of Singapore has speculated that a common *Lex Mercatoria* may emerge from the growing band of international commercial courts. Those courts, with a growing number of reported judgments, are the ideal fora to develop such body of law.

5.2 It may plausibly be said that the UNIDROIT principles already constitute a basic *Lex Mercatoria*. They enshrine basic principles of contract law which are common to civil law jurisdictions and common law jurisdictions. For example, *pacta sunt servanda* and freedom of contract.

5.3 What about a general *lex constructionis*? Building contracts are one specialised form of contract. They have particular features which recur time and again: provisions governing variations, extensions of time, practical liability, practical completion or taking over, certification and so forth. The concepts which underlie the various standard forms have much in common. They are balancing the interests of employers, contractors, sub-contractors, designers and other parties. Donald Charrett in his excellent book *Contracts for Construction and Engineering Projects*[7] argues that a body of widely accepted principles already exists, which may fairly be described as *lex constructionis*. He formulates 20 principles, including for example:
"5. The Employer has the right to instruct variations consistent with the original scope of the contract, and the Contractor has the obligation to carry out all such variations.
12. The parties have a reasonable time to perform their obligations and exercise their rights.
20. Unresolved disputes are finally resolved by arbitration."
These principles have been derived, it would seem, from a review of numerous standard form construction contracts

5.4 Building projects around the world generate high value disputes of great complexity, which generally go to arbitration. The new international commercial courts provide an alternative – and perhaps attractive – forum for some of those cases. Sir Vivian Ramsey sits in the SICC and is available to hear such cases. Sir Vivian is a former head of the TCC in London. He is also a qualified engineer. The AIFC Court can also offer construction expertise. There are many common features in construction dispute resolution across all continents. See for example *Construction Law*[8] by Julian Bailey, which synthesises the construction law of England and Wales, Australia, Hong Kong and Singapore.

5.5 The FIDIC conditions are widely used in both civil and common law jurisdictions. So is the *Delay and Disruption Protocol* published by the Society of Construction Law (SCL). SCL is itself an international organisation, with a branch in Paris. It would be helpful to the construction industry if

[5] See R. Garnett, Determining the appropriate forum by the applicable law", *International Comparative Law Quarterly*, vol 71 (2022) pp 589-626 at 614-615.
[6] See the discussion in Dimitropoulos and Brekoulakis 2022, chapter 8.
[7] Second edition, 2022
[8] Third edition, 2020

a body of case law on construction issues emerges from the international commercial courts and from those arbitration awards which are published. At the moment, arbitrators around the world are grappling with recurrent issues arising from the FIDIC conditions, the SCL Protocol etc, largely in ignorance of what their colleagues are deciding. Of course, we have the national law reports from many jurisdictions – the Building Law Reports edited by Atkin Chambers in London are a good example. But reports of construction cases which (a) arise out of international projects and joint ventures and (b) are decided in the new international commercial courts or – where confidentiality is waived – international arbitration tribunals would be a valuable addition.

5.6 *JSC Insaat Sanayi ve Ticaret A.S. v The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan* (Astana International Financial Centre Court, 16 November 2021) arose from a building contract between a Turkish company and a Kazakhstan government body. The contract incorporated the FIDIC conditions (red book). In paragraph 3.16 of the judgment the judge observed:
"In addressing these issues, I must apply the law of the Republic of Kazakhstan. This is contained in (amongst much other material) four codes (Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code) and other legislation. For present purposes, the most important legislation is the Enforcement Law. I also bear in mind that the FIDIC Conditions contained in the present contract are widely used on engineering projects around the world. Although there are certain well-known differences of approach between civil and common law jurisdictions, the construction industry operates in the expectation that the FIDIC conditions will be applied in a broadly consistent manner in international construction disputes."

5.7 The international reach of the FIDIC conditions is steadily growing.[9] I have been called upon to construe and apply FIDIC under numerous legal systems (Nepal, Gulf Region states, EU states, England, Kazakhstan, etc). An interesting article in a recent issue of the *Construction Law Journal*, ("FIDIC model contracts in Mexico: how and why they should be used"[10] by R. Garcia) calls for a much wider use FIDIC in Mexico.

6. THE PROBLEM OF REPLIES

6.1 In a typical construction arbitration the pleadings, if printed out, may fill ten or twenty ring files or perhaps more. As arbitrator, I have to sit down and read them all. This exercise takes a long time and is expensive for the parties. Obviously, the statement of claim (or particulars of claim) and the defence are hugely informative. They tell the tribunal what the case is about. But when readers reach replies and rejoinders, they may heave a heavy sigh. That is because replies and rejoinders usually contain much repetition. May I suggest a rule or direction that replies and rejoinders must be limited to new material not previously pleaded?

6.2 The same problem crops up with expert reports. In any large construction case, the first round of expert reports (if printed out) usually fill numerous ring files. The tribunal reads them with care and with interest. Then come the reply reports. These are often lengthy and contain much repetition or paraphrasing of what the expert has said before. That makes it extremely difficult for the weary arbitrator to sift out the new material. May I suggest that experts should resist the temptation to reiterate what they have said before? A direction that they should do this would help.

[9] See eg Charrett, *The International Application of FIDIC Contracts, a practical guide*, Routledge, 2020, which discusses the application of FIDIC contracts in 18 different jurisdictions.
[10] 38 Construction Law Journal (2022) 386-393 calls for much more extensive use of the FIDIC conditions in Mexico.

6.3 These proposals are an attempt to tackle a wider problem. In any major construction arbitration, there are large teams of experts and lawyers on each side. All team members are diligent and productive. They produce reams of material for the hapless tribunal to digest. But there is a limit to how much the human mind (even an arbitrator's mind) can absorb and analyse. Therefore, I respectfully suggest that these large and highly skilled teams should devote more of their expertise to condensing the material and presenting it in a user-friendly format.

7. COSTS

7.1 I have grown up in a common law jurisdiction, where costs shifting is the norm. In the US, by contrast, parties generally bear their own costs, win or lose. In civil law systems there normally is costs shifting, but the costs involved tend to be much lower.

7.2 Academic research shows that full costs shifting tends to drive up the costs of both parties: see, for example, the study published by Sneider & Hughes in 1990.[11] The reasons for this are not hard to imagine. Against that background, may I suggest that parties sometimes consider including a 'no costs shifting' provision in their arbitration clause. Such a provision would encourage economy on both sides and would avoid a crushing burden eventually falling on the losing party.

7.3 Alternatively, may I suggest that parties consider providing for costs budgeting in their arbitration clause. This is a procedure which has been used by the courts in England and Wales with success (despite initial opposition) over the last nine years.

7.4 If the parties to any particular dispute decide to adopt such a regime, the procedure would be roughly as follows:
(i) At the outset the parties would prepare and exchange their anticipated budgets for the case.
(ii) The parties would either agree each other's budget or the tribunal would be invited to scrutinise them at the first CMC. Having scrutinised the budgets and heard some argument, the court would then fix the budgets for both parties.
(iii) At the end of the case, the court would then award costs to the winning party in line with its approved budget.

8. EXPERT EVIDENCE

8.1 Finally, if time allows, a word about expert evidence. As I understand it, the French courts will appoint an expert where it is considered appropriate, i.e. where such evidence is needed to assist the court. The cost of court appointed experts forms part of the *depens*, and will be ultimately payable by the unsuccessful party. It is open to parties to appoint their own experts, if they wish. However, successful parties will recover at best a very modest *frais* in respect of their own legal costs and expert fees. Common law jurisdictions, by contrast, make much more use of party-appointed experts; the court's power to appoint experts is rarely invoked.

8.2 The same difference of approach exists in arbitration. Arbitral tribunals comprising common lawyers generally proceed with party-appointed experts. Arbitral tribunals comprising civil lawyers are more likely to rely upon their own appointed experts. The ICC Rules, obviously, make provision for both tribunal-appointed experts and party-appointed experts.

[11] Snyder E. & Hughes J. (1990): "The English Rule for Allocating Legal Costs: Evidence Confounds Theory", Journal of Law, Economics and Organisation, volume 6, pp 345-380

8.3 The Rules of the Swiss Arbitration Centre are widely used.[12] Article 28 of the Swiss Rules provides that the arbitral tribunal, after consulting with the parties, may appoint one or more experts to report to it, in writing, on specific issues. The expert submits his/her report to the tribunal, which must then submit it to the parties. The parties may review any document on which the expert has relied in his report. At the request of any party, the expert may be called at a hearing during which the parties shall have the opportunity to question the expert. The opinion of the tribunal-appointed expert generally carries more weight than the opinion of any party-appointed experts.

8.4 The civil law approach has the obvious advantage that the principal expert evidence comes from someone totally independent, who is not on the side of either party. The disadvantage is that, in a finely balanced case, the tribunal may adopt the views of the tribunal-appointed expert without needing to grapple with the competing considerations. French lawyers have complained to me that sometimes the opinions of court-appointed experts carry undue weight with judges.

8.5 The common law approach has the obvious advantage that technical issues are fully ventilated, with opposing experts setting out and justifying their respective opinions. Counsel cross-examine the experts. The court or tribunal can then see how each stated opinion stands up to rigorous scrutiny. The disadvantage of the common law approach is that the experts upon which the court or tribunal relies are employed and paid by the parties. This carries the risk that they will tailor their views to assist their clients' case. I never cease to be amazed by the extent to which experts form opinions favourable to the party who is paying them. Sometimes, this is blatant dishonesty, nothing less. We all encounter that from time to time both in court and in arbitration. But very often it is not. There seems to be some psychological process at work, which is beyond my understanding. Perhaps it could be called minor subconscious bias. I say minor, because experts seldom advance extreme or untenable views.

8.6 The problem of how to eradicate biased expert evidence is an old chestnut. Lord Woolf tried to eradicate it by requiring experts to sign declarations of impartiality in their expert report. I sought to combat it by promoting concurrent expert evidence ('hot tubbing') in litigation. The idea is that when experts are sitting next to each other in the witness box they will feel more detached from their clients and more collegiate towards their opponents. But the problem remains.

8.7 This issue was the subject of discussion at a meeting of the Judicial Committee of the Academy of Experts in the UK last month. It was a source of real concern for all of us. One suggestion made was that those who instruct experts should be subject to firmer guidance, to ensure that they present balanced instructions. Another suggestion was that more should be done to educate both experts and parties. Such education should emphasise that concessions and fairness are very powerful tools.

8.8 The reality is that a partisan expert loses credibility. His/her evidence, even when well founded, may be doubted. By contrast, an expert who is patently impartial gains huge credibility. I can recall instances where an expert said candidly that he could not support his/her client's case on points A and B, but went on to support the client's case on points C and D. This makes a very favourable impression on the tribunal – ultimately to the advantage of the client. The message which we all need to get across is that genuinely impartial expert evidence generally serves the client better than biased or slanted evidence.

[12] J. Valdes, 'The arbitral tribunal-appointed expert: a Swiss approach', 38 Construction Law Journal (2022), pp 435-455 at 443