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Effective Claims Management on International Megaprojects: How to Position your Organization in the Best Position to Win a Claim

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Panama Canal Expansion, Panama

Three Gorges Dam, China

One World Trade Center, New York

London Crossrail, London

Port Mann Bridge, Vancouver, B.C.

Jubail Industrial City, Saudi Arabia

Bay Bridge Eastern Span, San Francisco-Oakland

Marmaray Tunnel, Turkey

Shanghai Tower, China



Time to build: 8 years

Cost to build: \$2.4 billion

Introductions



- Paul Bruno (Fluor)
 - Managing general counsel who leads dispute resolution at Fluor
 - Leads a team of professionals in dispute resolution for their global business
 - Liaison for external audit on dispute matters



- Arjun Agarwal (Chevron)
 - Counsel for International Upstream Litigation Management Group
 - Manages construction claims and disputes
 - Handling active claims/formal dispute in excess of \$2B



- Stephan O'Neal (Jones Day)
 - Litigation counsel on international and domestic arbitrations
 - Expertise on construction and infrastructure agreements
 - Represented clients in state, federal, and sovereign jurisdictions.



- Joshua Ritti (Exponent) - Moderator
 - Construction consulting principal
 - Consults on risk management, assessment, and portfolio management
 - Expert witness services on domestic and internal projects

Effective Claims Management on International Megaprojects

- Two critical factors to success
 - Contract Strategy
 - International jurisdiction
 - Dispute resolution clause
 - Assembling Correct Team
 - Internal Resources
 - Outside Experts

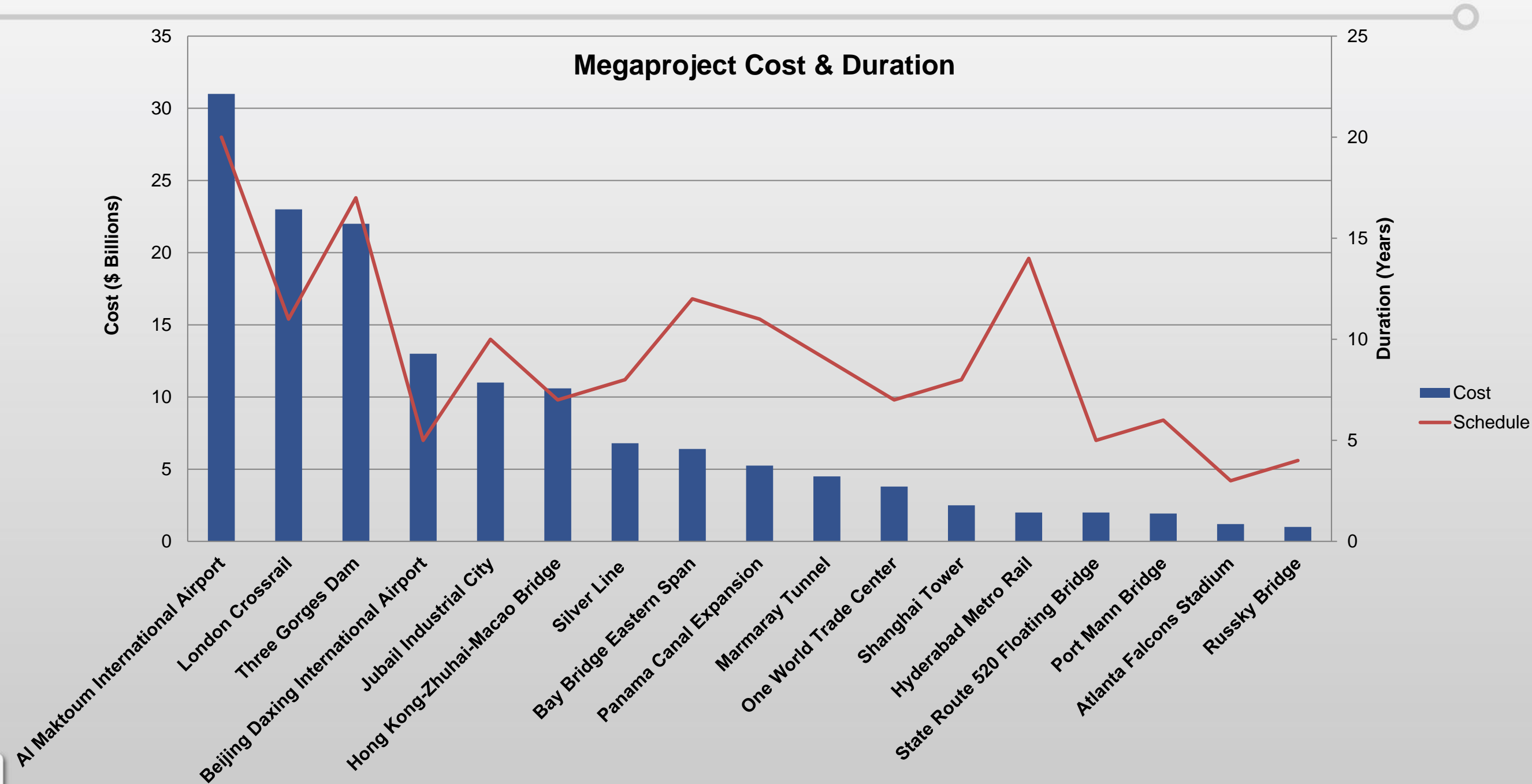
Lessons Learned

As the global economy worsens, disputes on troubled megaprojects are expected to increase.

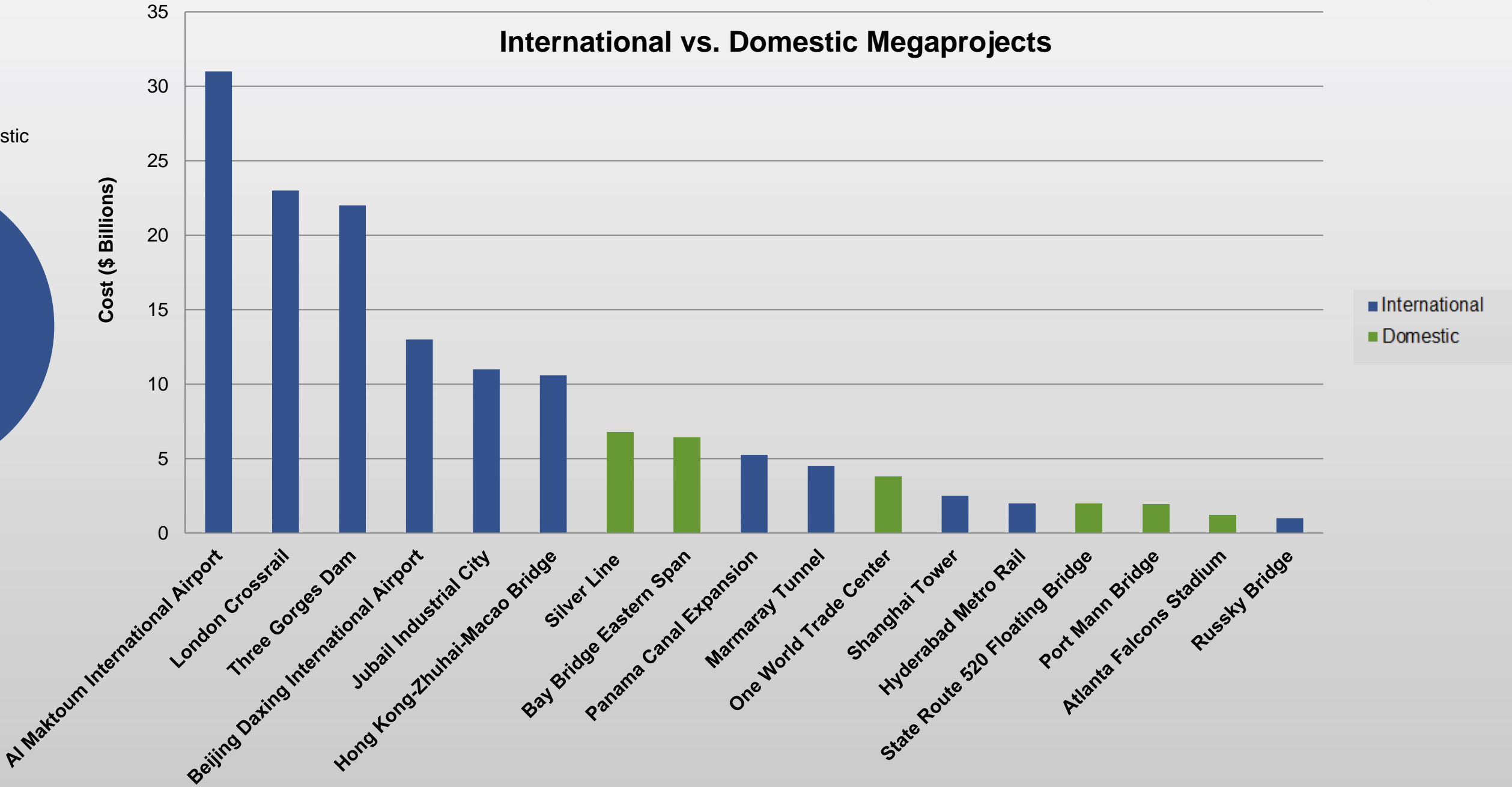
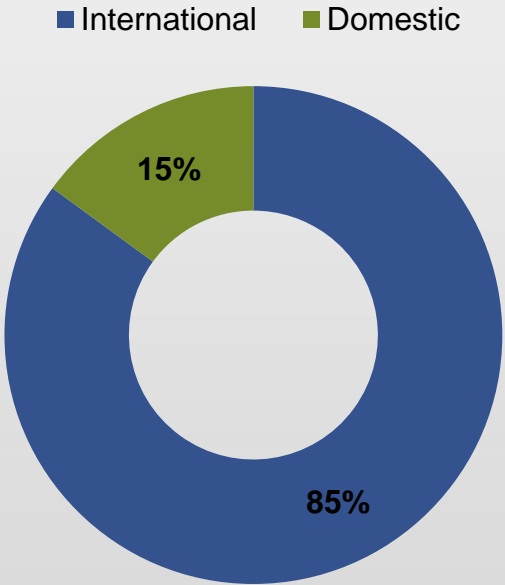
Megaprojects Background

- The construction industry is changing; we are entering a new era of billion and trillion dollar projects. These megaprojects are defined as:
 - Large-scale, complex ventures that typically cost **US \$1 billion** or more, take many years to develop and build, involve multiple public and private stakeholders, are transformational and impact millions of people.

Megaprojects Background



Megaprojects Background



Achieving Success on Megaprojects

- Challenges influencing megaproject success and failure include:

- Development of Project Management
- Internal Resource Challenges
- Experience in Megaproject Management
- Long time frames
- Corruption (in some countries)
- Political Influence
- Risk Allocation
- Contract Structure & Financing

Lessons Learned

If people knew in advance the real costs and challenges involved in delivering a large project, “they probably would never have touched it” and nothing would ever get built

Dispute Resolution Contract Terms & Strategy (Paul)

■ Common Dispute Resolution Strategies

— Arbitration

- Parties refer to a neutral 3rd party, individual or group, where in dispute is resolved on basis of material facts, documents, and relevant legal principals.

— Expert Determination

- Mutual 3rd party will resolve the dispute

— Litigation

- Case is presented in front of a judge for a binding resolution

— Mediation

- Parties meet prior to litigation with mediator to facilitate a discussion between the parties aimed at resolving the dispute.

— Adjudication

- Judicial party which is neutral to the proceeding provides resolution on dispute which is typically quicker and decides the dispute, but can still result in further dispute resolution proceedings.

Traditional Arbitration on International Megaprojects

- Most widely used form of dispute resolution for international construction.
- Complaints have been made that arbitration is becoming too much like litigation in that it is beginning to take far too long and is too expensive.
- There are substantial differences between administered and ad-hoc arbitration

Lessons Learned

Arbitration is often criticized as taking too long and costing too much; however, on the international scene, arbitration is still preferable to litigation in local courts

International Dispute Resolution Forums

	LCIA	ICC	ICDR	SIAC	HKIAC	UNCITRAL
Head Office Location	London	Paris	New York	Singapore	Hong Kong	Vienna
Default No. of Arbitrators	Sole Arbitrator	Sole Arbitrator	Sole Arbitrator	Sole Arbitrator	HKIAC Decides	Three Arbitrators
Time for Challenging Arbitrator	14 days from appointment or becoming aware of relevant circumstances	30 days from appointment or becoming aware of relevant circumstances	15 days from appointment or becoming aware of relevant circumstances	14 days from appointment or becoming aware of relevant circumstances	15 days from appointment or becoming aware of relevant circumstances	15 days from appointment or becoming aware of relevant circumstances
Advantages	One of the foremost international arbitral institutions and widely respected. Speed as there is no need for Terms of Reference or review of final award. Availability of wide array of interim relief.	One of the best known arbitral institutions.	Procedure tends to be more flexible and less bureaucratic than other formal institutions. Trending use in South and Central America.	Confidentiality, fixed schedule of fees and costs, considered internationally neutral.	Potentially acceptable to Chinese counterparties as an acceptable "offshore" dispute mechanism	Ad hoc arbitration; well-known rules similar to others (ICC, ICDR)
Disadvantages	May not be considered sufficiently neutral by non-English parties where the other party is English.	Additional time needed to appointment of arbitrators and the need for Terms of Reference and vetting of the award by the ICC Court	Can be seen as America-centric (International arm of AAA)	Procedures determined by tribunal	Panel drawn from a restricted list, which includes government officials. Care when using with a SOE.	Ad hoc arbitration

Alternative Dispute Resolution

- Manage changes/claims to settle early prior to litigation
- Reassess change management and claims strategy
 - Dispute Adjudication Board (DAB)
 - Dispute Resolution Board (DRB)
 - Adjudication Interim Resolution Strategies

Lessons Learned

To avoid unnecessary costs and time, disputes should be addressed at the earliest possible moment and the resolution process should be tailored to the specific problem at the heart of the dispute

DAB/DRB

- Consider providing for Dispute Adjudication Board (“DAB”)/ Dispute Review Board (“DRB”)
- Temporarily binding dispute resolution
- Established at outset of project
- Standing panel of 1 or 3 lawyers/engineers appointed for life of project
- Visit site quarterly to monitor progress and address potential problems

DAB/DRB

- Can be contractor-friendly cash flow device
- Can be huge waste of time and money for owner (and dangerous to cash flow)
- Procedure for claims submission to DAB/DRB for interim decision
- Decide whether interim *recommendation* or interim *decision* is preferred

DAB/DRB

- DRB – interim recommendation – if parties object to DRB recommendation parties may contest by arbitration or litigation and NOT bound by recommendation in interim
- DAB – interim decision – if parties object to DAB decision may contest by arbitration or litigation but ARE contractually bound by decision until arbitrators or court rule otherwise
- Decide whether recommendation or decision admissible in a later arbitration proceeding

Adjudication

Adjudication in Australia

- Building and Construction Industry Payments Act 2004 (BCIPA)
 - Cannot contract out of legislation
 - Each State has its own legislation, which can significantly alter process
 - Purpose is to ensure contractor cash flow
 - Fast track, generally 40 to 60 days, from initiation to decision

Adjudication in United Kingdom

- Local Democracy, Economic Development and Construction Act 2009
 - Formerly The Housing Grants, Construction & Regeneration Act 1996
 - Fast track from initiation to decision, but can be derailed by court action

Adjudication elsewhere

- Malaysia - Construction Industry Payment & Adjudication Act 2012 (CIPAA)
- Proposed Security of Payment Legislation in Hong Kong

Adjudication built into Contracts

- For jurisdictions without Payment Acts, possible to build into Payment & Dispute Resolution clauses language that provides for fast track resolution of progress payment disputes
 - Focused contract language specific to progress payment administration / cash flow

Interim Resolution (IR) Strategies

- Benefits and challenges of IR
 - Benefits
 - Resolution of change orders prior to disputed amounts becoming “unresolvable”
 - Cost savings
 - After IR decision the focus is back on completing construction
 - Challenges
 - Early commitments and buy in from stakeholders for successful IR
 - Legal system of jurisdiction not favorable to IR
 - Early identification and submission of issues

Assembling the Correct Team

- Engaging outside expertise to supplement the internal project team
 - Outside Counsel
 - Consultants
 - Engineers
 - Forensic accountants
 - Expert schedulers



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