

SCHOUPS

Construction disputes:
what will 2021 bring?

10 December 2020





SCHOU PS

SOME NUMBERS

70 years young

2 offices (Antwerp and Brussels)

65 lawyers

41 is average age of partners

80+ news flashes per year

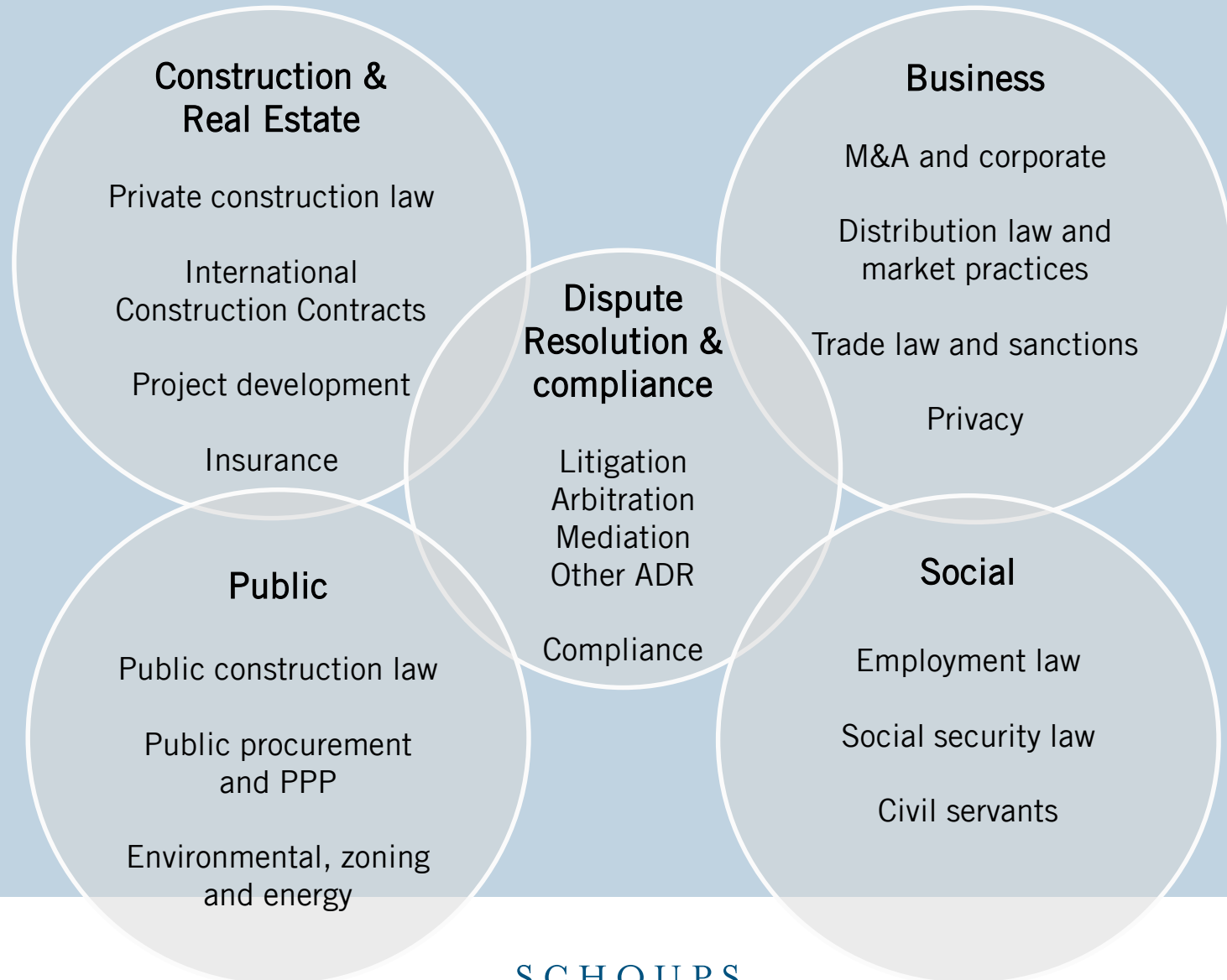
+/- 12 client seminars per year
(and a lot of webinars)

+/- 12 publications per year



SCHOUPS

AREAS OF EXPERTISE



SCHOUPS

Siegfried Busscher

- Partner
- Construction law and International Construction Contracts
- Member of the editorial board of the Construction and Real Estate Law Review



Geert De Buyzer

- Partner
- Dispute resolution in commercial, corporate and construction matters
- Accredited mediator and collaborative lawyer



Marco Schoups

- Managing Partner
- Former President of the Antwerp Bar Association
- Listed with Legal 500 and Chambers as Leading Individual in Real Estate and Construction



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PREPARING FOR CLAIMS

I. PREPARING FOR CLAIMS

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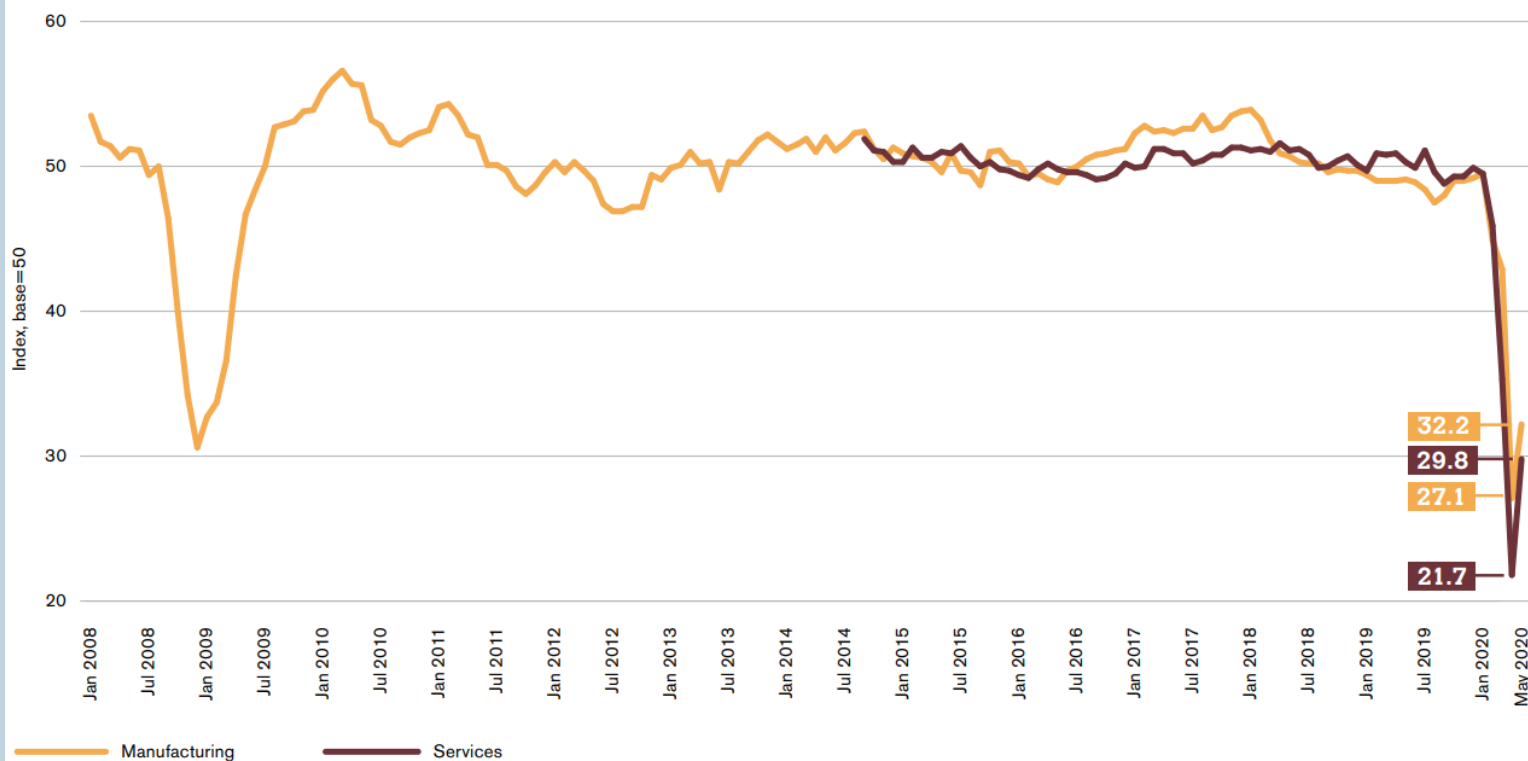
COVID-19 PANDEMIC - SHARED CONCERNS

- ➔ Immediate effects on worldwide health
- ➔ Domestic governmental measures with cross border effects
- illness ⇔ availability of talent, concern for life & health
- on site measures ⇔ diligent and timely performance of works
- transport measures (domestic and cross border) ⇔ availability of materials, equipment and personnel
- complete lockdowns; restricted access
- regulatory changes ≈ governmental policies and scientific developments ⇔ regulatory certainty and stability
- shift in investment priorities ⇔ focus on construction

WORLD MERCHANDISE TRADE 2020

Global PMI new export orders indices, January 2008 - May 2020

(Index, base=50)



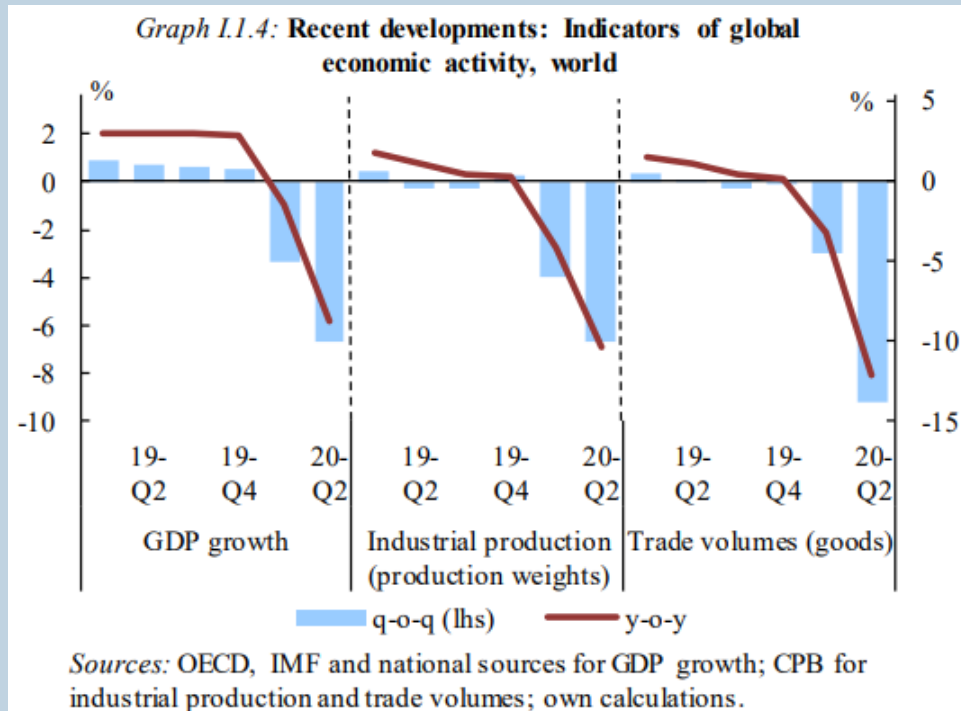
Note: Values greater than 50 indicate expansion while values less than 50 denote contraction.

Source: IHS Markit.

WTO - World Trade Statistical Review 2020

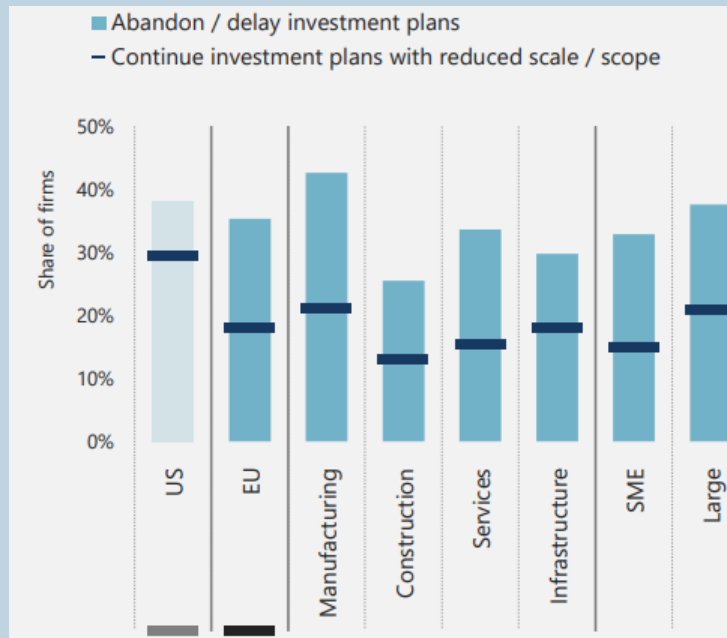
© WTO 2020

WORLD GDP GROWTH, PRODUCTION & TRADE 2020



European Economic Forecast – Autumn 2020
© European Commission 2020

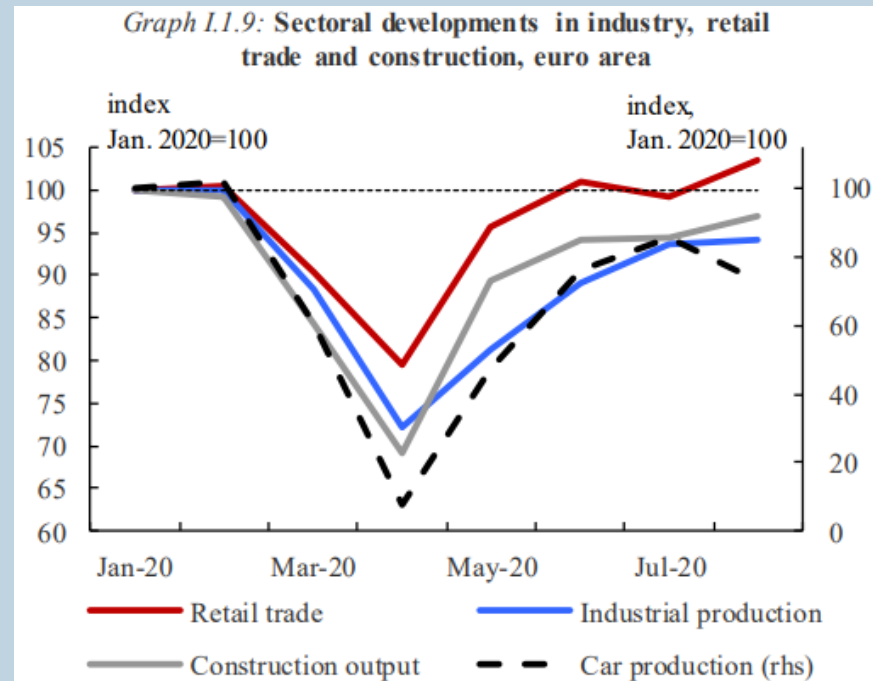
CONSTRUCTION SECTOR INVESTMENT DYNAMICS 2021



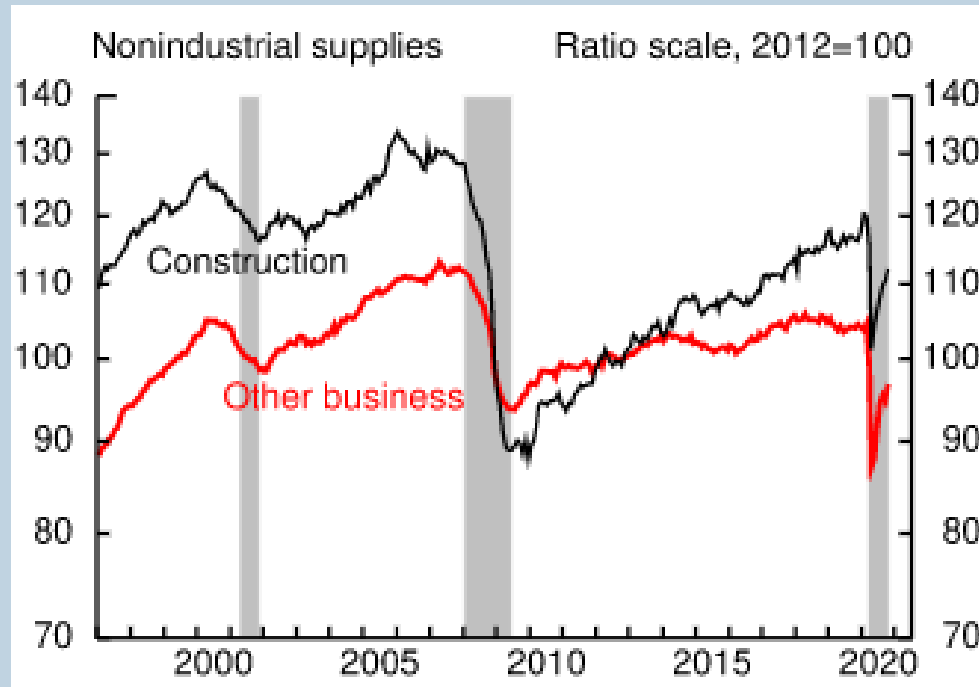
EIB Investment Study 2020 EU Review
 © European Investment Bank 2020

European Economic Forecast – Autumn 2020
 © European Commission 2020

Common delay / abandon in investment (35%)
 ⇔ more continuation in US
 ⇔ fewer delay / abandon in construction industry



US CONSTRUCTION 2020

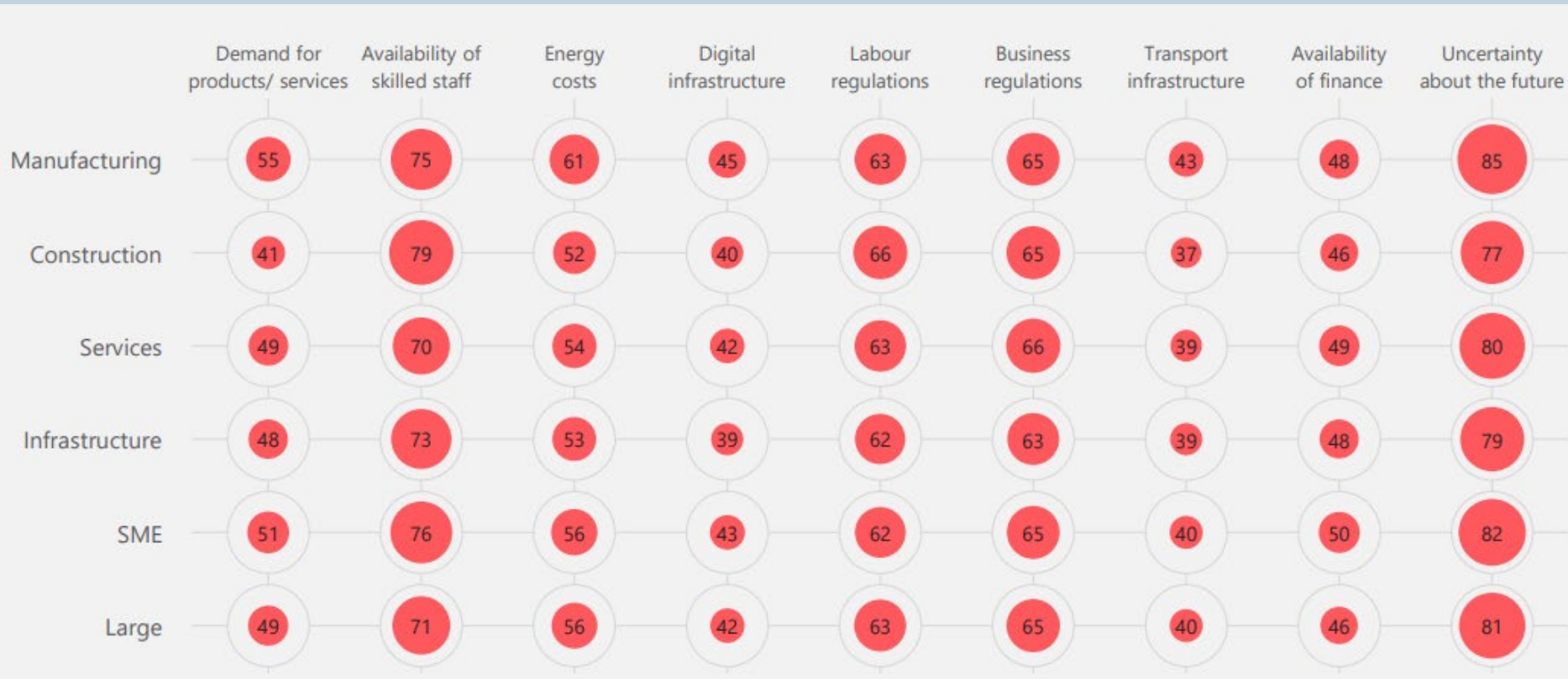


US Federal Reserve Statistical Release G.17 (419); November 17, 2020
© Federal Reserve 2020

“Industrial production rose 1.1 percent in October. The index has recovered much of its 16.5 percent decline from February to April, but output in October was still 5.6 percent lower than its pre-pandemic February level.”

“The indexes for [...], construction supplies, business supplies, and materials each advanced 1.0 percent or more in October”

CONSTRUCTION SECTOR OBSTACLES FOR INVESTMENTS



Obstacles in construction:
 1.Availability of skilled staff
 2.Uncertainty about the future

EIB Investment Study 2020 EU Review
 © European Investment Bank 2020

SHARED CONCERNS ⇔ DIVIDED RESPONSIBILITIES

- Contractor's risks and obligations
 - Timely and duly performance of the assignment ⇔ **measures**
 - On site health, safety and environmental obligations ⇔ **completion date**
 - Compliance with law ⇔ **new regulations**
- Employer's risks and obligations
 - Enabling the works
 - allowing the works ⇔ **investment focus shift**
 - access to site ⇔ **measures**
 - general building permits ⇔ **a darker shade of red tape**
 - General health and safety obligations for personnel
 - On site, shared responsibility for compliance to domestic law, including HSE obligations
 - Timely payment for works and services

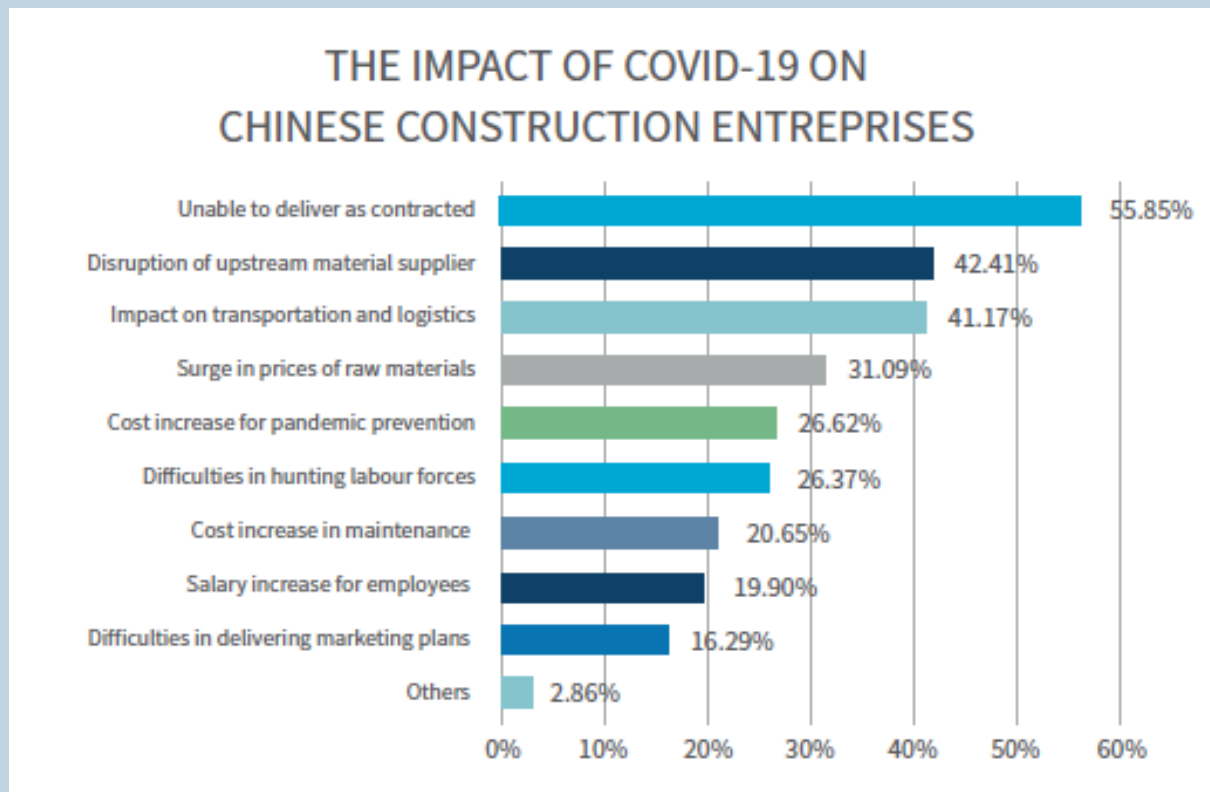
SHARED CONCERNS ↔ DIVIDED RESPONSIBILITIES

- Communicate:
 - time-barred obligations
 - cooperation and coordination
 - practical solutions

COVID-19 CAUSES FOR CLAIMS

- Immediate effects + governmental measures
 - ➔ additional (impractical) onsite HSE-measures; travel and housing restrictions (fewer personnel); temporary lockdowns...
 - ➔ performance of the works suspended or slowed down
 - ➔ decisions and determinations suspended or slowed down
 - ➔ acceleration measures to remedy delays
 - ➔ change in costs of material, equipment & personnel
- Claims
 - EOT
 - Compensation for EOT, prolonged onsite presence
 - Compensation for Changes & Variations
 - Termination for convenience + compensation
 - Termination for continued force majeure event

COVID-19 CAUSES FOR CLAIMS



The Impact of COVID-19 on the Construction Industry in China – Lexology

© FTI Consulting Asia Pacific 2020

COVID-19 RESPONSE TO / QUERIES ON CLAIMS

- Formal notification requirements (time-barred or presumption of waiver; medium; addressees...) = form
- Merit: supporting particulars, contemporary records
- Force Majeure
 - ⇔ Established impact on critical path of the Works; previous delays; concurrency of delays?
 - ⇔ Foreseeability (new waves and lockdowns; mutation...)?
 - ⇔ Impossibility of performance? Which specific obligation(s) prevented?
 - ⇔ Mitigating measures
- Hardship
 - ⇔ Domestic legislation (e.g., Belgian civil law)
 - ⇔ Contract particulars

FIDIC GUIDANCE MEMORANDUM 2020



- Reminder of principles:
 - cooperation & trust;
 - no undue advantage bargaining power;
 - focus on dispute avoidance and timely & adequate payment
- Communicate!

FIDIC GUIDANCE MEMORANDUM 2020



- Unforeseeable shortages personnel or goods caused by epidemic or governmental actions → **EOT** (RB, YB) (no compensation) (↔ limited in SB)
- Changes to the Law → obligation to comply, **Variation** or claim event (= **EOT** and **compensation**) (RB, YB, SB)
- Exceptional Event or Force Majeure (RB, YB, SB) → **EOT** (no compensation) (“Covid-19 = Ex.Ev.”? Not always)
- Restriction of access to site → **EOT** and **Compensation** (RB, YB, SB)
- Slow decision making by Employer or Engineer → **EOT** (no compensation, unless...)
- Instruction to suspend → **EOT**, **compensation** and termination

NEC4

- Changes to the Law (option X2 → Core Cl. 60, **Compensation** event)
- Prevention event, constituting a **Compensation** Event, if real impact on date for completion not to be remedied (Core Cl. 19; instruction by Project Manager on how to deal with events → Core Cl. 60.1(19))
- Changes in the works, delayed communications or withheld acceptances constituting a **Compensation** Event (Core Cl. 60.1(1) (6) (9))



CASE STUDY

- Tank storage facility, The Netherlands – Fidic YB 1999
 - March 2019 contract close
 - August 2019 installation of DAB (*adjudication*, not *avoidance*)
 - 2019-... performance of works
 - sub-contractors



(Example of tanks, not the actual project of the case study)

CASE STUDY

- Covid 19 measures in The Netherlands, Belgium, Slovakia, Czech Republic...
- Force Majeure (cl. 19 YB 1999), EOT Claim (cl. 8.4(d)) and change in law (13.7)
 - Contractor: notices as of March 2020 for Contractor's claim
 - Employer & Engineer: request for
 - details of causes
 - details of consequences
 - explanations on mitigating measures
 - Contractor: Further clarifications; detailed log; summary and supporting particulars for financial and timing implications... (including sub-contractor claims)
- System of determination and adjudication ⇔ stay / respite

2020 SURPRISES ⇔ DEEMED KNOWLEDGE IN 2021

- Continued influence of FM Event / Exceptional Event / Hardship / Changes & Variations
 - Performance of Changes caused in 2020 events
 - Descoped works
 - Suspension
 - Termination
- Unforeseeable → foreseeable (mutations; new lockdowns...)
 - ⇔ new FM Events / Exceptional Events / Hardship

COVID-19 RAPID RESPONSE SERVICES

- Schoups Virtual Round Tables
 - several digital round tables
 - periodical updates
 - clients (construction professionals) and industry interest groups
- Contract reviews (ongoing projects; commencing projects)
- Contract management (strategical counsel; notices)
- Task force
- Clients practical and st/lt concerns ≈ firm practical and st/lt concerns



ADR METHODS FOR AVOIDING OR RESOLVING DISPUTES

II. ADR METHODS FOR AVOIDING OR RESOLVING DISPUTES

1. GENERAL
2. A COLLABORATIVE APPROACH
3. MEDIATION
4. DISPUTE BOARDS



1. General

Why opt for ADR?

- Predictability and control
- Faster resolution
- Lower costs
- Preserve relationship
- Tailored to the issues at stake

1. General

ADR: the options

- Negotiations between parties
- Negotiations between parties with the help of a third party
- Non-binding recommendations / advice of a third party
- Binding decisions of a third party

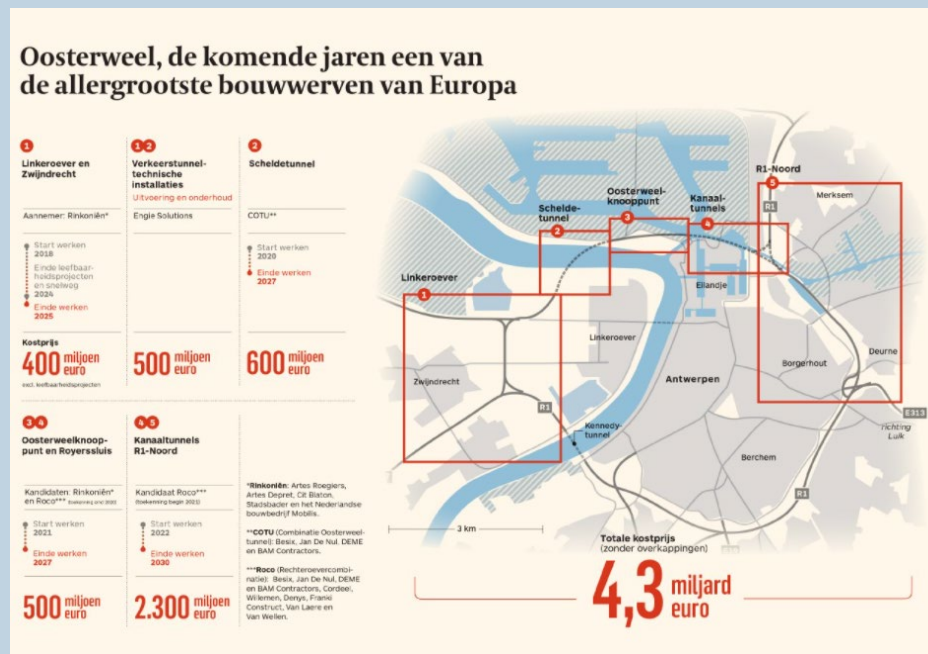
1. General

Points of attention

- Contractual framework
- Communication
- Timing
- Joint interests
- Authority
- Realism

2. A collaborative approach

- Building team
- NEC4



© De Tijd, 5 December 2020

3. Mediation

- Unknown, unloved in Europe?

Europe:

2019 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2018 RANK
1	Party-to-party negotiation	1
2	Arbitration	New ranking in 2019
3	Litigation	New ranking in 2019

North America:

2019 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2018 RANK
1	Mediation	2
2	Party-to-party negotiation	1
3	Litigation	New ranking in 2019

Middle East:

2019 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2018 RANK
1	Party-to-party negotiation	1
2	Arbitration	2
3	Mediation	3

© Arcadis Global Construction Disputes Report 2020

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3. Mediation

Recent evolutions

- Belgian Act on Mediation (2018):
 - court can order mediation, even against the will of a party
- Singapore Convention on Mediation
 - harmonised and simplified enforcement of mediated settlement agreements
 - entered into force on 12 September 2020

4. Dispute boards

- Dispute avoidance
- Dispute review or adjudication
- Standing or *ad hoc*
- Site visits during COVID-19?
 - Pictures/videos (drone), timelapse, ...
 - Virtual meetings



LITIGATING OR ARBITRATING CONSTRUCTION DISPUTES

III. LITIGATING OR ARBITRATING CONSTRUCTION DISPUTES

1. GENERAL
2. RESPONSES TO COVID-19
3. SOME EXPERIENCES WITH ARBITRATION

1. General

For international construction disputes, arbitration is generally preferred over litigation.

ICC Dispute Resolution 2019 statistics:

211 of the 869 new case filed were within the sectors of construction/engineering

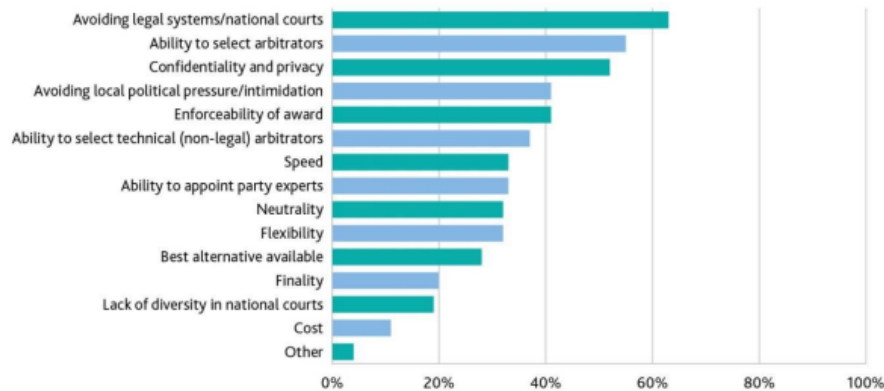
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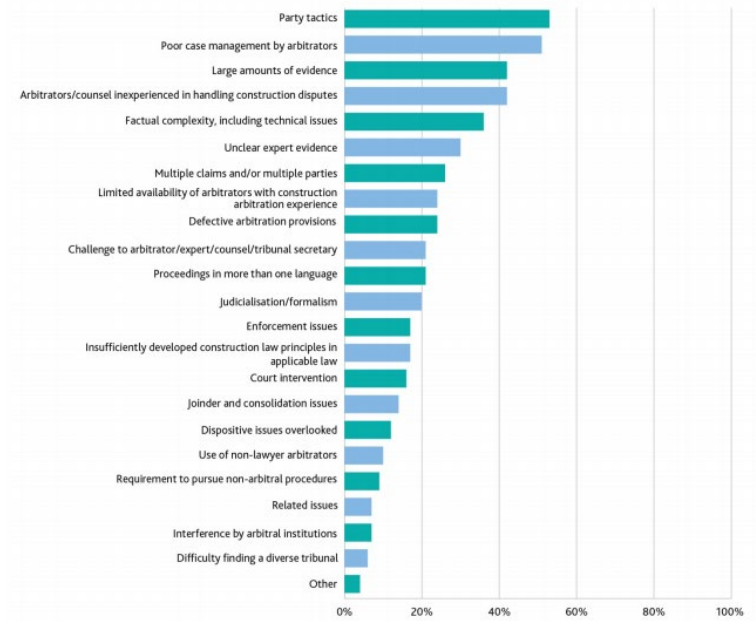
1. General

Reasons:

In your experience in the last five years, why have parties chosen international construction arbitration over litigation for resolving international construction disputes? (One or more responses)



In your experience in the last five years, what makes or can make international construction arbitration inefficient? (One or more responses)



© international arbitration survey 2019

1. General

Main differences between litigation and arbitration (from a Belgian perspective)

- Cost
- Speed
- Language
- Flexibility
- Confidentiality / privacy
- Enforceability
- Joinder and consolidation
- Knowhow (?)
- ~~Neutrality~~

2. Responses to COVID-19

- Most arbitration institutions have quickly issued rule changes, guidelines and protocols
 - electronic-only submission of request for arbitration
 - electronic-only filing of submissions
 - virtual hearings
 - electronic-only notification of award
- (Belgian) national courts have also responded
 - suspension of prescription period
 - suspension of procedural terms
 - written procedure
 - virtual hearings (second wave)

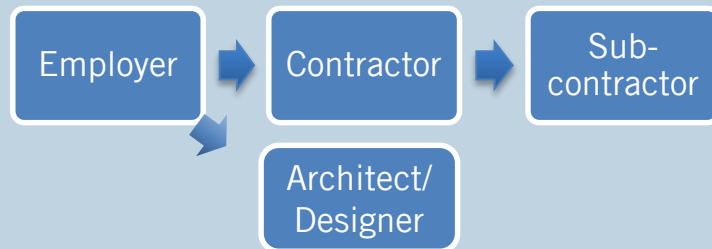
3. Some experiences with arbitration

1)



Both contracts contain similar (but not the same) arbitration clause → two parallel arbitration procedures

2)



Subcontractor has a direct claim on the Employer and is not bound by an arbitration clause in the relation Employer-Contractor

IV. Conclusion – what will 2021 bring?

- Claims are being prepared
- More important than ever to avoid that claims turn into disputes
- Will the current consensus towards a collaborative approach prove to be sustainable?
- ADR remains an option, even in the phase of litigation/arbitration

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QUESTIONS?



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