

ASA below 40 Spring Seminar - Construction Arbitration

Prevalent Model Clauses / Usefulness of Pre-Arbitral Mechanisms

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Is there a prevalent model dispute resolution clause in the construction industry?

- > **At the outset:** **difficult to assess** whether there is a prevalent model dispute resolution clause
 - > Many standard contracts used in international construction projects (FIDIC, ENAA, AIA A201 – 2017 *General Conditions of the Contract for Construction*) have similar dispute resolution clauses providing for a multi-tiered process with arbitration (or litigation) as the final step of the escalation
 - > However, many contracts in international construction projects contain also “merely” the standard clauses of one the major arbitral institutions (or, sometimes, creative adaptations of such clauses)
- > **Therefore:** **Should** there be a **prevalent** model dispute resolution clause in the construction industry at all?

Is there a prevalent model dispute resolution clause in the construction industry? (2)

- > As in every other industry, contractual parties should try to **tailor their dispute resolution mechanism** to their needs, while trying to **use the available different standard clauses**

- > To this end, a **variety** of model clauses better serves the users needs than a prevalent “one-size-fits-all” clause

- > Factors influencing the decision on the best dispute resolution clause are:
 - Size of the project
 - Multiple parties / multiple contracts
 - Location of the project and home jurisdictions of the involved parties
 - Relationship of the parties and duration of the project

Is there a prevalent model dispute resolution clause in the construction industry? (3)

- > Depending on aforementioned factors, the following considerations could be relevant:
 - Multi-tiered dispute resolution yes/no?
 - If yes, how many and which steps?
 - Last tier arbitration or litigation?
 - If arbitration, ad hoc or institutional?
 - Seat of the arbitration and applicable law (particularly in view of the impact of limitation periods, in case multi-tier dispute resolution clause is agreed)
 - Specifically address multi-party/multi-contract situations?
 - Specifically address interim and injunctive relief?

- > **Conclusion:** Given that each construction project is **different**, also the dispute resolution clause should be **adapted** and not simply taken from a prevalent model clause.

- > **However:** Given the risks involved in drafting a dispute resolution clause from scratch, **also tailored clauses should be based upon available model clauses**

Are pre-arbitral mechanisms such as Dispute Adjudication Boards a useful first step?

- > Again, no “one-size-fits-all” answer – also the pre-arbitral mechanism should be tailored, taking into account the parties’ specific needs
- > Parties to construction projects, contrary to many other industries, have often to address disputes and problems **while the project is still ongoing** and might be ongoing for many more months or even years
- > It is against this background that the advantages of pre-arbitral mechanisms have to be analyzed

Are pre-arbitral mechanisms such as Dispute Adjudication Boards a useful first step? (2)

> Advantages

- > Disputes can be resolved while the project advances and do not bring the daily operations to a halt
- > Pre-arbitral mechanisms are quicker and less costly than arbitration
- > Highly technical issues can be resolved by an expert (who's decision can be reviewed, if needed)
- > The parties might have more trust in Engineers, Experts, DABs etc. than Tribunals

> Disadvantages

- > Difficulty if dispute concerns both technical and legal aspects
- > Quickness of the proceeding also entails less detailed analysis of the positions and less structured (controllable) process
- > Potential difficulties to address multi-party and multi-contract issues at the pre-arbitral step
- > Enforceability issues

Are pre-arbitral mechanisms such as Dispute Adjudication Boards a useful first step? (3)

- > Specific issues of pre-arbitral steps in proceedings with seat in Switzerland
- > Case law of the Supreme Court regarding pre-arbitral steps
- > Some issues from international practice and case law

Thank you for your attention.

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