DIS40 Spring Conference 2019: The Nuts and Bolts of Construction Arbitration

By Pascal Wagenführ, Frankfurt am Main*

I. Introduction

On 9.4.2019, the DIS40 Spring Conference took place in Bonn with the topic "The Nuts and Bolts of Construction Arbitration – From a lawyer's, expert's and in-house counsel's perspective".[1] The conference was moderated by *Dr. Annabelle Möckesch* (*Schellenberg Wittmer*) and *Dr. Benjamin Lissner* (*CMS Germany*). The conference was divided into two workshops on the topics "How to deal with delay" and "Procedural aspects of construction disputes" and ended with a panel discussion.

II. Workshop 1: How to deal with delay

Dr. Tino Schneider, Associate at *LALIVE* in Zurich, explained the importance of claims for extension of time ("EoT claims") for employers and contractors in construction projects. He presented the topic by using a pipeline project as a hypothetical case in which delays occurred. In this context, *Dr. Schneider* referred to the distribution of risks between the parties. He explained the importance of model clauses in construction contracts. The parties base tailor-made solutions on these clauses to achieve legal certainty, as many national legal systems hardly regulate the

EoT. The *Fédération Internationale des Ingénieurs Conseils* (FIDIC) provides model clauses in its so-called "FIDIC Books". *Dr. Schneider* used Art. 8.5 of the FIDIC Red Book[2] as an example and explained its requirements for an EoT. The contractor is entitled to such an EoT for example, if the employer changes the scope of services or in the event of delays or hindrances attributable to the employer. In the further course of his presentation, *Dr. Schneider* dealt, on the one hand, with the regulations on an EoT under several national legal systems. On the other hand, he highlighted further special topics on the EoT such as the critical path of a project and how to deal with concurrent delays.

Daniel A. Correa, Managing Director at *DAC Consulting Services* in London, gave a presentation on the different methods for determining delays in construction projects, namely "as-planned vs. as-built", "as-planned impacted", "collapsed as-built" (also "as built but for"), "time impact" and "windows analysis". *Correa* stressed that there is no method that is suitable for all cases. Moreover, the selection of a suitable method depends on many factors. On the one hand, it is decisive whether the analysis should be carried out prospectively or retrospectively. On the other hand, the regulations of the project contract, the size of the project and the available time as well as the project records are crucial. Based on practical experience, fact-based methods should be preferred over those with hypothetical assumptions. In addition, *Correa* recommended involving a delay expert as early as possible and putting him or her in direct contact with the client's project managers or key personnel. The parties already involved in arbitration should try to agree on the

facts on which their experts can base their analysis upon. This would reduce the complexity of the analysis and make it easier for the arbitral tribunal to assess the case.

Emma Niemistö, a partner at *Merilampi Attorneys at Law* in Helsinki, gave a lecture on the topics of the EoT and the "Quantum" or claims for damages and remuneration. The legal assessment of the respective claims should be made separately for each claim. The requirement to conduct individual analyses can result from the contractual provisions or from the legal stipulations on which a project is based. *Niemistö* gave some practical examples and references to Finnish law in her presentation. She examined how to determine if a delay occurred and to what extent. Based on the contractor's original plan, she highlighted the role of consultants, for example, in identifying inefficiencies. She also emphasized the importance of recording the progress of the project as comprehensively as possible. In this way, the client can more effectively refute arguments of the other party with facts.

III. Workshop 2: Procedural aspects of construction disputes

Christina Täuber, Legal Counsel at *CML Construction Services GmbH*, i. e. *STRABAG SE*, focused her presentation on a central, but often neglected part of project management, namely the compliance with contractual and legal notification obligations. Often, notifications are either not delivered or delivered incorrectly. The latter happens, for example, if no follow-up takes place in a multi-stage notification process. *Täuber* substantiated this statement with some practical examples, which illustrated the situation of project managers. Based on these practical examples, she identified two main reasons for the non-compliance with notification requirements. Firstly, notification obligations are regularly simply forgotten during the project execution, as the project managers focus rather on the implementation of the project. Secondly, all participants are interested in a speedy implementation of the project and, in particular, in the early phases of the project, the collaboration is smooth and constructive. Since it is in the interest of the project managers, they avoid notifications in order not to damage the good working relationship with the project partners. *Täuber* also addressed the requirements for notifications and the consequences of non-compliance. The latter ultimately depends on the origin of the respective obligation. For example, notification requirements under statutory law arise primarily to prevent the limitation of claims, whereas the non-compliance with contractual notification obligations can ultimately cause a preclusion of the claims in question. *Täuber* gave some valuable practical advice on how to deal with notification obligations in a project. *Inter alia*, all notification obligations should be identified before the start of the project and included in a practice guide for those responsible for the project. All claims arising during the course of the project should be included in an overview in order to enable effective control of the corresponding notification obligations. As further practical advice, *Täuber* recommended consulting with a legal advisor before answering the other party's assertion that a notification obligation had not been complied with. Additionally, minutes of meetings provided by the other party should always be read thoroughly before being signed.

Philipp Duncker, Counsel at *Hogan Lovells* in Munich, examined different mechanisms for pre-arbitral dispute resolution in construction disputes. He focused, *inter alia*, on negotiation, mediation and adjudication mechanisms. Construction contracts often contain provisions according to which the parties have to undertake an attempt to settle disputes by way of negotiation. *Duncker* recommended setting an expiry date for negotiations to prevent unfair delay by the other

party. The parties may also commit themselves to attempt mediation under the project contract. The parties' negotiations are then guided by a neutral expert or mediator. However, the mediator is not authorised to make a binding decision on the subject matter of the dispute. The parties may also undertake to carry out adjudication based on the provisions of the project contract. This can be done by a single adjudicator or a Dispute Adjudication Board (DAB) with several members, whose selection depends on the circumstances of the case, namely the volume and the technical complexity of the project. The adjudicator or the DAB may make a decision which is binding on the parties, the non-compliance with which constitutes a breach of contract. Even if the decision does not have any formal binding effect on subsequent proceedings, it could still have a certain informal steering effect on the subsequent decision or even set a precedent.

Dr. Lisa B. Reiser, Associate at *Baker McKenzie* in Frankfurt am Main, highlighted three key factors for the successful management of construction arbitration. A first key factor are the people involved in the project. Major projects are a "people's business" crucially based on the performance of the involved individuals. In this respect, *Dr. Reiser* recommended an early kick-off meeting in order to determine the essential elements of the dispute. This is crucial because sometimes the project documentation does not show important and decisive details. Such a kick-off meeting can also be used to form the project team and assign responsibilities to the individuals involved. A second key factor for successful construction arbitration is a planned, structured and controlled approach. In order to cope with the enormous effort involved in construction arbitration, it has proved to be useful to define work packages for certain activities and to assign responsibilities under these packages to individual persons. Ultimately, visualization plays a central role for successful construction arbitration. In particular, factual connections or causalities,

but also technical systems and functionalities, could be made accessible much easier by using pictures, videos and even miniature models.

IV. Summary

Construction disputes are often resolved in the course of arbitration.[3] At the same time, the resolution of such disputes shows unique features compared to regular arbitration. The DIS40 Spring Conference in Bonn offered a valuable insight into this fascinating area of practice. The different perspectives of a lawyer, an expert and an in-house counsel made it possible to look outside the box and gain a broader understanding of the subject matter.

---

* Pascal Wagenführ is a lawyer in the Practice Group Infrastructure, Energy, Resources and Projects at Hogan Lovells in Frankfurt a. M.

1 The report of the previous DIS40 Spring Conference 2018 can be found in SchiedsVZ 2018, 365.

2 Officially, the FIDIC Red Book is called "Conditions of Contract for Construction". Unofficially, the FIDIC Books are named according to their cover color.

3 Approximately 23 % of all cases brought before arbitral tribunals of the International Chamber of Commerce in 2017 were construction-related, see ICC Disp. Resol. Bull. 2018 Vol. 12/2, 61.