



Guest blog: Managing recurrent claims and disputes on large-scale projects – is it avoidable?

The 1st ICC Tokyo Arbitration Day took place last month showcasing why more Japanese parties are choosing ICC as their preferred arbitral institution for the resolution of their cross border commercial disputes. In this guest blog post HKA's Scott Ramsden, Principal, Quantum Expert and Janice Cheng, Senior Consultant take a look at the return of post-pandemic recurrent disputes in Asia's construction industry.

Given the robustness of the construction sector globally, following the challenges observed due to the effects of the pandemic and the Ukraine war, industry leaders are focusing on the lessons learned in preparation for the next crisis. Leveraging new technologies, redefining contractual terms on force majeure and changes in law provisions are some of the more significant considerations within the industry. Yet, the paramount concern remains the management of recurrent claims and disputes. This appears to be the primary hurdle that prevents the industry from growing in a healthier direction.

Is Asia prepared for the return of the battle with recurrent construction disputes?

In Asia, with the strong rebound in construction activity to pre-pandemic levels, the region is expecting a record growth of megaprojects in the foreseeable future – partly driven by the investment in renewable energy transition as a stimulus to boost economies. Consequently, large-scale projects in Asia will inevitably be forced to face the prospect of recurrent construction disputes if lessons are still not being learned.

According to the latest CRUX Insight Report¹, published by HKA in 2022, 'Change in scope' remains the top-ranking cause of claims and disputes in most regions, which has been the case ever since the CRUX

¹ An annual report based on an integrated research programme into claims and dispute causation on major capital projects globally.

research programme first launched in 2018. This is followed by the all too familiar 'design conflict' and 'contract interpretation issues'.

Although the construction sector in Asia has seen a gradual change in claims culture in recent years with, among others, a wider adaptation of the improved NEC and FIDIC contract forms, improvements in record-keeping and a timely resolution of issues, factors such as the quality of design and contract interpretation are still increasingly causing disputes in the region.

The challenges embedded in cultural differences

While the aforementioned "common causes" apply to major capital projects, they exist within a web of other interrelated causation factors; one such distinctive factor in the Asian region is cultural differences, including the fragmented interests among cross-border stakeholders and contracting parties. The prevalence of a variety of Asian contractors working across the world does contribute to increased cultural complications, especially in project execution. One common concern is the focus on cutting costs, notwithstanding the outcome, which often leads to deficiencies in contract management and, in turn, leads to an increase in "sympathy claims", instead of an evidence-based submission founded on credible and comprehensive record keeping, which generally prevents such claims succeeding.

Complex cultural factors aside, disputes are also likely to be exacerbated by risks and uncertainties, whether they stem from political agendas on more prominent sectors, such as renewable energy and infrastructure projects, or whether they relate to contract governance. In the interest of partaking in opportunities, overwhelming mutual trust, and subjective understanding of contract terms between parties do at times result in poor risk assessment, resulting in unbalanced risk allocation. Many contractors commit to contracts without fully understanding their risk exposure and only seek to negotiate terms for recovery after the event. Inappropriate risks being pushed down to contractors, and subsequently down through the supply chain, inevitably generates claims, if mitigation measures fail. Project owners in the region very often underestimate the need for investing in a sound risk register as a comprehensive means of monitoring risks and allocating them to the party best able to manage them.

Keeping up with these increasing challenges – governments to lead the way

The construction industry in Asia is becoming increasingly aware of the need to shift towards a greater collaborative culture, through the alignment of interests through early engagement of the supply chain, to manage problems as they emerge on a project. The shift is however still relatively slow in the Asia region, compared to that within Europe and America, where issues relating to cultural and cross-border barriers are less significant. With megaprojects across all sectors on the rise in Asia, government contracts are best placed to foster and cultivate a culture that emphasises partnering principles, balanced risk-sharing and operating with good faith, allowing a raft of standardised policies and best practice protocols to be developed and practised. This should facilitate mutual understanding and agreed interpretations of contracts, and a more robust basis for managing differences/disputes.

What does it all mean?

As contractors take on increasingly challenging projects, design and construction complexities also increase accordingly. The pattern of claims and disputes will remain entrenched in the construction landscape until lessons are learnt from the repetitive failures across the sector. While there are positive signs that project stakeholders will re-focus on dealing with the recurring causes of disputes, the hope is that this change in business objectives involving cultural barriers, risk management and other good governance practices will keep pace with the rise in project complexities.

Contact details



Scott Ramsden
Principal, Quantum Expert
scottramsden@hka.com



Janice Cheng
Senior Consultant
janicecheng@hka.com

This article presents the views, thoughts, or opinions only of the author and not those of any HKA entity. While we take care at the time of publication to confirm the accuracy of the information presented, the content is not intended to deal with all aspects of the subject referred to, should not be relied upon as the basis for business decisions, and does not constitute professional advice of any kind. This article is protected by copyright © 2023 HKA Global Ltd.