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C H A N C E



**CONSTRUCTION
ARBITRATION
TRENDS 2023**



— THOUGHT LEADERSHIP

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As the construction sector emerges from COVID-19, we have seen activity rebounding to pre-pandemic levels. Now the sector faces a new set of challenges – shortages in critical commodities and inflationary pressures, which is leading to an increasing number of disputes. While every construction dispute is unique and dependent on local conditions, outlined below are some of the global trends.

Recovering from COVID-19?

As government temporary relief packages for businesses adversely affected by COVID-19 have now largely concluded, disruption from the pandemic is still being felt. We will continue to see an increase in disputes activity as the knock-on effects of delays play out. Along with the continued aftermath of the pandemic, economic turbulence and geopolitical fallout from Russia's invasion of Ukraine has placed significant pressure on global supply chains, and many large economies are on the brink of recession. That said, investment in construction remains high, for instance through stimulus funds provided by programmes such as the landmark US Infrastructure and Jobs Act. We anticipate that continued investment in the sector, combined with economic challenges, will feed an increase in global construction disputes, which are likely to remain high-value and complex.

Inflation

Inflationary pressures and the rise in prices of materials, labour and energy are leading to delays in construction projects. Following on from challenges faced during the pandemic, higher costs and tighter credit are causing supply chain challenges which are, in turn, creating difficult conditions for contractors. The situation is especially challenging for contractors involved in long-term projects with fixed or lump-sum pricing, or price adjustment mechanisms which were not designed to cope with the actual levels of inflation. Owners and contractors negotiating contracts in the current

environment may seek to share the burden of inflation and price escalation by negotiating inflation-linked or index-based pricing mechanisms. However, in the case of participants in existing projects, we are likely to see an increase in disputes in connection with the value of change, cost of delays and interpretation of price escalation clauses. As ever, poorly drafted or unclear clauses and inadequate project administration will continue to be a common source of disputes. While some project participants recognise the need for compromise, international arbitration will continue to be the preferred forum for resolving disputes which are not resolved amicably.

Zero carbon and ESG

The building and construction sector is responsible for 37% of energy-related carbon emissions. The construction industry is therefore at the centre of the drive towards sustainability and meeting climate change targets, along with the increasing focus on ESG which has been accelerated by the pandemic. Disputes will continue to arise around claims in the areas of renewables and sustainable construction, which will require increasing amounts of technical expertise. We also anticipate that ESG will increasingly be an arena for disputes, as project participants come under increasing pressure to deliver "net zero" and ESG targets, in addition to dealing with pricing pressure in the market. Accountability for practical decarbonisation and issues around standards of energy performance disclosure could be potential sources of disputes.

Technology

As a sector with traditionally low levels of automation, the construction industry has been moving steadily towards the adoption of digital solutions and new technologies, a process which has been accelerated by COVID-19. The full scope and application of these new technologies is vast, but some notable examples include:

- automated systems and tracking technologies designed to enable faster completion, increased security and better monitoring of resources on site;
- digital twin technology to create simulations, which (among other things) can be utilised to improve energy efficiency and sustainability; and
- augmented reality technologies, which can assist with project presentation, work in difficult or hazardous locations and improving safety standards;
- contracts and blockchain technology, which will likely find application in, for instance, procurement, contract administration, valuation and interim payments.

The scale of these developments will have an impact on the types of disputes we see in the market:

- There will be a variety of new challenges in relation to intellectual property issues and IP disputes; for example, ownership of intellectual property rights in the images and data generated by new technologies, managing trade secrets, data privacy and cybersecurity risks associated with information collected by these technologies. These issues have been raised in a number of recent cases and it is expected that these trends will continue as the construction industry continues its digital transformation journey.
- While industry and contractual standards in relation to new technologies will develop in due course, their use and application will form an additional component of construction disputes. Some practical concerns may relate to standards of transparency and security in how new technologies are implemented.



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