
INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK

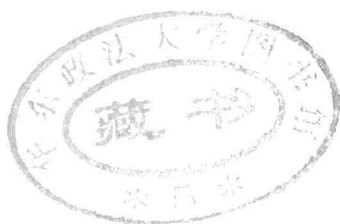
JOHN W. HINCHEY
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INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK

By

John W. Hinchey
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Dedication

John W. Hinchey:

To the stream of souls who have gone before me, yet who faithfully cleared and charted the way for me to follow;

To my father, Roy Hinchey, pastor, writer and counselor, for the wise example that a life of leadership means a life of service;

To my mother, Ruth Ownby Hinchey, for the discipline of work that must never cease until the job is done and done well;

To Sherie Paulette Hinchey, who, for 40 years and counting, has been my wife, best friend, cheerleader, my strong support and critic, and who was marked as my soul mate from the beginning to the end of time;

To my sons and daughter, Paul, John Oliver, and Meredith Marie, who have honored their parents by exemplary lives—our sons who serve in the armed forces of their country, and our daughter as a pediatric nurse, mother and homemaker;

And, not least, to our Siberian Husky, Odessa Pearl, that lay by my side for untold hours, chin on floor, patiently waiting for this work to be done.

Troy L. Harris:

To my beloved son, John A.A. Harris.

A wise son maketh a glad father. (Prov. 10:1)

About the Authors

John W. Hinchey leads the construction disputes practice at King & Spalding, an international law firm. He focuses his practice on international and domestic construction arbitration and dispute resolution, representing clients across a broad spectrum of construction, contracting and procurement activities. He has served as advocate, arbitrator or mediator in multiple large national and international complex construction disputes and has negotiated or performed risk analyses of a variety of design build, turnkey and EPC agreements.

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Preface

This Handbook is a guide to the subjects, issues and considerations applicable to international construction arbitration. To be sure, the coverage shares common ground with domestic construction arbitration, on the one hand, and general international commercial arbitration, on the other. Indeed, the lawyer experienced in construction dispute resolution and the experienced international arbitration practitioner will find much that is familiar in these pages, few of which could have been written without the path-breaking work of experts in those fields. Still, international construction arbitration presents issues and challenges that are different from any other field of dispute resolution. Those who choose to ignore or are not aware of these differences will find themselves at a significant disadvantage when dealing with those who are. As with most guides, this Handbook does not presume to be comprehensive in its treatment of all the topics and issues that can arise in the field. However, it does attempt to be comprehensive in its identification of those topics and issues, beginning with the role of construction and construction arbitration in the world marketplace of today (Chapter 1). Because the starting point for a practical understanding of international construction arbitration (legally and logically) is the arbitration agreement itself, Chapter 2 considers the essential elements of such agreements, along with potentially useful (if not essential) elements and various options available among the recommended forms promulgated by the world's leading arbitral institutions.

Because performance of the construction arbitration agreement will necessarily take place in some legal context, the next logical step in a description of the process is to consider the legal framework within which international construction arbitration occurs (Chapter 3). While there is much about the legal framework that will be familiar to those who practice international arbitration generally, there are also issues that, if not unique to construction disputes, will at least arise with greater frequency than in other types of arbitrations. For example, the existence of conditions precedent to a party's right to initiate arbitration or the circumstances under which multiple parties may be brought into an arbitration are routine issues in construction arbitrations. Another particularly significant aspect of the legal framework of international construction arbitration is the role of state courts

in enforcing agreements to arbitrate and, when necessary, intervening to assist the arbitration process. This is the subject of Chapter 4.

The heart of this Handbook (Chapters 5 through 10) is devoted to the “nuts and bolts” of international construction arbitrations. Chapter 5 considers the steps involved when initiating an arbitration, including such practical details as payment of fees, interim relief, and selection and challenge of arbitrators. Chapter 6 builds upon this foundation by providing practical suggestions for preparing one’s own construction case as well as anticipating claims and defenses typically raised by other parties to a construction proceeding. Obviously, the arbitral tribunal has a vital part to play in the process, so Chapter 7 describes the tribunal’s powers and duties with reference to the types of issues typically encountered in international construction disputes. Chapters 8 and 9 focus on the actual conduct of the proceedings, from the preliminary procedural conference through pleading the case, exchange of information, and the hearing itself. Chapter 10 considers a recent and still somewhat experimental variation on the usual construction arbitral process, the “fast track” construction arbitration.

The ultimate goal of the arbitration process is the final and binding resolution of disputes. Where the parties do not settle their difference, the arbitral tribunal must render an award. Chapter 11, therefore, describes the types and essential features of international arbitration awards, with particular reference to awards that may be relevant to construction disputes. Although voluntary compliance with awards is still the rule rather than the exception, exceptions do exist. Thus, Chapter 12 examines the types of post-award proceedings in which parties may engage to enforce, set aside, or modify awards.

Finally, the Handbook includes a number of appendices of primary source materials and sample forms that practitioners may find useful in orienting themselves to the laws, rules, and procedures in common use.

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