ALTERNATIVE DISPUTE RESOLUTION

CONSTRUCTION ARBITRATION

Here we speak to Metehan Sonbahar, Managing Director of Equitas Consulting's Turkey practice about the issues surrounding the arbitration process in relation to construction disputes. Metehan holds a B.Sc. in civil engineering and MSc in Construction Management, and is currently pursuing an LLM in Construction Law and Arbitration. He is also a member of the Chartered Institute of Arbitrators, Chartered Institute of Building, Dispute Resolution Board Foundation, Society of Construction Law and Turkish Chamber of Civil Engineers with more than 15 years broad based experience in building, civil engineering, power, oil & gas, light rail, power and process, highways and bridges, and water distribution projects internationally.

As a chartered civil engineer with expertise in international arbitration, adjudication, construction claims and expert witnessing, Metehan serves as an expert in quantum matters, claims management, dispute avoidance/resolution and arbitration support. He has participated in numerous construction disputes and international arbitration cases using ICC, LCIA, DIAC, DIFC, UNCITRAL and ICSID, some of which involved projects financed by the Asian Development Bank, JBIC, European Union and the World Bank. He has experience in ADR forums including negotiation, DRB/DAB, adjudication and has been appointed as a DAB under the FIDIC contracts.

Hill International is a pioneer and world leader in construction claims consulting and has developed an international reputation for innovative approaches to preventing and resolving time and cost overruns on major construction projects worldwide. Hill offers its clients a host of construction dispute resolution services, enabling them to complete construction on time and within budget, while minimizing claims and other problems. Hill's claims consulting services include claims resolution, case strategy, issue analysis, establishment of causation, cost recovery, damages assessment, schedule and delay analysis, litigation support, expert witness testimony, mitigation, claims prevention and training programs as well as other management support.

As an experienced expert witness, adjudicator and arbitrator within the international construction industry – what are the unique challenges of operating in such a complex sector across multiple jurisdictions?

Time is a critical element in construction. Generally speaking, with the advancement of construction technics, and the financial and investment restrictions requiring projects to be completed ever faster, the pressure received by the construction industry with regards the time is immense. This is one of the major areas where many dispute arise within the international construction sector. There are different construction work planning and scheduling software used internationally to accomplish timely completion of projects. Because time also equals money - either entitling delay damages to employers or prolongation costs to contractors,- different delay analysis technics have also been developed , mainly in the USA and the UK, for the assessment of cause and effect of construction delay. However not in all jurisdictions these technics are warmly welcomed and accepted. This is one of the major challenges encountered by construction dispute resolution professionals when dealing with delay in different jurisdictions. This is because the way in which delay is measured, the liability towards delay and the damages derive from that may be evaluated differently in various jurisdictions.

In addition to that, in different jurisdictions there may be various legislative matters affecting the implementation and execution of construction contracts. By way of an example, in one jurisdiction a court order may be required to suspend and/or terminate a construction contract, or there may be a series of set procedures regulating the taking over and commissioning of a construction project performed as public works. Such procedures and regulations need to be well understood by dispute resolution practitioners when dealing with international arbitration cases.

Governing law and arbitration clauses are also of great importance. The law that applies to the contract and also to the substance of the dispute may possess certain restrictions on the physical execution of the construction work on site.

Therefore, as a dispute resolution professional acting under different jurisdictions you may well need to familiarise yourself with the unique characteristics and requirements embedded in the roots of the relevant jurisdiction, affecting the commencement, execution and completion of construction projects.

How do construction engineering and infrastructure disputes differ in nature from commercial disputes?

Although at the end of the day most of the construction disputes end up with a claim for additional time and/or money, construction works are performed in a unique process, in which various commercial, technical, administrative and organisational technics are implemented and applied. As such with the diversification and evolution of construction technics, inclusion of workforce from different cultures and backgrounds, and also due to the differences in technical specifications and understanding of quality from country to country, construction sector claims and disputes may widely differ from commercial disputes.

> *"Hill International is a pioneer and world leader in construction claims consulting"*

Generally speaking, disputes occur in the construction industry may be very technical in nature. A variety of codes, laws, regulations, terminology, technics, systems and methodologies exist with regards the construction industry in different jurisdictions. These need to be very well understood and applied by the sector practitioners and the dispute resolution professionals. By way of an example, in order to assess and determine the damages alleged to have been incurred by one party due to poor ground conditions, you may well need to deal first with the geotechnical matters referring to the substance of the dispute, second; whether or not this was foreseeable, third; whether any changes required on design and finally the parties' liabilities thereafter embedded in the contract and its technical specifications. To this extent resolution of construction disputes may require expertise from different disciplines.

Variations are another area where differentiation occurs. When variations are initiated in construction sector, either to works or design, extensive additional costs to parties and delay to completion may occur particularly in complex structures. In most of the cases, parties fail to agree on the consequences of variations – generally extra time and money to contractors- and such variations give rise to large disputes, which may possess matters concerning design, technicality and time, requiring in debt understanding of the way in which construction works are performed.

Another area where distinction occurs between construction and commercial disputes is related to the time and delay. In a medium size construction project, there may be a thousand of workers and some hundreds of engineers, designers, technicians, suppliers, sub-contractors and sub-subcontractors., working under different disciplines and work packages, all of which are interlinked to each other by separate contracts. Therefore, as highlighted above, establishing liabilities in a construction dispute concerning delay may be a very difficult process, requiring the use of different planning and delay analysis technics to set out the cause and effect of each delay event and the liabilities thereon.

Design and construction are two integrated processes, one following other in an interchanging fashion as the project progresses. It is usually the case that; to start with; construction follows design and thereafter subsequent design follows construction. In case of a defective construction, disputes generally occur between parties as regards the ownership of defect, as to whether the defect is due to design or workmanship.

To what do you attribute the increasing number of international construction arbitration cases in which Turkish contractors are involved?

With its 43 construction and contracting companies listed in "The World's Top 250 International Contractors" published by the leading international industry magazine "ENR - Engineering News Record" in 2015, Turkey ranked second country in the world after China. Turkish contractors have accomplished projects in 104 different jurisdictions within the past forty years. The first contracts were signed mostly consisted bespoke conditions and set out litigation as a means for dispute resolution. Turkish contractors operating under contracts with litigation clauses lived through this and gained a bitter experience with traditionally operating local courts in different jurisdictions. The rulings were made by non-construction specialised commercial judges. At this point it should also be noted that; it was only in 1992 Turkey signed and ratified the convention on the recognition and enforcement of foreign arbitral awards, also known as the New York Convention.

Between 2000 and 2014 Turkish contractors expanded even further to undertake larger projects in the Middle East, the CIS and Russia. With this expansion the use of standard form contracts such as FIDIC became very common. Within the same period two major financial crises occurred, giving rise to a number of disputes in construction projects. Most of the projects were terminated unilaterally by employers, invoices were not paid and bank guarantees were cashed.

These were mainly the two milestones which literally diverted Turkish contractors towards arbitration clauses in their contracts.

However this was not the breakpoint yet. Despite the existence of arbitration clauses in their contracts, Turkish contractors traditionally, preferred to solve their disputes between employers through negotiation or amicable settlement. However with the recent developments in the world's political and economic situation, in which companies try to optimise their costs and no one has toleration towards financial loss, Turkish contractors, in order to deal with the situation, drifted away from the traditional approach and started to take their disputes to arbitration to ensure that their case would be in right hands.

To this extent, in an attempt to answer the increasing demand and with an aim to establish a new private body to provide arbitration and alternative dispute resolution services for both foreign and domestic disputes, the Istanbul Arbitration Centre (ISTAC) was established in 2014 and the General Assembly approved the ISTAC Arbitration Rules on 26 October 2015 .

What are the most important considerations that your clients need to be aware of in the pre-arbitral negotiation process and how do you assist them with these pre-proceeding stages?

Pre-arbitral negotiation process is a very critical stage for a number of reasons. First of all, in or order not to waive any rights or entitlements in the subsequent potential arbitration, they should be run without prejudice in my opinion.

With application of various ADR methods, parties may reach less costly and relatively faster settlement. Therefore I recommend my clients to consider a suitable method according to the characteristics of the dispute, provided that the relevant jurisdiction and the contract impose no specific restrictions.

At that point it is important to talk about the governing law and arbitration clauses. I make sure my clients are well aware of the time bar clauses and other potential limitations under the law in which their contracts are governed. There may be certain time limitations to start pre- arbitral negotiations and/or arbitral proceedings, which should be carefully followed.

An expert assessment during the pre-arbitral proceedings may also be a useful tool for disputed parties to consider. My experience with such cases shows that a preliminary expert assessment, whether legal or technical, would be very helpful for parties to evaluate their positions, pros and cons of their case and whether it is reasonable and feasible to take it to arbitration.

Arbitration is firmly established as a preferred form of dispute resolution in relation to construction disputes and claims – what other forms of ADR are in your opinion relevant to this type of cases?

This is a very good question in deed. We know that adjudication is widely used in the UK and in some other jurisdictions. Adjudication may in fact be very helpful in timely resolution of certain construction claims and disputes. From the perspective of FIDIC standard form contracts for example, the Dispute Adjudication Board (DAB) mechanism established in their contracts is a mandatory pre arbitral stage and because it is generally run by experienced practitioners, usually helpful in resolving the dispute more efficiently and in a shorter period. The decisions of DABs under FIDIC contracts are binding on all parties and final unless a dissatisfaction notice is served by either party within 28 days after the receipt of the decision.

There are also dispute boards (DB) as a standing body composed of one or three members to help the parties avoid disputes that arise during the implementation of the contract. Various organisations such as the International Chamber of Commerce, Chartered Institute of Arbitrators, Dispute Resolution Board Foundation, Institution of Civil Engineers (UK) and American Arbitration Association publish their rules. Dispute Boards usually give non-binding decisions in the form of recommendations.

Negotiation is the traditional and most basic method of ADR for the construction disputes.

Mediation and conciliation are other forms of ADR, used in many different kinds of disputes. The form and procedure of the mediation depend on the type of dispute, the parties' and mediator's views on how to proceed and on the terms of any set of rules or guidelines that apply. This method is used in commercial disputes in the UK and is recognized by the Turkish legal system pursuant to Turkish Mediation Act on Civil Disputes entered into force on 23 June 2013. However despite that we have not seen many implementations within Turkey and the MENA regions with regards the construction disputes.

Last but not least, expert determination can also be considered as a form of ADR. This is a form which involves the determination of some technical or scientific disputes by an independent expert. Parties may wish to refer a dispute to an independent expert. ICC Rules also exist to this extent, offering expert appointment and administration services.

You have advised clients on drafting and reviewing construction contracts on a worldwide basis – what are the key considerations that private companies and individuals need to be aware of before embarking on a contractual dispute against a foreign corporation?

As highlighted above construction disputes generally include technical, financial, contractual and legal aspects by their nature. Such disputes generally require lengthy resolution processes which could also affect the financial status of companies. If the dispute includes a foreign element, things get even more complicated, due to the involvement of different jurisdictions, and commercial, contractual and financial systems. Therefore the first consideration that private companies and individuals should be aware of is the legal systems i.e. the jurisdictions in which their contracts are governed, the works are performed and the counter parties operate. They should familiarise themselves with the relevant jurisdiction and the systems therein regulating resolution of construction disputes. By way of an example, there may be strict time bars and restrictions for notification of disputes in certain jurisdictions.

In addition, the dispute resolution processes set out in contracts should also be reviewed and understood in their entirety. Whether there is negotiation, adjudication or any other method of ADR exist in the contracts as condition precedent to arbitration, should be clarified.

Even if no ADR exist in their contracts I would still recommend my clients to consider and evaluate ADR methods jointly with their counter party. By implementation of different ADR methods, as set out above, most disputes may be resolved faster and at lower costs to all parties.

As to whether or not the foreign counter party is a legitimate legal entity, whether the persons signed the contract were authorised to so, are also among the critical issues to be investigated before embarking a contractual dispute.

A further key consideration is that, in most construction contracts disputes may be referred to the dispute resolution stage as the works progress. Contractors need to be well aware of their contractual and legal rights and obligations as to performance of works, suspension, termination, mitigation of delay and loss etc. In the event that the parties to the contract are private entities or individuals from different legal systems, it is likely that the business culture and ethics in which they operate will be different. This difference will also affect the way in which the disputes are managed and resolved. Therefore, before embarking on a contractual dispute companies are firstly recommended to implement non adversarial tactics and to change the tone of their argument if & when the things escalate to contractual & legal disputes.

In your opinion, what are the unfavourable contract terms that lead to disputes regarding contracts and joint-venture agreements in the construction industry?

I have been involved in the management and resolution of numerous contractual claims and disputes arising from varies types of contracts including design & build contracts, EPC contracts, FIDIC standard forms, bespoke contract conditions, joint-venture, consulting and sub-contract agreements in the construction industry. In my experience most of the disputes arose were mainly due to unilateral contract provisions, lack of in depth understanding of contract provisions and unbalanced and wrong distribution of risks.

By way of an example, payment provisions regulate some of the substantial rights and obligations of the parties under construction contracts. I have seen cases where no time bar was set out as to employers' payments or contractors were not entitled to financial compensation in case of late payments by employers. Not properly structured advance payment provisions and the way in which the

advance payment is returned to employers may also cause disputes.

Another example is as regards extension of time, claim making, suspension and termination clauses. In contracts where the rights and entitlements of contractors' with regards additional payment, extension of time, suspension and termination are unilaterally drafted to aid employers, or to restrict contractors' rights, disputes are inevitable. I have seen some bespoke contract provisions which did not contain some of the necessary provisions by help of which the contractor could initiate a contractual claim against the employer for the matters attributable to the employer under the contract. Conversely, such provisions were surprisingly included to limit and bar contractor's rights to rightful damages.

With regards the distribution of risk under construction and joint-venture agreements, some contract provisions transfer too much of unforeseeable and uncertain risks to one party. In construction contracts for example, provisions which transfer most of the underground risks to the contractor are risky themselves. Similarly in joint-venture agreements, provisions imposing certain risks on one party, knowing that this party would fail if things go wrong, usually occur in relation to unfair and unbalanced distribution of financial, administrative or technical responsibilities vis-à-vis company capabilities.

You have degrees in Civil Engineering and Construction Management – given that you operate in a sector that requires understanding of science and engineering principles, how does your knowledge benefit your clients?

Having trained as a civil engineer, I have worked in various civil, building, rail, power, and oil & gas projects in the Middle East, Eastern Europe, Turkey and the CIS as a contracts and claims consultant. I believe this has gained me a knowledge and understanding of a variety of technical aspects in different disciplines. In addition to that I have worked with solicitors, arbitrators, expert witnesses and lawyers from different jurisdictions in a number of construction disputes and arbitration cases internationally. This, I believe provided me with an ability to combine my technical knowledge with the understanding of different legal principles and the way in which construction disputes are resolved at the legal stage.

In terms of possessing complex technical matters from variety of engineering disciplines, construction disputes are unique in their nature. The successful resolution of construction disputes generally requires understanding and evaluation of technical, contractual and legal matters to a certain degree. To this extent, I believe my technical knowledge and background coupled with contractual and legal practice is a key advantage to my clients. Most of my clients are contractors, employers, and public and private entities, mainly retaining me for dispute resolution, expert witnessing and arbitration services wherein I contribute both involving my technical background and legal practice.

Is there anything else you would like to add?

Each construction project is a unique and complex product in its nature, consisting of various elements and disciplines. The advancement of engineering and material science brings us to an era where more high-tech structures could ordinarily be built all around the World. As the complexity and size of projects enlarge, the type and number of participants required in a typical project chain also diversifies and increases. Likewise, with the diversification of the construction skills, technics and implementation of different financial models - such as Public-Private-Partnership enabling private sector funding in civil and infrastructure projects-, construction disputes also evolve, get more sophisticated and difficult to deal with.

In an attempt to cope up with this speedy evolution, alternative dispute prevention and resolution technics are being implemented and developed by professionals from different jurisdictions. Investors, contractors and corporations start realising the criticality of dispute management. Professionals who are equipped with better contract chain and dispute management skills become an essential part of the businesses. International arbitration, being the only final and binding method of dispute resolution alternative to litigation - owing its legitimacy to the New York Convention- is still considered by many as a safe harbour, due to its firmly established international foundation and the freedom to choose the arbitrator(s), applicable law, the venue, the language, and the arbitration procedures. Similarly, binding & non-binding ADR promises growth with the recent developments in the construction industry. **LM**

Metehan Sonbahar
Managing Director
Email: msonbahar@equitas-consulting.com
Website: www.equitas-consulting.com

Equitas Consulting