Introduction

Edited by academics who teach construction contracts and arbitration at the School of International Arbitration in London, GAR’s Guide to Construction Arbitration pulls together both substantive and procedural sides of the subject in one volume. Across four parts, it moves from explaining the mechanics of FIDIC contracts and particular procedural questions that arise at the disputes stage, to how to organise an effective arbitration, before ending with a section on the specifics of certain contracts and of key countries and regions. The chapters are written by leaders in the field from both the civil and common law worlds and other relevant professions.

This fifth edition is fully up to date with the new FIDIC suites and includes chapters on expert witnesses, claims resolution, dispute boards, ADR, agreements to arbitrate, investment treaty arbitration and Canada. It is a must-have for anyone seeking to improve their understanding of construction disputes or construction law.

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Introduction

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Summary
We are delighted to introduce the fifth edition of *The Guide to Construction Arbitration*. During the three years of the pandemic, the construction industry suffered significant disruption, giving rise to a substantial number of construction arbitrations worldwide. There are two types of covid-19-related disputes that the pandemic brought about. First, disputes concerning delay and disruption that occurred at all developing stages of construction projects, including procurement, engineering, supply and building. Many construction sites had to suspend work in the course of 2020 and 2021. Further, projects experienced significant slowdown in supply chains for materials due to border closures, steep rises in freight rates and costs of materials, including, for example, steel prices, which have more than doubled in the past 12 months in Europe and the United States, and labour shortages due to illness, self-isolation and travel restrictions.

Second, disputes arising out of concession contracts concerning the operation of infrastructure projects. Because the pandemic disrupted people’s ability to travel and commute both internationally and domestically, operators and developers of infrastructure projects, such as airports and highways, saw a dramatic decline in their earnings, which left them exposed to financing and operational debts. As a result, they commenced arbitration claims against states that had taken measures restricting travel to protect public health. In the past couple of years, several arbitration tribunals have been dealing with these issues, assisting parties to resolve their disputes.

With the construction sector now emerging from this major disruption, activity has already reached pre-pandemic levels. However, the sector still faces considerable challenges, including persisting shortages in materials, inflationary pressures as well as pressures to meet climate change targets (the construction sector is responsible for 37 per cent of energy-related carbon emissions). The sector’s goal for the future is how to adopt new digital technologies to increase its levels of automation and thus become more sustainable and productive.

Against this background, the Guide aims to offer helpful insight in the field of international construction contracts and dispute resolution. A question that often arises is why international construction disputes are different from other types of commercial disputes and why do they require specialist arbitration knowledge? In the first place, construction projects are associated with a wide range of risks, including unexpected ground and climate conditions, industrial accidents, fluctuation in the price of materials and in the value of currency, political risks such as political riots, governmental interventions and strikes, legal risks such as amendments in law or failure to secure legal permits and licences, and – as we have all recently learned – global pandemics. Further, time is typically critical in construction projects.

In the second place, delay and disruption claims in construction arbitrations tend to be complex. Many phases of a construction project, such as engineering and procurement, can run concurrently, which often makes it difficult to identify the origins and causes of delay. Legal concepts such as concurrent delay, critical path and global claims are unique features in construction disputes.

Equally, the involvement of a wide number of parties with different capacities and divergent interests adds to the complexity of construction disputes. A typical construction project may involve not only an employer and a contractor, but also several subcontractors, a project manager, an engineer, an architect, specialist professionals such as civil or structural
engineers and designers, mechanical engineers, consultants such as acoustic and energy consultants, lenders and other funders, insurers and suppliers. A seemingly limited dispute arising from one subcontract may give rise to disputes under the main construction contract and the other subcontracts, as well as disputes under much wider documentation, such as shareholder agreements, joint operating agreements, funding documents and concessions. Disputes involving several parties may give rise to third-party arbitration claims and multiparty arbitration proceedings.

Another important feature of construction disputes is the widespread use of standard forms, such as the FIDIC or the ICE conditions of construction contracts. Efficient dispute resolution requires familiarity and understanding of the, often nuanced, risk allocation arrangements in these standard forms. Good knowledge of construction-specific legislation is necessary too. Although the resolution of most construction disputes usually turns to the factual circumstances and the provisions of the construction contract, legal issues may also arise in relation to statutory (frequently mandatory) warranty and limitation periods for construction claims, statutory direct claims by subcontractors against the employers, statutory prohibition of the pay-when-paid and pay-if-paid provisions and legislation on public procurement.

Finally, construction disputes are procedurally complex, requiring efficient management of challenging evidentiary processes, including document management, expert evidence, programme analysis and quantification of damages. The evidentiary challenges in construction arbitrations have given rise to the use of tools such as Scott Schedules (used to present fact-intensive disputes in a more user-friendly format), which are unique in construction arbitrations.

It is for all these reasons that alternative dispute resolution and arbitration of construction disputes require special focus and attention, which is what this Guide aims to provide.

The Guide to Construction Arbitration is designed to appeal to different audiences. The authors of the various chapters are themselves market-leading experts so that the Guide can provide a ready reference to specialist construction arbitration practitioners. At the same time, the Guide has been compiled and written to offer practical information to practitioners who are not specialists in international construction contracts and dispute resolution. For example, it will be a practical textbook for in-house lawyers who may have experience in negotiating and drafting construction contracts but are not familiar with the special claims and remedies that exist under standard forms of construction contracts. Equally, construction professionals who may have experience in managing construction projects but lack experience in the conduct of construction arbitration will find the Guide useful. Last but not least, students who study construction arbitration will find it to be a helpful source of information.

Although the main focus of the Guide is the resolution, by arbitration, of disputes arising out of construction projects, it also contains chapters that address important substantive aspects of international construction contracts. To understand how construction disputes are resolved in international arbitration, one has to understand how disputes arise out of a typical construction contract in the first place, and what are the substantive rights, obligations and remedies of the parties to a construction contract.

Thus, the book is broadly divided into four parts. Part I examines a range of substantive issues in construction contracts, such as the foundation of construction projects, the FIDIC
suite of contracts, allocation of risk in construction contracts, contractors’ claims, remedies and reliefs, employers’ claims, remedies and reliefs, and an examination of the critical topic of concurrent delay.

Part II focuses on the processes for the resolution of construction disputes and addresses topics such as the contractual dispute resolution methods in construction contracts, dispute boards, alternative dispute resolution in construction and infrastructure contracts, the suitability of various arbitration rules for construction disputes, arbitration agreements in construction contracts, subcontracts and multiparty arbitration in construction disputes, organisation of the proceedings in construction arbitrations, the management of documents and experts in construction disputes, and awards issued in construction arbitrations.

Part III examines a number of selected topics in international construction arbitration by reference to some key industry sectors and contract structures, including the field of investment arbitration, the energy sector, offshore construction disputes and turnkey projects. Part IV examines construction arbitration in specific jurisdictions of particular interest and with very active construction industries.

Overall, the fifth edition builds on the outstanding success of the previous editions, which have made The Guide to Construction Arbitration one of the most popular guides in the Global Arbitration Review (GAR) series. The structure and organisation of the Guide is broadly based on the LLM course on international construction contracts and arbitration at Queen Mary University of London. The course was introduced by HH Humphrey Lloyd in 1987 and was taught by him for more than 25 years. Humphrey has been an exceptional source of inspiration for the hundreds of students who have followed his classes, and we are personally indebted to him for having conceived the course originally and for his generous assistance when he passed the course on some years ago.

We want to thank all the authors for contributing to The Guide to Construction Arbitration. We are extremely fortunate that a group of distinguished practitioners and construction arbitration specialists from a wide range of jurisdictions have agreed to participate in this project. We further want to thank Joseph Ross and Ouassila Mebarek for all their hard work in the commissioning and production of this book. They have made our work easy. Special thanks are due to David Samuels and GAR for asking us to conceive, design and edit this book. We have thoroughly enjoyed the task, and hope that the readers will find the result to be useful and informative.

Footnotes

[1] Stavros Brekoulakis is a professor at Queen Mary University of London and a member of 3 Verulam Buildings. David Brynmor Thomas KC is a barrister at 39 Essex Chambers and visiting professor at Queen Mary University of London.
For example, in the United Kingdom, with the UK Housing Grants Construction and
Regeneration Act 1996.

For example, EU Directive 2014/24.


Endnotes

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4 ibid., p. 8.  Back to section

5 For example, in France, Law No. 75-1334 of 31 December 1975 on Subcontracting.  Back to section

6 For example, in the United Kingdom, with the UK Housing Grants Construction and
Regeneration Act 1996.  Back to section

7 For example, EU Directive 2014/24.  Back to section
