

Around the World: Latest Construction Disputes Developments From: (1) Europe, (2) Middle East and (3) Africa

Paris Arbitration Week

20 March 2024

dwfgroup.com





Speakers

- **Yolanda Walker**, Partner, DWF (UK), Moderator
- **Maciej Jamka**, Partner, DWF (Poland)
- **Ahmed Habib**, Senior Associate, DWF (Qatar)
- **Nicholas Maciolek**, Barrister, Atkin Chambers



Agenda

- Welcome and presentation on key ADR trends and development in Africa, Yolanda Walker
- Presentation on key ADR trends in Europe, Maciej Jamka
- Presentation on Key ADR trends in the UK, Nicolas Maciolek
- Presentation on Key ADR trends in GCC, Ahmed Habib



Welcome and presentation on key ADR trends and development in Africa

Yolanda Walker

Partner, DWF

Africa

Trend No. 1

The “knock on effect”

- Rapid population growth
- Increase in construction and infrastructure
- Cost implications
- Time impact
- Disputes

Africa

Trend No. 2

The capacity build...

- African Arbitration Academy
- Africa Construction Law
- The ICC Africa

Africa Trend No. 3 Dispute Avoidance!

- Early risk management
- Market knowledge – the price is the price!
- Commercial discussions

Africa

Trend No. 4

The long game...

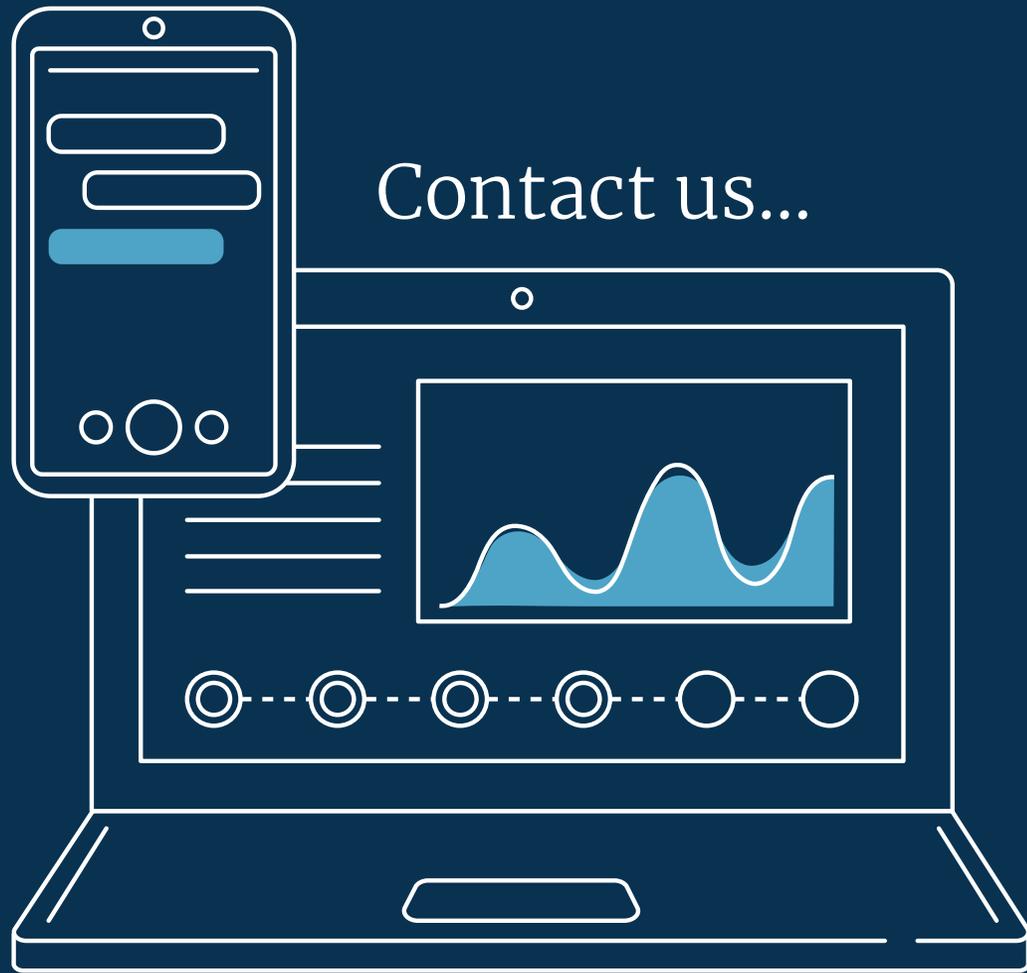
- International investment
- Term of investment
- Interest in Arbitration?
- Appetite thereafter (for parties with shallower pockets)?

Africa

Trend No. 5

The horizon...

- Nigerian Arbitration and Mediation Act 2023
- Malawi's International Arbitration Bill 2023
- Africa Continental Free Trade Area Investment Protocol



Yolanda Walker

Partner

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Pandemic, war, and inflation – what's next for the construction markets in Europe?

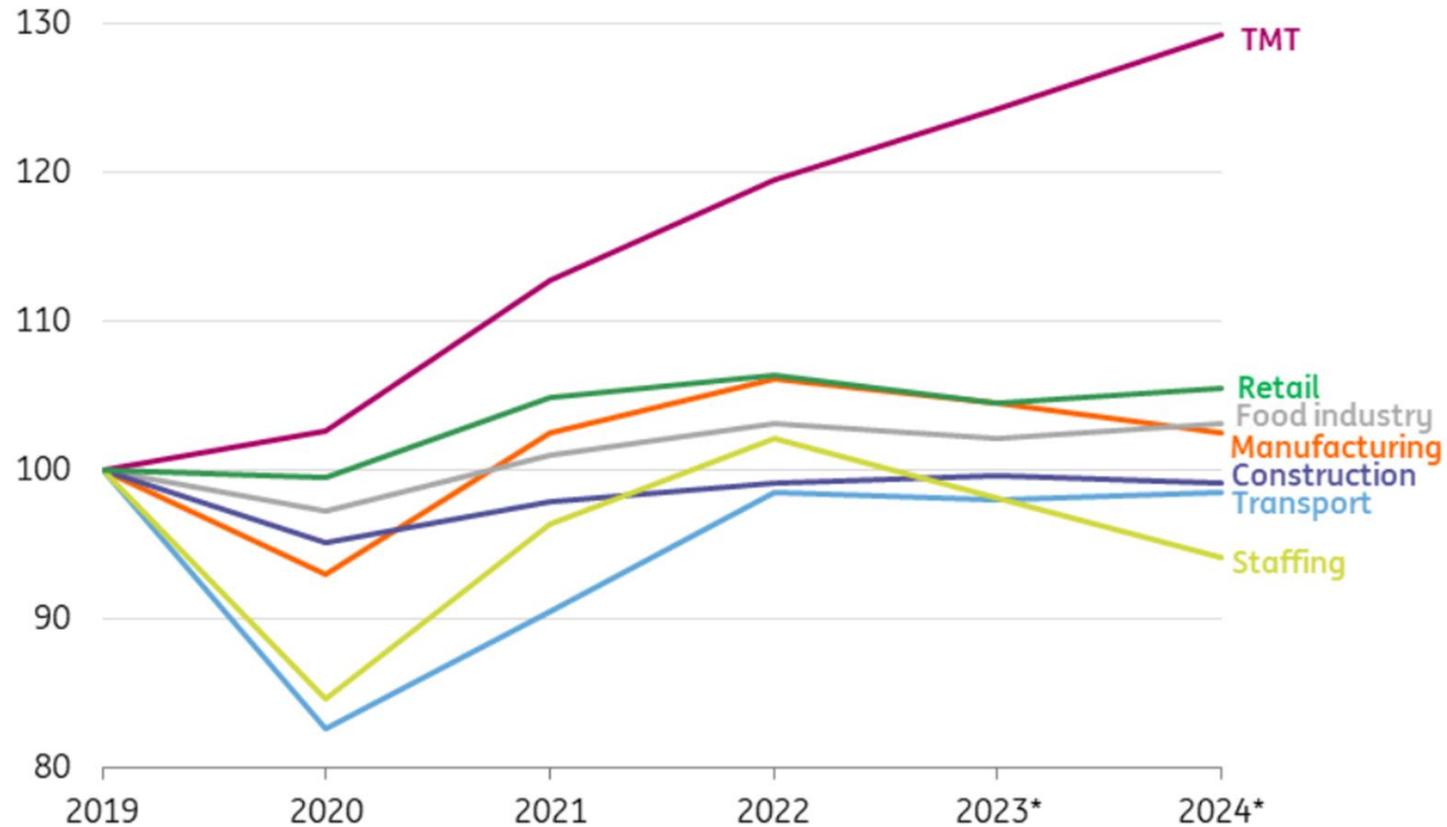
Dispute resolution for construction claims in Europe

Maciej Jamka

Partner, DWF

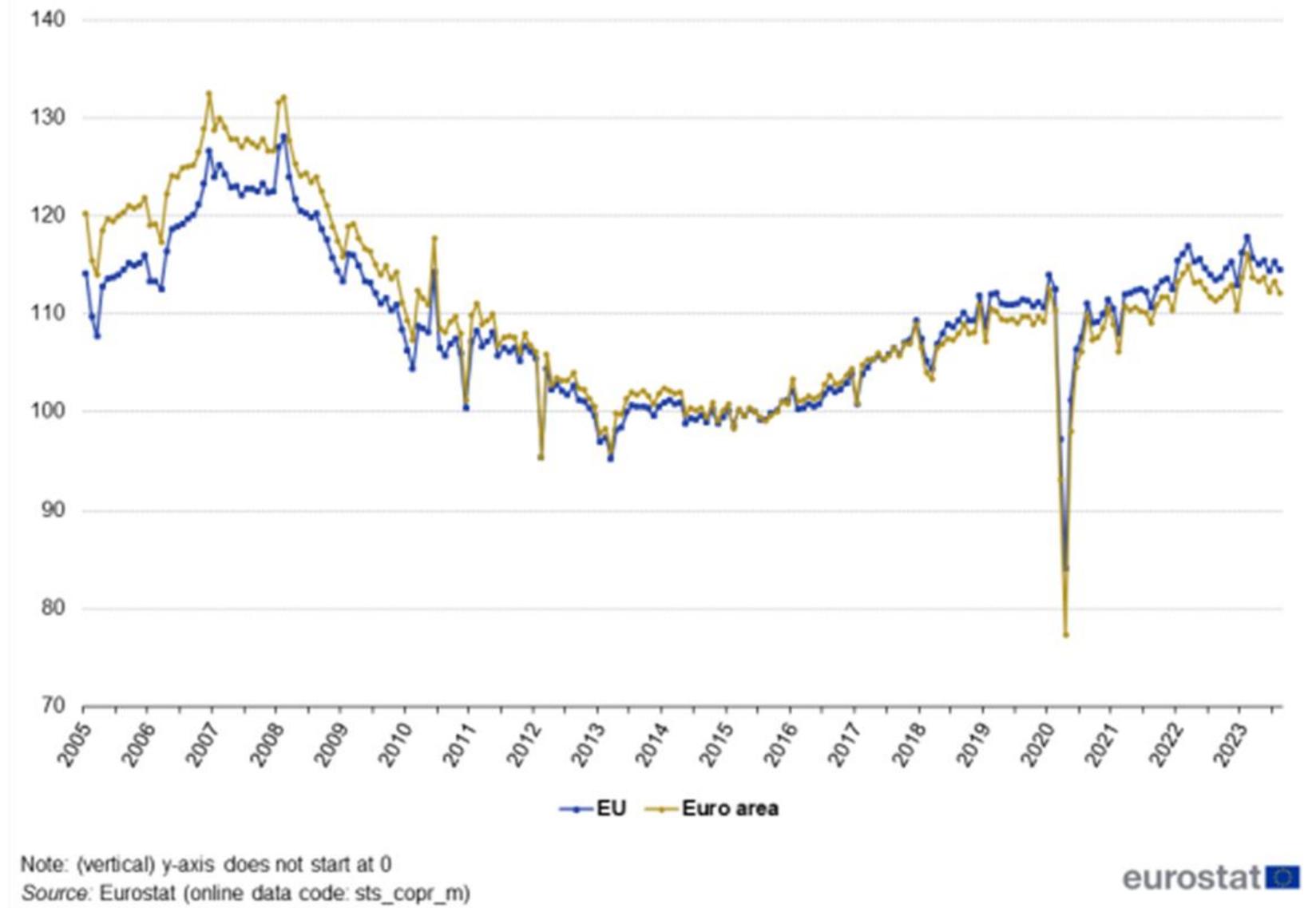


Development production across EU sectors



Eurostat, ING Research (*2023 estimate and 2024 forecast)

Construction production 2005-2023



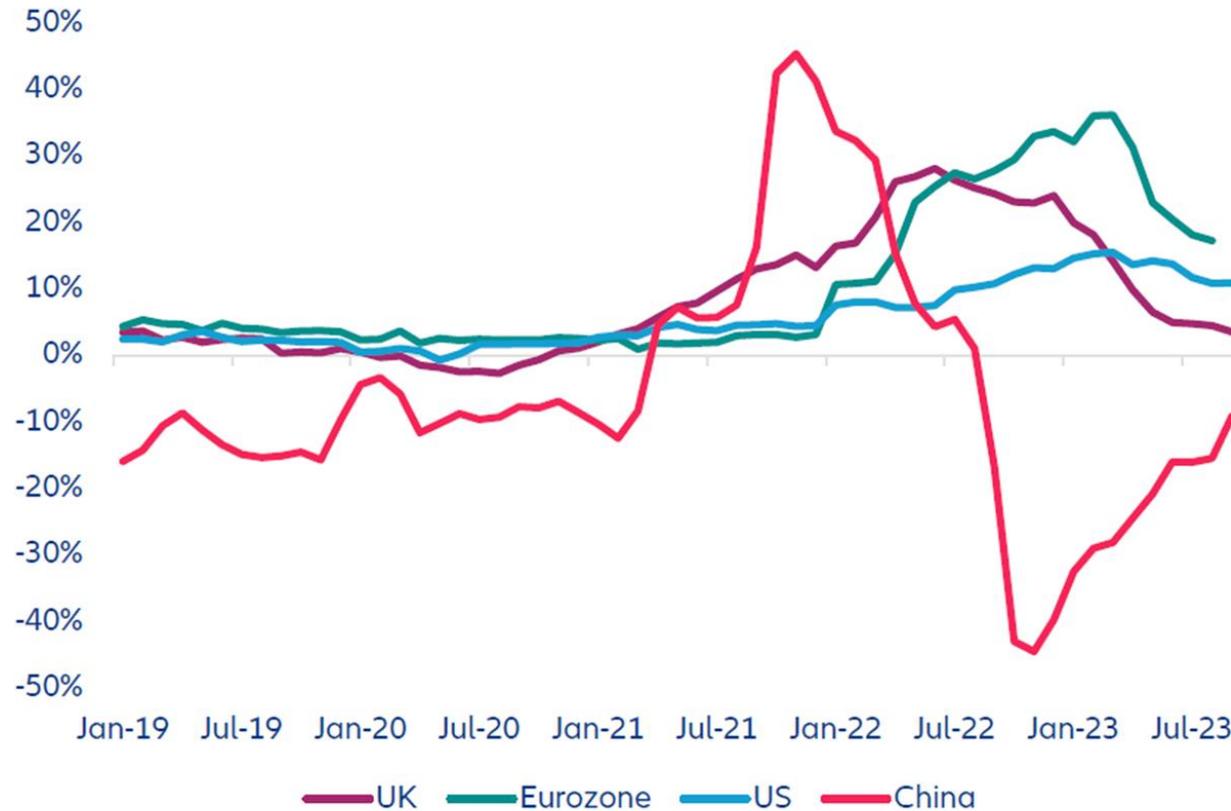
The issuing of EU building permits is declining

New non-residential buildings permits in m2 excluding offices & new number of residential buildings permits in the EU (index 2018 Q1 = 1000. SA)



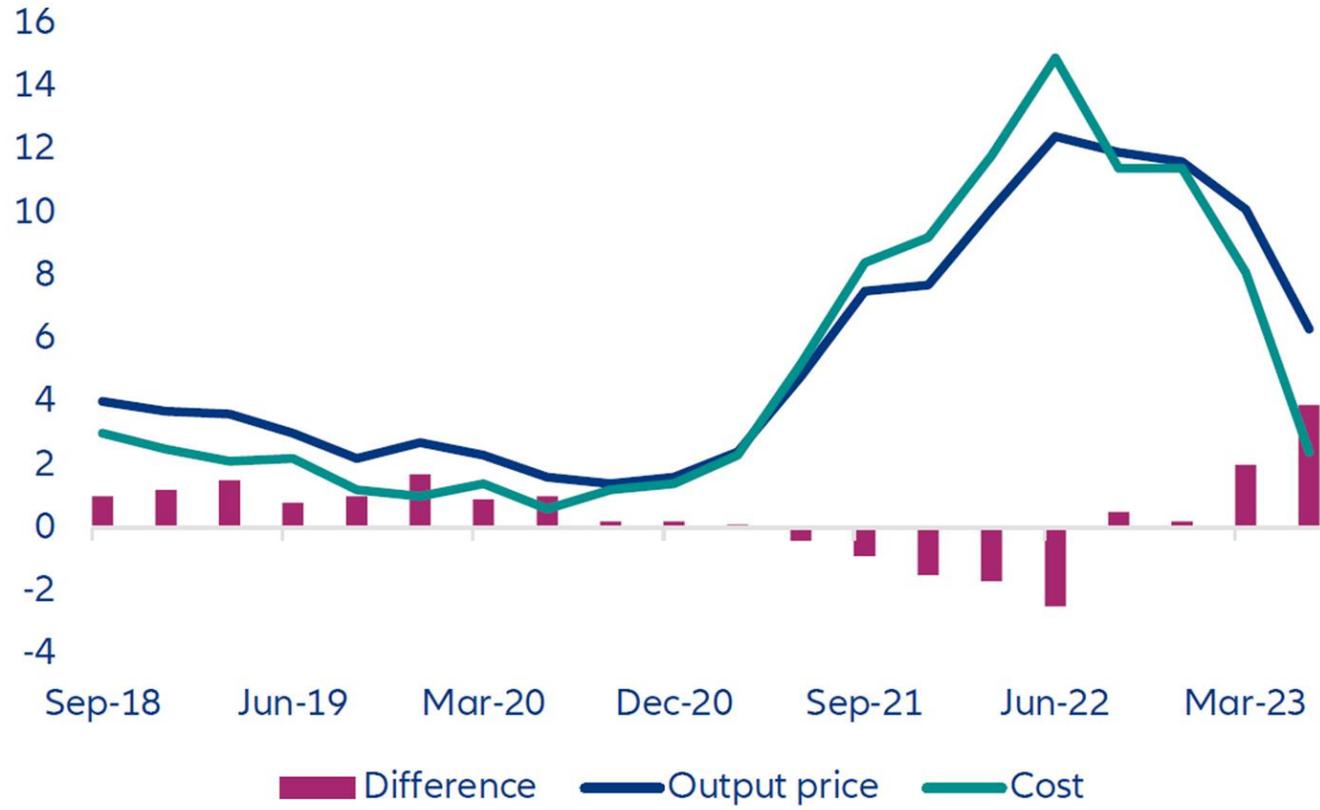
Eurostat, ING Research

Producer prices for cement



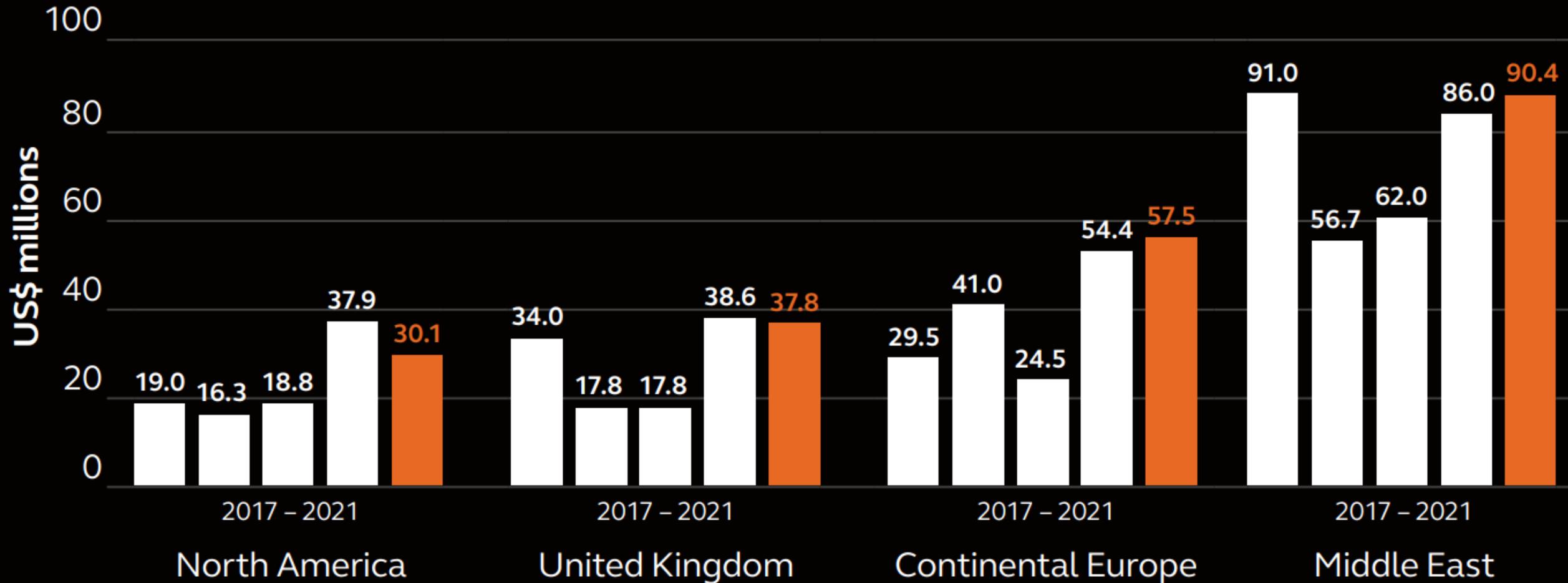
Sources: Refinitiv, IMF, Allianz Research

Construction output prices vs input prices in the EU



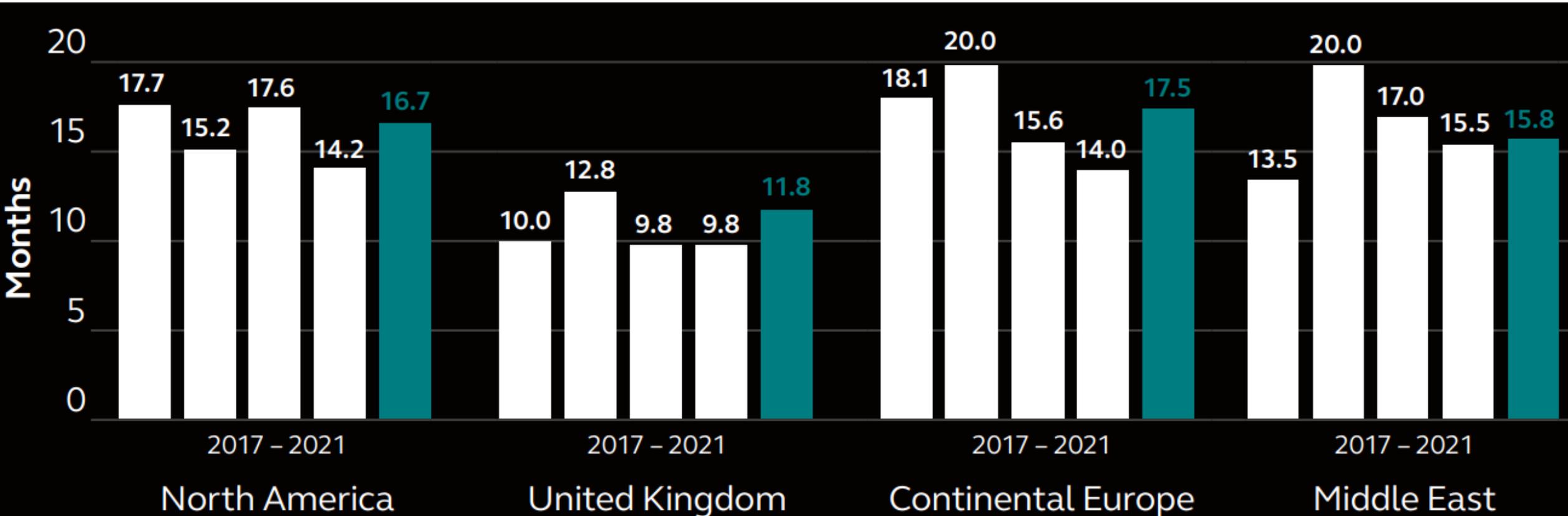
Sources: Refinitiv, Allianz Research

Regional average dispute value



Source: Arcadis 2022 Global Construction Disputes Report

Regional average dispute length



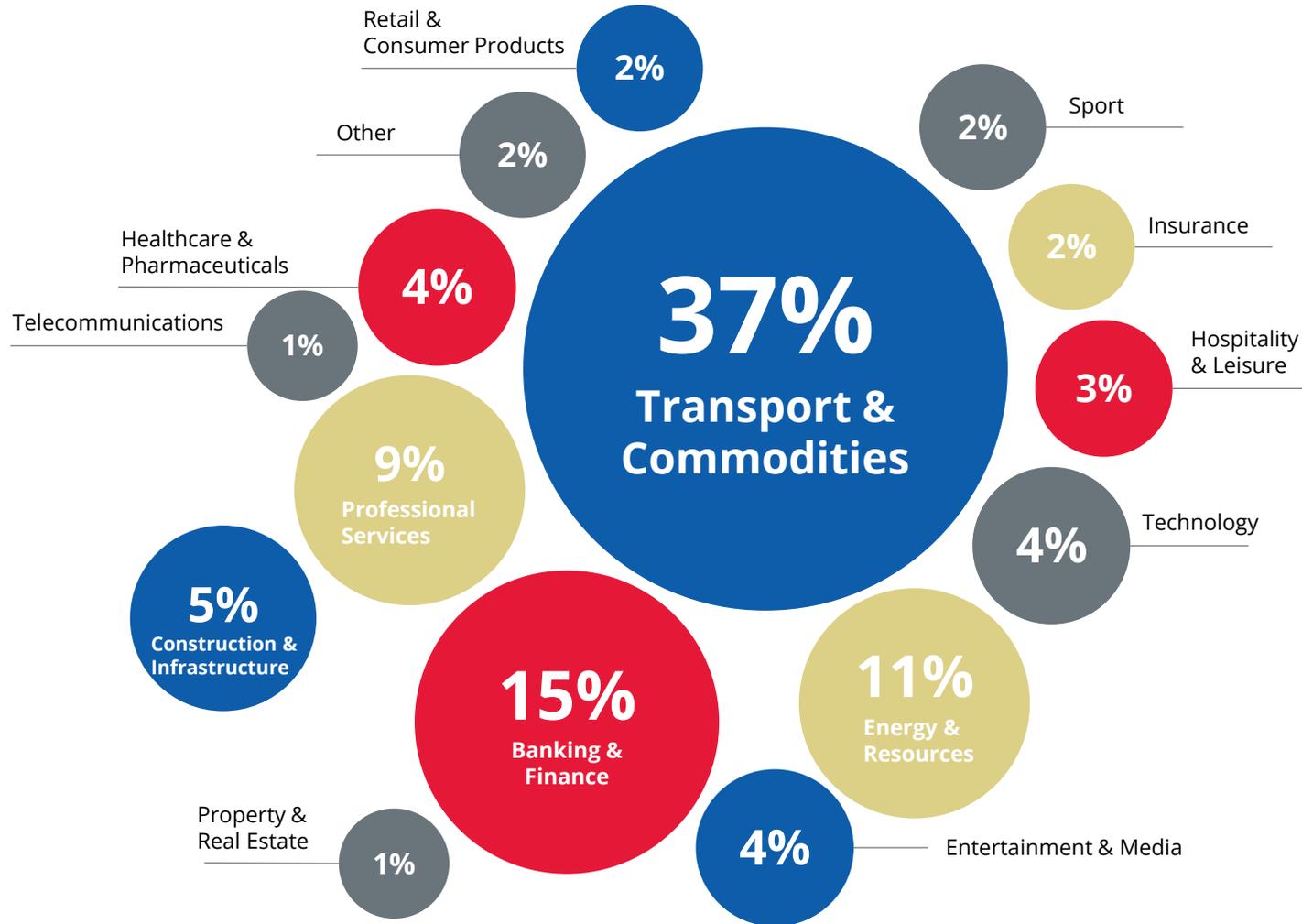
Source: Arcadis 2022 Global Construction Disputes Report

Specialised courts

The screenshot shows the website for the Kammer für Baulandsachen (Specialised Chamber for Building Matters) in Detmold. The header includes navigation options for 'LEICHTE SPRACHE', 'GEBÄRDENSPRACHE', 'BARRIEREFREIHEIT', and 'KONTAKT'. The main navigation bar features icons for 'MENÜ', 'GESCHÄFTSVERTEILUNG', 'ÖFFNUNGSZEITEN', 'PRESSE', 'REFERENDARABTEILUNG', 'SITZUNGSTERMINE', and 'SUCHE'. Below this, a dark blue bar contains the text 'Startseite > Aufgaben > Abteilungen' and 'Kammer für Baulandsachen'. A sidebar on the left lists various departments under 'Abteilungen'. The main content area features an aerial map of a residential area with a legend on the right. The legend includes: 'Stadlerium', 'Toll & Kollberg', 'Regenröhrenabdeckungen', 'Grünraum mit Wege', 'Spielplatz', 'Bauhof EHN', 'Bauhof MHN', 'Bauhof', and 'Richtebauwerk'. Below the map, the text 'Umlegungsgebiet' and 'Quelle: LG Detmold' is visible. At the bottom, a dark blue box contains the text 'Kammer für Baulandsachen' and 'Zuständigkeit nach dem Baugesetzbuch'.

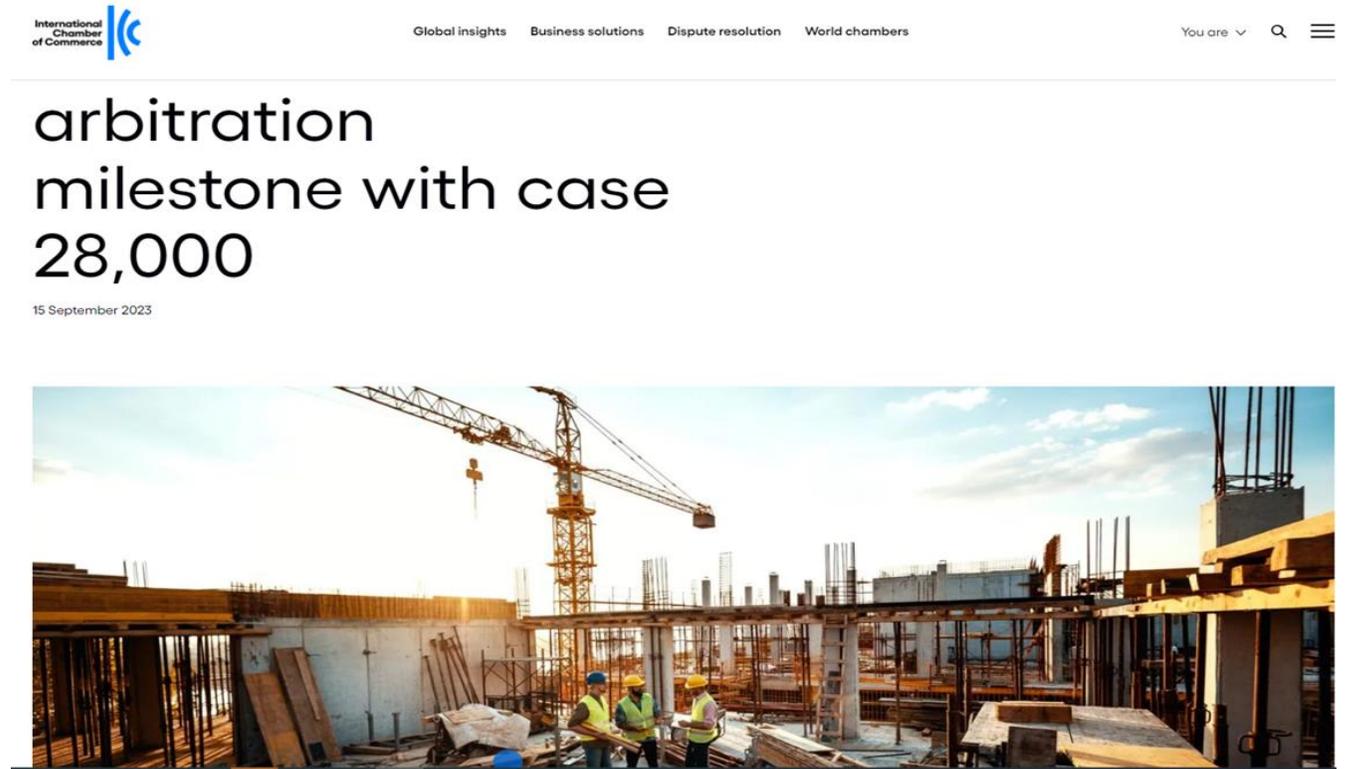
The screenshot shows the GOV.UK website for the Technology and Construction Court. The header includes the 'GOV.UK' logo, a 'Menu' dropdown, and a search icon. The main navigation bar contains the text 'Home > Courts and Tribunals'. The main content area features the title 'Technology and Construction Court' and the text 'Administered by HM Courts & Tribunals Service'. A sidebar on the right contains the text 'Take a case to the court', 'The Technology and Construction Court guide', 'File documents electronically with the court', and 'London Technology and Construction Court hearing and trial dates'. Below the title, a dark blue bar contains the text 'What we do'. The main content area contains the text 'We handle disputes about buildings, engineering and surveying. Cases that we hear include:' followed by a list of case types: 'claims about services provided by engineers, architects, surveyors and other professionals in this sector', 'claims about local authority duties relating to land and buildings', 'environmental claims (eg pollution)', 'claims resulting from fires', and 'challenges to decisions of arbitrators in construction and engineering disputes'. At the bottom, the text 'We do not normally handle cases with a value of less than £250,000 unless' is visible.

LCIA 2022 Annual Casework Report



Arbitration milestone with case 28,000

The 28,000th registered dispute concerns a major FIDIC infrastructure project that experienced delays due to COVID-19. The case involves a total of four parties, located in North and South Asia. The arbitration is administered by ICC's case management office in Singapore, which celebrates its fifth anniversary this year. As in previous years, 25% of the parties in ICC cases came from Asia and the Pacific. **In 2022, construction and energy disputes accounted for 45% of registered cases.**



Queen Mary University London, Future of International Energy Arbitration Survey Report 2023

Dispute resolution methods

What are the most effective methods of dispute resolution?

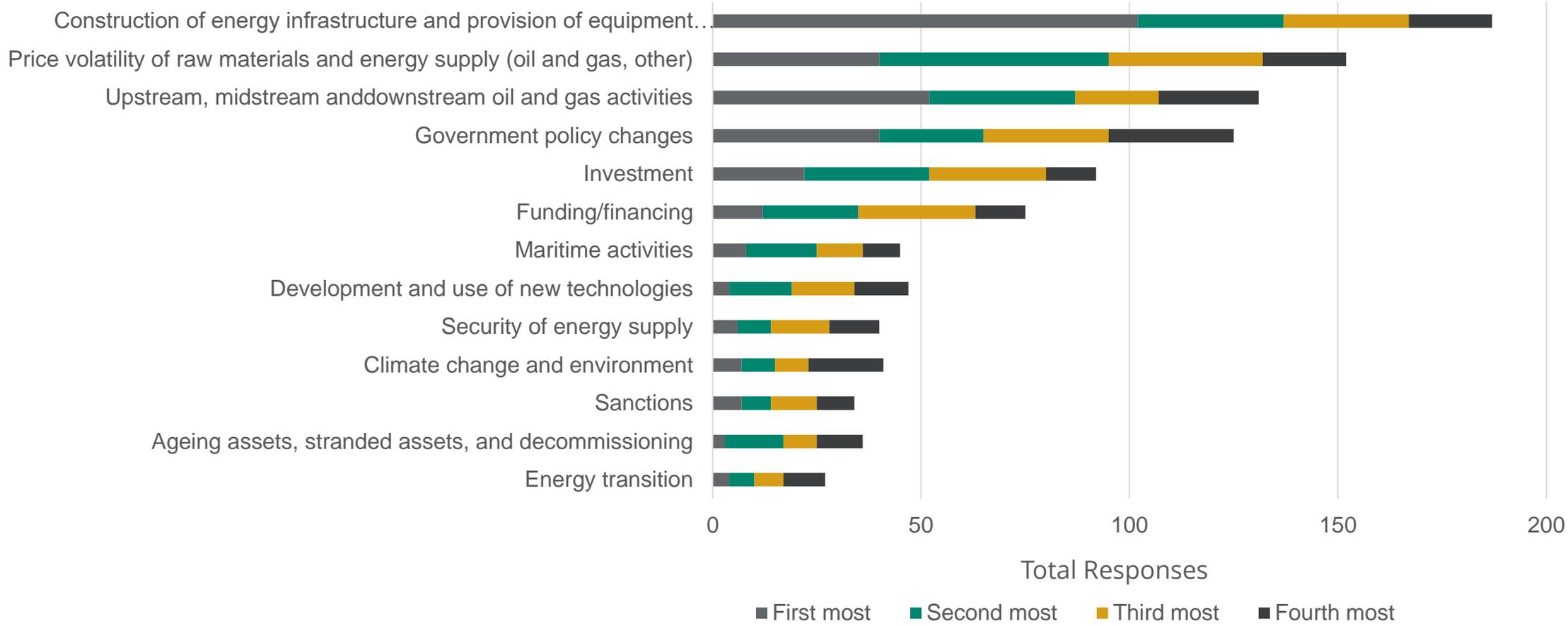
		2019	2020	2021	2022	2023	
1	Negotiation of the parties	78%	85%	78%	76%	74%	
2	Mediation	29%	38%	43%	49%	51%	
3	Common Court	36%	18%	13%	21%	19%	
4	Arbitration	15%	17%	22%	10%	14%	
5	Adjudication	14%	10%	16%	8%	8%	
6	'wait-and-see' approach	5%	1%	1%	3%	4%	

Change of position



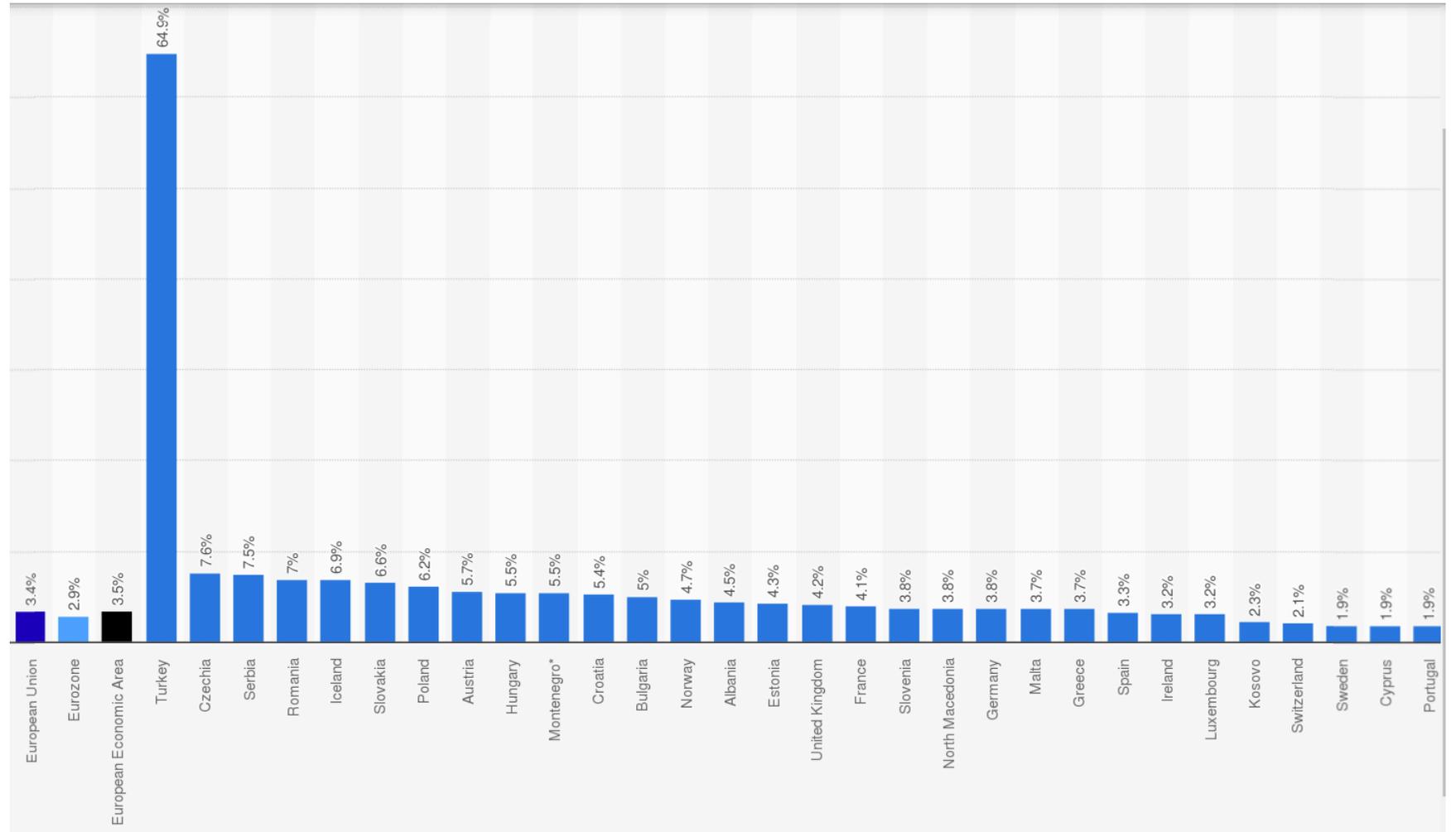
Source: Report on Construction Disputes in Poland 2023 - perspective for 2024, CAS

Causes of international energy disputes in the last five years



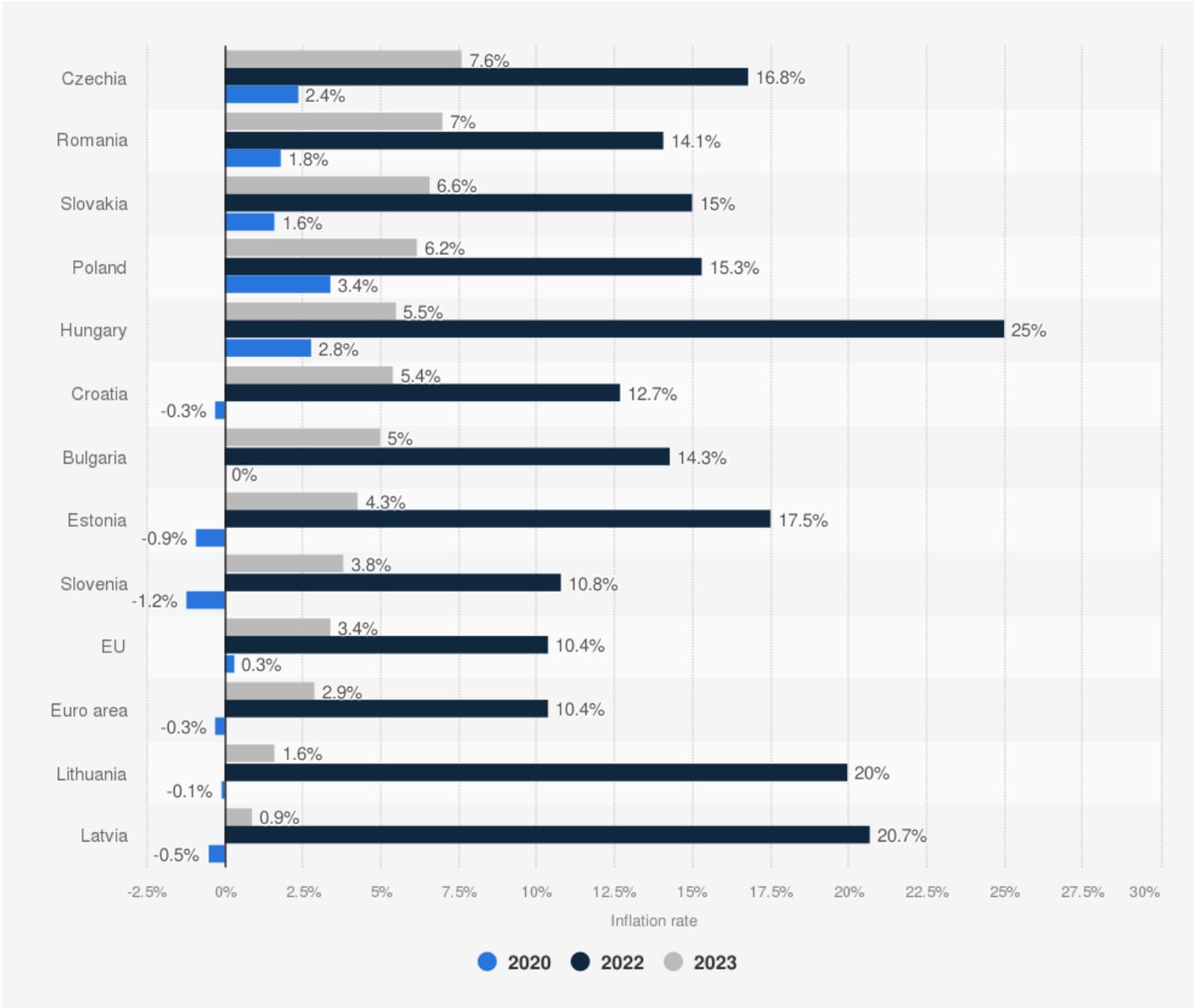
Harmonized index of consumer prices (HICP)

Inflation rate in Europe
in December 2023,
by country



Annual inflation rate in CEE

Central and Eastern European countries from December 2020 to December 2023



Source
Eurostat
© Statista 2024

Additional Information:
CEE; Eurostat; December 2020 to December 2023

**Prokuratoria Generalna
Rzeczypospolitej Polskiej**

**Sprawozdanie z działalności Prokuraturii Generalnej
Rzeczypospolitej Polskiej za 2022 rok**

General Counsel to the
Republic of Poland

Report on the activities of the General Counsel to the
Republic of Poland form 2022

**“ The total number of applications for
mediation and conciliation increased
from 2 in 2018 to 306 in 2022. ”**

Current themes



Force majeure



Good faith



Rebus sic stantibus



Price escalation



l'imprevison



Wegfall der Geschäftsgrundlage



Themes for the future



ESG



Energy change

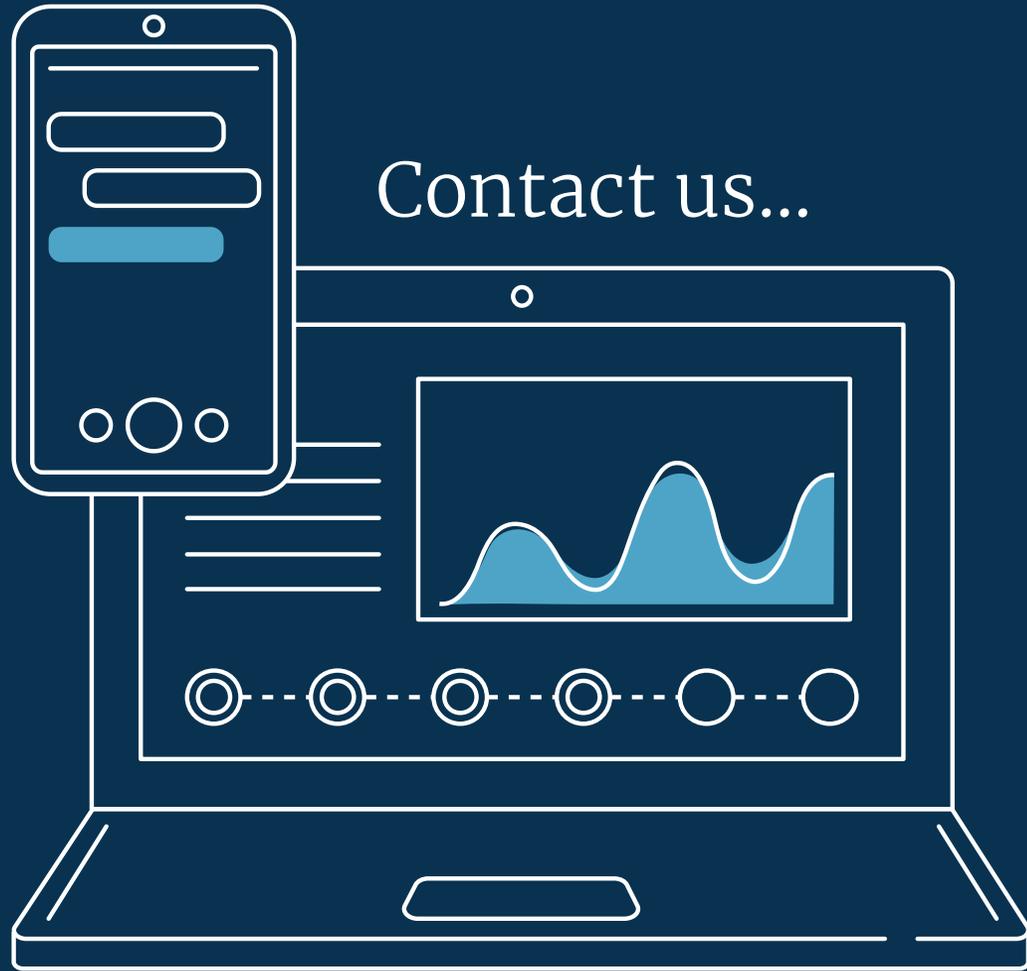


Reconstruction of Ukraine



Artificial intelligence





Maciej Jamka FCIArb

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Presentation on Key ADR trends in the UK

Nicholas Maciolek

Barrister, Atkin Chambers



The Arbitration Act – a ‘tidying-up exercise’

- New Arbitration Bill presented to Parliament in November 2023 – assent likely by mid-2024
- Many Arbitration Act 1996 provisions retained:
 - Confidentiality
 - Opt-out approach to appeals on points of law (s.69)
 - Duty of impartiality vs independence
- Two key developments for construction practitioners to note:
 - A statutory basis for summary disposal
 - Court orders to support arbitral proceedings against third Parties

Arbitration Act – Summary disposal

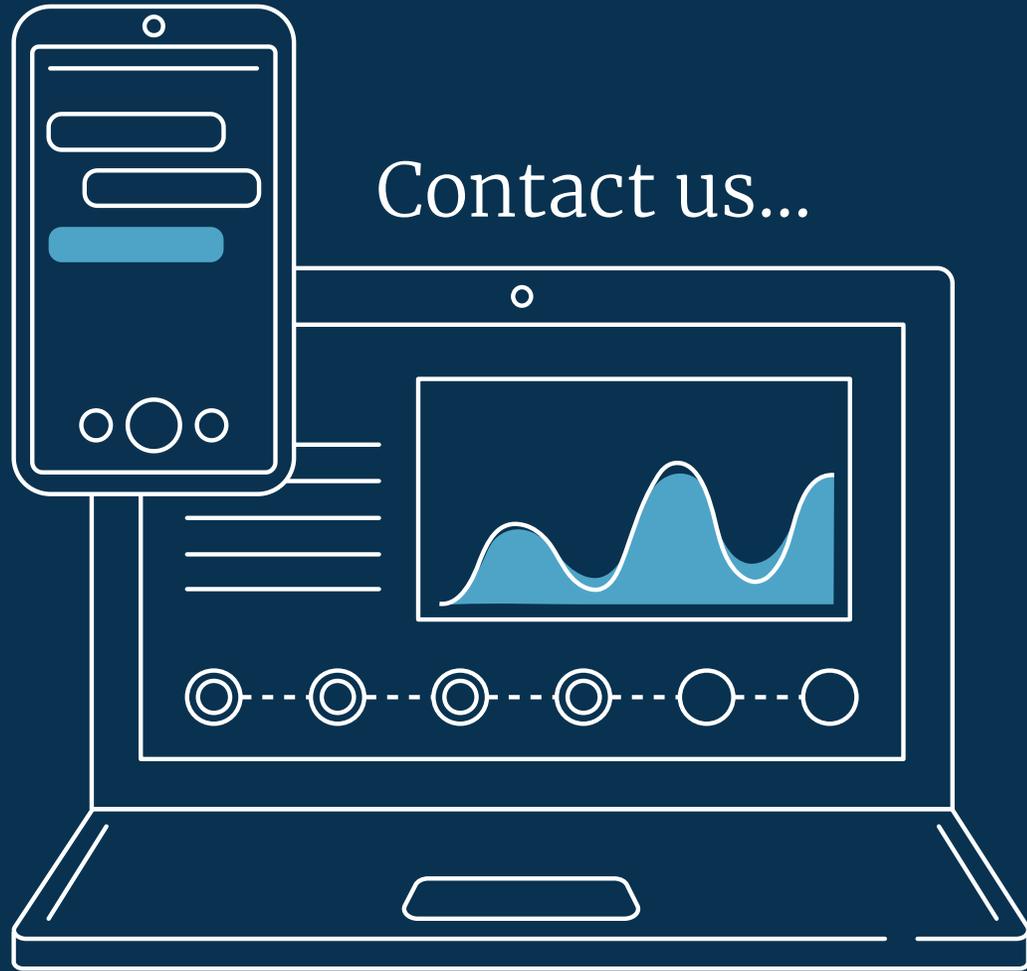
- Probably a pre-existing power
- Now proposed to be codified in line with some institutional rules – (SIAC 2016 r.29,; LCIA art 22.1(viii); SCC Arbitration Rules art 39, ICC note on Conduct under 2021 Rules of Arbitration)
- Threshold of success – real prospects of success; not ‘manifestly without merit’

Arbitration Act – supportive measures with respect to third parties (section 44)

- Bringing to an end a decade of uncertainty in the English courts
- Importing the domestic regime for third party orders with regard to taking and preservation of evidence; orders relating to property; sale of goods, interim injunctions; appointment of receivers

Stays for Arbitration – Republic of Mozambique v Prinvest Shipbuilding SAL (Holding) and others (2023)

- A significant decision on the powers of the English Courts to stay proceedings in favour of arbitration, arising partly in a construction context; already applied in *Município de Mariana & ors v BHP Group (UK) Ltd and ors* [2023] EWHC 3281 (TCC)
- After a review of common law decisions around the world, a five-stage test promulgated likely to be of wide influence
- ‘Matters’ under an arbitration agreement relating to liability vs. ‘matter’ relating to quantum



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Presentation on Key ADR trends in GCC

Ahmed Habib

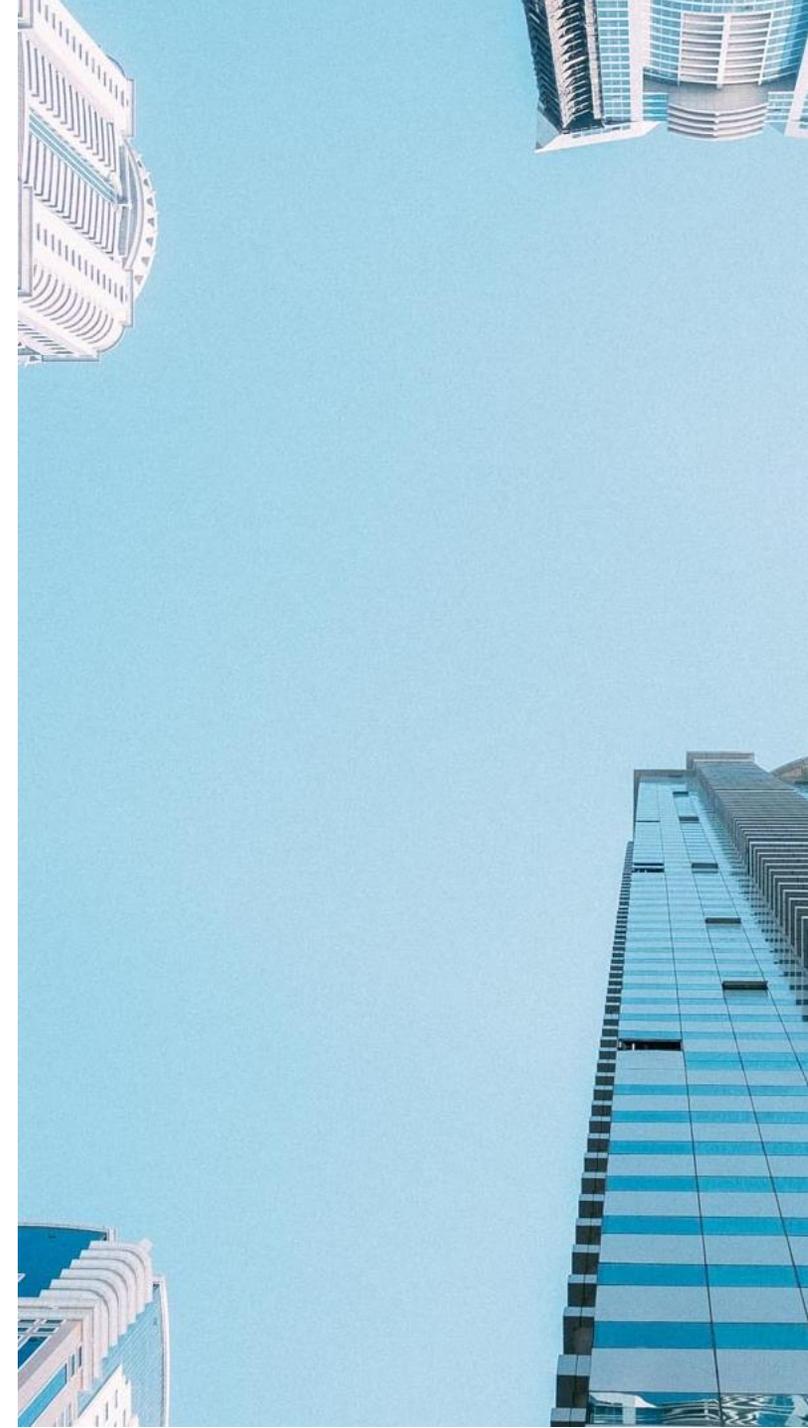
Senior Associate, DWF

Overview

- I. State of the construction industry and disputes in the Middle East
- II. The impact of the state of affairs on the management of disputes and the content of agreements
- III. The example of liquidated damages: Definition and Rationale
- IV. Liquidated damages: Comparative law
- V. Liquidated damages: Main Schools in the GCC Jurisdictions
- VI. Qatar Law Example: the Relevant Provisions
- VII. Saudi Arabia: Shari'a regime vs. the new civil transactions law
- VIII. The New Saudi Civil Code

I. State of the construction industry and disputes in the Middle East

- The construction industry has faced multiple challenges in recent years: the impact of the pandemic, armed conflicts in Europe and the Middle East, challenges pertaining to internal dynamics within each GCC country, etc.
- **Result:** reduced economic growth, volatility of prices, and increased inflation
- This has impacted the management of disputes and even the very content of the stakeholders' agreements



II. The impact of the state of affairs on the management of disputes and the content of agreements

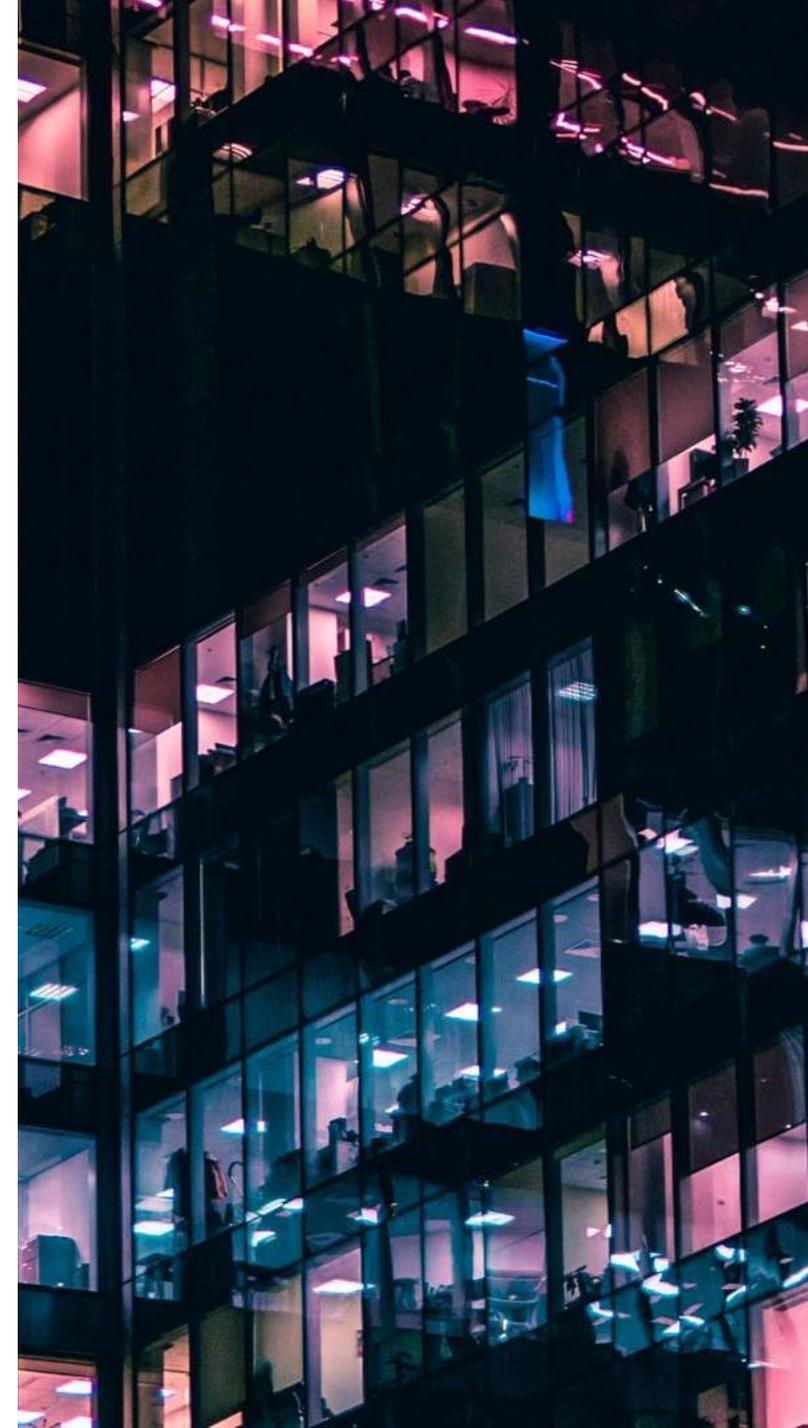
- **The management of disputes:**

The Parties have resorted to the flexibility of the arbitration proceedings to optimise the management of their dispute:

For instance, pleadings style arbitrations vs. memorial style arbitrations or bifurcation of proceedings to tackle first jurisdictional challenges, preliminary or liability issues before tackling valuation of damages and quantum, etc.

- **The content of the construction agreements:**

The Parties aim to manage the risk and enhance predictability through contractual provisions, for instance pay-when and if-paid and liquidated damages clauses



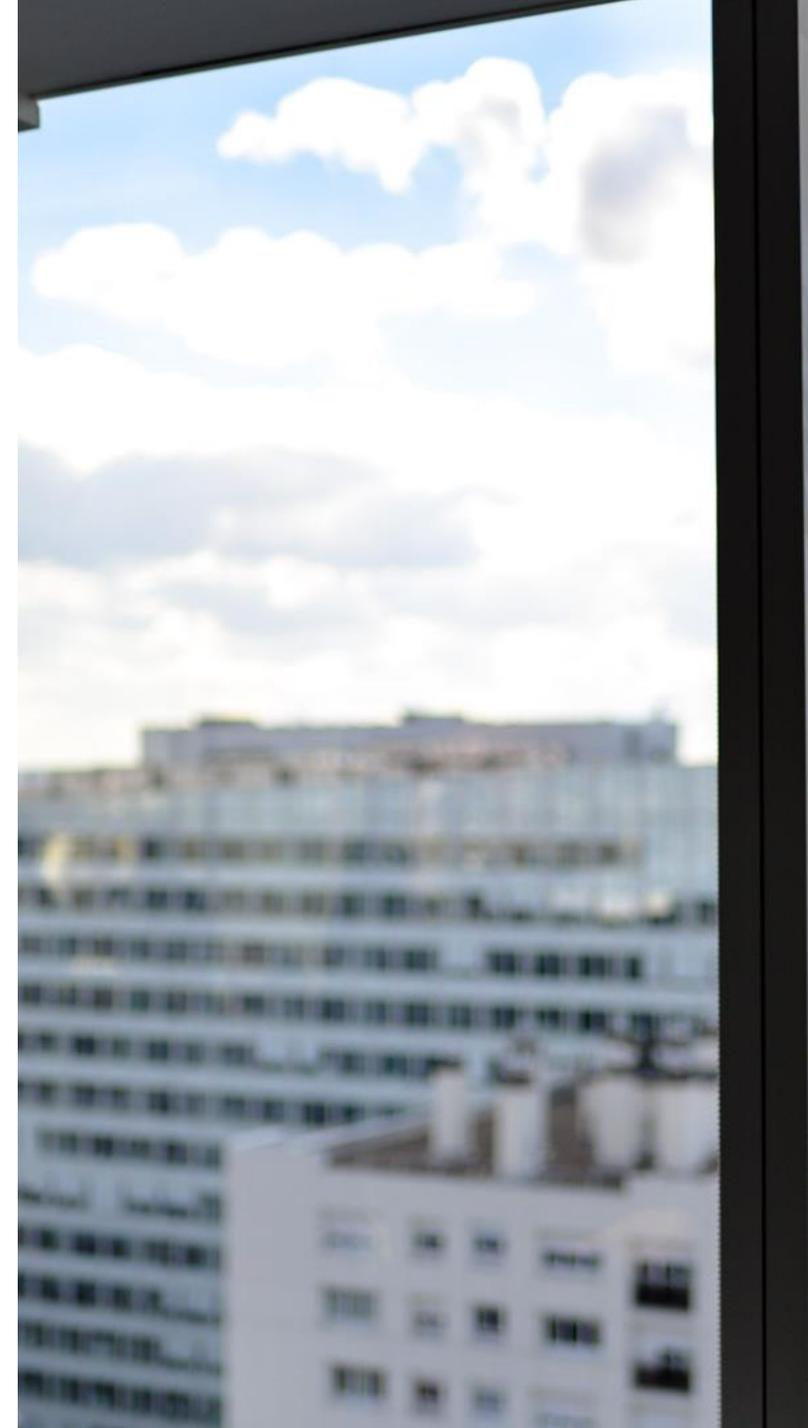
III. The example of liquidated damages: Definition and Rationale

➤ *Definition*

- Clauses reflecting a fixed rate, agreed in advance, to compensate the employer for the delay of the contractor, if any

➤ *Rationale*

- Certainty/predictability for both co-contractors from the very beginning
 - Saving time, effort and cost of proving loss whenever there is a delay
- ## ➤ *But do liquidated damages provisions really achieve these purposes?*
- The **answer depends on the legal regime** applicable to these provisions in every jurisdiction



IV. Liquidated damages: Comparative law

- Generally common law courts *validates or invalidates* the clause depending on whether it is considered a *pre-estimate of loss* or a *penalty* but do not interfere with the agreed amount
- *As civil law jurisdictions, the GCC jurisdictions have a different approach:*
- They empower the arbitrator and the judge in certain circumstances:
 - To enforce (or not) the liquidated damages;

but also

 - To interfere with the agreed amount and amend it



V. Liquidated damages: Main schools in the GCC jurisdictions

➤ *We can distinguish two main schools in the GCC jurisdictions*

- (i) The position taken for instance by Qatar, Bahrein and Saudi Arabia; and
- (ii) The position taken for instance by Jordan, Oman and the UAE.

- **Qatar, Bahrein and Saudi Arabia:**

The law of those jurisdictions **empowers the arbitrators** and the courts:

- (i) not to enforce the liquidated damages clause *if* there was no actual harm; or
- (ii) to reduce the amount of liquidated damages *if* it was grossly/greatly exaggerated in comparison to the loss actually suffered

- **Jordan, Oman and the UAE:**

The law of those jurisdictions **empowers the arbitrators** and the courts *in all cases if requested by one of the parties* to disregard the liquidated damages clause entirely and assess the damages as equal to the actual loss incurred by the employer



VI. Qatar Law Example: the relevant provisions

Liquidated damages under Qatar law are governed by Articles 265, 266 and 267 of Law no. 22 of 2004 promulgating the Civil Code:

- **Article 265 validates the principle of Liquidated damages as follows:**

“Where the subject of the obligation is not payment of money, the contracting parties may calculate the amount of damages in advance in the contract or in any subsequent agreement.”

- **Article 266 allows their non-enforcement or the reduction of the amount:**

“No agreed indemnity shall be payable if the obligor proves that the obligee has suffered no damages. The court may decrease the agreed amount of indemnity if the obligor proves that the calculation is exaggerated to a considerable degree or if the obligation has been performed in part. Any agreement to the contrary shall be invalid.”

- **Article 267 allows LD clauses to be used for limitation of liability, except in cases of fraud or gross negligence:**

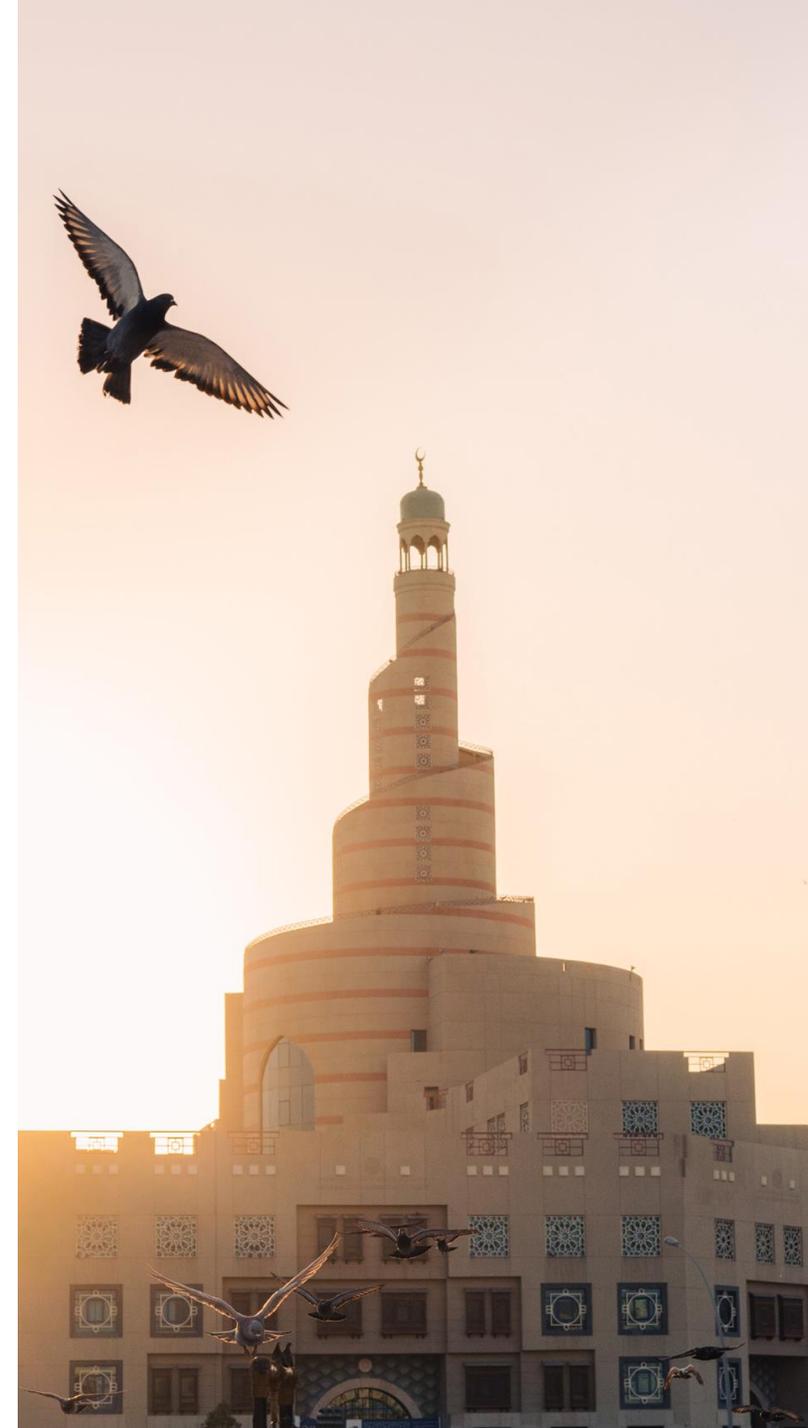
“Where the damages exceed the agreed amount of indemnity, the obligee may not claim a higher amount unless he proves the obligor's fraud or gross negligence.”



VII. Saudi Arabia: Shari'a regime vs. the new civil transactions law

The new civil transactions law has established a regime similar to Qatar law (both are inspired by Egyptian law):

- **Article 178** of the new Saudi Civil Transactions Law provides that:
“The contracting parties may specify in advance the liquidated damages by stipulating the same in the contract or in a subsequent agreement, unless the object of the obligation is a monetary sum. No notice shall be required for the damages to become due.”
- **Article 179** provides that:
 - “1. The liquidated damages shall not become due if the obligor proves that the obligee has not sustained any damage.*
 - 2. The court may, upon motion of the obligor, reduce the liquidated damages if the latter establishes that the liquidated damages were overestimated or that part of the original obligation has actually been performed.*
 - 3. The court may, upon the obligee’s motion, increase the liquidated damages in proportion to the damage sustained if the obligee proves that the damage has exceeded the amount of the liquidated damages as a result of fraud or gross error on the part of the obligor.*
 - 4. Any agreement conflicting with the provisions of this Article shall be null and void.”*



VIII. The New Saudi Civil Code

- The **Saudi Civil Transactions Law** was recently enacted on 19 June 2023 and it entered into force 3 months ago, on 16 December 2023
- It codifies for the first time the law governing contracts and tort. It has specific provisions tailored to contract types, including construction
- **Prior to this Civil Code**, most areas of law were governed in Saudi Arabia by Saudi's Shari'a Law
- **The Civil Code showcases** the modernization of Saudi Arabia's legal system as it reflects international practice
- **It aims to improve** commercial transactions involving investors from other nations and Saudi Arabia





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QUESTIONS



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