

INTERNATIONAL CONSTRUCTION CONTRACTS AND ARBITRATION

Responsible Faculty Instructor:
Avineet Singh Chawla [aschawla@jgu.edu.in]
Assistant Professor of Law

Credits: 4

Credits Type: Law

Cross-registration: N/A

Pre-requisites: Alternative Dispute Resolution

COURSE DESCRIPTION (COURSE VISION):

Construction disputes are amongst the most technically and procedurally complex disputes in international commercial landscape. These disputes often involve a multitude of parties, interrelated contracts, cross-border implications, and high financial stakes. In this intricate landscape, arbitration is often the most preferred dispute resolution mechanism owing to its flexibility, confidentiality, and ability to accommodate the technical and factual depth typical of construction matters.

Firstly, this course offers an in-depth understanding of the widely used standard international construction contracts, with a particular focus on the standard form contracts issued by the International Federation of Consulting Engineers (FIDIC - Red Book and Yellow Book). It explores how these different set of contracts allocate responsibility and risks among various parties involved (employer/owner, main contractor, engineer, specialist professionals, sub-contractors etc.), how disputes arise within such structures, and how these disputes are best managed and resolved through arbitration. Emphasis is placed on key issues such as most commonly seen disputes, project financing dynamics, the new dispute avoidance mechanisms (including Dispute Adjudication Boards), and the procedural features of construction arbitration under various institutional rules (particularly the ICC Rules of Arbitration). Given the increasing complexity of global infrastructure projects, often executed under turnkey arrangements, this course also delves into the specific challenges presented by design responsibilities, variations, delay claims, cost overruns, and performance disputes. It provides students with a hold of such standard contracts along with practical understanding of how construction arbitration functions in real-world scenarios, supplemented by industry insights and hands-on exercises.

TEACHING METHODOLOGY:

The course will adapt a discussion-based approach to learning and will intend to move beyond the usual lecture formats. Students are expected to complete the primary readings mentioned in the course manual prior to each class. This will form the basis of in-depth, critical discussions during weekly sessions. Given that *Alternative Dispute Resolution (ADR)* is a prerequisite, students are presumed to have a foundational understanding of arbitration. The course will build upon this base by examining complex contractual structures, standard forms such as FIDIC, and procedural issues unique to international construction disputes. This will allow classroom time to be

devoted to problem-solving, comparative perspectives, and real-world application rather than introductory exposition.

Classes will be conducted in an interactive format that encourages analytical engagement with model clauses in standard forms of contracts, cases, arbitral procedures, and evolving jurisprudence. Guest lectures by industry professionals and arbitration practitioners may also be organized to provide students with exposure to current trends and professional practice. The overarching goal is to ensure that students are equipped not just with doctrinal knowledge, but also with the skills to think critically and navigate the intricacies of international construction arbitration in a professional context.

INTENDED LEARNING OUTCOMES:

1. Understanding legal and practical frameworks governing the standard international construction contracts especially FIDIC Contracts.
2. The typical disputes arising in international construction projects and impactful use of dispute avoidance mechanism and arbitration in resolving such multi-party disputes.
3. Examining construction disputes in other sectors mainly investment treaty sector and energy sector.

READING LIST (upto 10 select readings):

1. Jane Jenkins, *International Construction Arbitration Law* (Third Edition)
2. *The Guide to Construction Arbitration* (5th Edition)
3. Philip L. Bruner, *Construction Law: Its Historical Origins and its Twentieth Century Emergence as a Major Field of Modern American and International Legal Practice*, 75 Ark. L. Rev. (2022)
4. *FIDIC Red and Yellow Book*
5. Nael Bunni, *The Four Criteria of Risk Allocation in Construction Contracts*, *International Construction Law Review*, Vol 20, Part 1, p. 6 (2009)
6. Nael Bunni 'Managing Risk' (FIDIC's International Conditions of Contract: A Two-day Seminar organized by IBC/FIDIC, December 2005)
7. Adrian Bell and Tom Christopher Pröstler, 'Chapter 3: Arbitration, A. Commercial Arbitration', in Andreas J. Roquette and Tom Christopher Pröstler (eds), *International Construction Disputes: A Practitioner's Guide*
8. Michel Dubisson, 'Arbitration in Subcontracts for International Projects', *Journal of International Arbitration*
9. Loukas Mistelis "Reality Test: Current State of Affairs in Theory and Practice Relating to Lex Arbitri" *American Review of International Arbitration* (vol 17, 2006) 155
10. L Carpentieri and F Gillion, 'Construction Arbitration and BITs: Is There Still a Future for Intra-EU Investment Arbitration?' *International Construction Law Review* (2018)

WEEKLY READING PLAN (WEEKLY OUTLINE):

A weekly plan is provided below:

MODULES	WEEK(S)
<p style="text-align: center;">MODULE 1: INTRODUCTION</p> <ul style="list-style-type: none"> • Introduction to Construction Contracts • Types and Features of Construction Contracts • Key Documents forming part of a construction contract • Key Pricing Methods • Key Payment Methods 	Week 1
<p style="text-align: center;">MODULE 2: PARTIES TO A CONSTRUCTION CONTRACT</p> <ul style="list-style-type: none"> • Owner or Employer • Main Contractor • Engineer • Specialist Professionals • Sub-contractors • <u>Overview of leading FIDIC contracts: Red, Yellow Books</u> 	Week 2
<p style="text-align: center;">MODULE 3: ALLOCATION OF RISK</p> <ul style="list-style-type: none"> • Risk and Responsibility (Indemnities, Employer’s risks, consequences of employer’s risks, IIPR) • Insurance • Exceptional Events (Force Majeure) • Contractor’s Claims • Defects Liability 	Week 3
<p style="text-align: center;">MODULE 4: PROGRESS, VARIATION, DELAY AND COMPLETION OF WORK</p> <ul style="list-style-type: none"> • Commencement of Work • Progress of a Construction Project • Variation • Programmes: Their status and effect • Test on Completion, takeover and certificates <p><u>Delay and Extension of Time</u></p>	Week 4 - 5

<ul style="list-style-type: none"> • Contractor Delay • Employer Delay • Concurrent Delay • Neutral Delay 	
<p style="text-align: center;">MODULE 5: CLAIMS AND REMEDIES</p> <ul style="list-style-type: none"> • Employer’s Claims, remedies and reliefs • Contractor’s Claims, remedies and reliefs • Global Claims 	Week 6
<p style="text-align: center;">MODULE 6: SUBCONTRACTS AND DISPUTE BOARDS</p> <ul style="list-style-type: none"> • Importance of Subcontracts • Types of Subcontracts <ul style="list-style-type: none"> ▪ Domestic Subcontractor ▪ Nominated Subcontractor • Principle of ‘Chain Liability’ • Back-to-back Contracts • FIDIC Subcontract • Role and Purpose of Dispute Boards • Powers of Dispute Boards • Dispute Boards in FIDIC • Enforcement of Decisions of Dispute Boards 	Week 7
<p style="text-align: center;">MODULE 7: DISPUTE RESOLUTION IN CONSTRUCTION CONTRACTS</p> <ul style="list-style-type: none"> • The Agreement to Arbitrate • Applicable Laws • Seat and Jurisdiction • Arbitrability • Commencing an arbitration • Constituting the tribunal • Court support for arbitration • Third Party Claims • Multiparty Claims • Awards 	Week 8 – 9- 10
<p style="text-align: center;">MODULE 8: EVIDENCE IN CONSTRUCTION ARBITRATION</p>	Week 11

<ul style="list-style-type: none"> • Rules on Taking Evidence • Expert Evidence <ol style="list-style-type: none"> 1. Tribunal Appointed Experts 2. Party Appointed Experts 	
<p style="text-align: center;">MODULE 9: INVESTMENT TREATY ARBITRATION IN CONSTRUCTION SECTOR</p> <ul style="list-style-type: none"> • Investment Treaties • Types of Protection and Claims • Umbrella Clauses • Stabilisation Clauses • Remedies • Overlap between Construction Disputes and BITs 	<p>Week 12-13</p>
<p>MODULE 10: ENERGY SECTOR CONSTRUCTION DISPUTES</p> <ul style="list-style-type: none"> • Nature of Disputes • Key Players: Significance of State • Overlap between Construction Disputes and Energy Charter Treaty 	<p>Week 14</p>
<p>REVISION WEEK</p>	<p>Week 15</p>