IBA International Construction Projects Committee

ADR in Construction

England & Wales

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Table of contents

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1. Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

For the purposes of this chapter, it is assumed that the relevant governing law, project location and seat of the dispute are all England and Wales. Any factual circumstances to the contrary may affect the validity of the following responses.

Statutory adjudication under the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy Economic Development and Construction Act 2009) (the 'Construction Act') is the most common form of dispute resolution used for construction matters in England and Wales, with roughly 1,500 adjudications a year. Its popularity largely stems from the fact that the right to adjudicate under The Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) (the 'Scheme') is implied into all construction contracts where there is not an express term providing the right. Parties usually choose to exercise the right to adjudicate (as opposed to, for instance, going straight to court or arbitration) due to the short 35 day procedure (7 days for appointment of an adjudicator and 28 days for a decision thereafter), providing for a faster and (often) cheaper decision than in most other methods of dispute resolution. Adjudication is also often voluntarily prescribed as a form of dispute resolution for contracts that fall outside the scope of the Construction Act, for example PFI/PPP contracts.

However, an adjudicator's decision is only temporarily binding, i.e. it is only binding until the dispute is finally resolved by litigation, arbitration or agreement (although in some cases (e.g. under NEC forms) a decision may become final and binding if one party does not give a timely notice, which notice may also simultaneously commence arbitral proceedings). In practice, an adjudicator's decision is often accepted as the de facto conclusion to a given dispute. Primarily as a result of this (and the popular JCT standard forms defaulting to litigation instead of arbitration), since 1998, there has been a dramatic reduction in the arbitration of disputes concerning domestic construction projects. There has also been a drop in litigation, for which other factors are also responsible, including rules which promote settlements before and during proceedings. Those rules include costs sanctions for parties who unreasonably refuse or delay accepting ADR (usually mediation) and settlement offers (e.g. denying them costs which would otherwise be recovered or even ordering them to pay opponents' costs).

Mediation is nearly always considered before or during litigation. Even when litigation is commenced about 95% of the time the case reaches a settlement (usually by negotiation or mediation) before trial.

1.2 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

From 1 May 1998 the Construction Act introduced statutory adjudication as a form of resolving disputes in all construction contracts. As explained above, the right to adjudicate is either included as an express provision in construction contracts or, if not, is implied under the Scheme. There are some notable exclusions from the remit of the Construction Act, including some PFI/PPP, energy and mining contracts.

The Arbitration Act 1996 (the 'Arbitration Act') governs all arbitration disputes where the specified seat is England and Wales (or Northern Ireland – which this chapter does not cover). It includes mandatory provisions which must be adhered to in all arbitral proceedings and non-mandatory provisions (helpfully listed in Schedule 1 to the Arbitration Act) which can be excluded by contract.

Civil litigation, including construction disputes, is governed by the Civil Procedure Rules (often referred to as the 'CPR'). The key principle in the CPR is the *'overriding objective'*, which is for the parties to act in such a way to enable the court to *'deal with cases justly and at proportionate cost'*.

The CPR provides for a special pre-action procedure for construction disputes known as the Pre-action Protocol for Construction and Engineering Disputes. This protocol requires the provision of a Letter of Claim and Letter of Response together with a "without prejudice" meeting for the parties to identify the key issues in the case, whether those issues might be resolved without recourse to litigation and, if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective noted above. The parties can either manage the process themselves, opt out of the Protocol by agreement or, where the dispute is complex and high value, they can agree that compliance with the Protocol shall be policed by a 'Referee' under the Protocol Referee Procedure.

Construction disputes are also heard by a specialist division of the English High Court referred to as the Technology and Construction Court or the "TCC" for short. The TCC Guide sets out specific procedures and guidance which applies to construction disputes heard by the TCC.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators? What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

England and Wales have a common law system and are not governed by a civil code. One looks primarily to legislation and court judgements for the law. Generally speaking there are no provisions in the legislation regarding binding decisions of non-statutory dispute adjudicators.

The type of binding processes that are used for construction disputes are:

(1) Litigation.
(2) Arbitration.
(3) Adjudication (see 1.1 above).
(4) Expert determination.

Expert determination is where an expert in the field relevant to the dispute is appointed to provide a decision (often on a final and binding basis). This is most commonly used where the dispute is technical in nature, although the expert can be asked to determine a wider scope than the specific technical issue itself. This role is different to an expert witness, who provides evidence for a third party (who may be an expert determiner) to decide a dispute.

In respect of expert determination, it is important that the contract grants the expert express powers to make a final and binding determination, to avoid arguments to the contrary by the losing party. The provisions of the Arbitration Act have no effect on an expert determination. Clarity is also required to avoid arguments that an expert determination provision constitutes an arbitration agreement. In the case of *Wilky Property Holdings Plc v London & Surrey Investments Ltd* [2011] EWHC 2226 (Ch) the court found that it is important to look at the specific wording of the provision, for example whether there are references to '*expert'* and the natural meaning of the words used. However, *"the way in which the dispute resolution process is described or labelled by the parties in their agreement is not conclusive as to the true character of that process."*

There is no general requirement for an expert to follow the rules of due process or natural justice although certain aspects of these rules may apply to a greater or lesser extent depending on the circumstances (see *Bernhard Schulte GmbH & Company KG v Nile Holdings Limited* [2004] EWHC 977 (Comm) and *Barclays Bank PLC v Nylon Capital LLP* [2011] EWCA Civ 826). Unless the contractual terms state to the contrary, a decision will be binding and cannot be set aside on the basis that the expert failed to act fairly and impartially.

1.4 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

The main difference between arbitration and adjudication is the status of their output. Adjudication decisions are usually temporarily binding (see 1.1 above). Arbitration awards are usually final, binding and recognised internationally, e.g. under the New York Convention.

In addition, adjudication is the subject of only brief provision in the Construction Act. Conversely, arbitration is governed by the Arbitration Act. Parties often agree in advance to rules which will govern any arbitration.

There are separate rules for the invariably much speedier process of adjudication. If the parties do not agree upon 'off the peg' rules or their own procedural rules (or they agree to rules which are non-compliant with the Construction Act), the Scheme provides the rules for construction contracts governed by the Construction Act.

For expert determination, there is no statutory framework. Where it is used in construction disputes, parties usually agree ad hoc to a set of rules (such as those produced by the Centre for Dispute Resolution (CEDR) or the Academy of Experts).

Of course, for arbitration, adjudication and expert determination, the tribunal may also direct aspects of the applicable procedure.

1.5 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

The TCC has specialist expertise in construction disputes. This court is based in London, but also has District Registries around the country, for example in Cardiff and Leeds, for regional disputes. The TCC and the courts more generally have a tightly limited supervisory jurisdiction with regard to arbitration under the Arbitration Act (from appointments through to awards). With regard to adjudication and expert determination, parties tend not to involve the courts other than in proceedings to enforce or challenge decisions.

The London Court of International Arbitration (the 'LCIA') is an institution based in London specialising primarily in international arbitration, although it also deals with mediations. Parties can agree to use the services of the LCIA in their contracts or ad hoc when a dispute arises. The LCIA performs the usual functions of an arbitral institution. Despite being based in London, more than 80% of the cases referred to the LCIA involve no parties who are based in England and Wales (or the wider United Kingdom) at all.

The Society of Construction Arbitrators publishes the Construction Industry Model Arbitration Rules (see 2.3 below).

Various bodies appoint arbitrators, adjudicators ('Adjudicator Nominating Bodies') and experts, for example the Chartered Institute of Arbitrators ('CIArb') and the Royal Institute of Chartered Surveyors ('RICS').

1.6 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in

your country (for example dispute recommendation boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

It appears that mediation is reasonably prevalent for construction disputes, but it seems less popular than adjudication and little used for construction disputes with international aspects which are resolved in England and Wales.

Dispute Boards (such as DAABs under the FIDIC 2017 and DABs under the NEC4 suites of contracts (both referred to as 'DABs' in this chapter for ease of reference)) are currently rare in England and Wales. This is partly because of the rare use of FIDIC forms domestically and the only recent introduction of the DAB provisions in the NEC4 suite in 2017 and partly because of mandatory provision for adjudication. Expert determination (both binding and non-binding) is used occasionally (but far less often than adjudication and mediation), but tends to be limited to disputes of a technical nature. The use of negotiation (without a third party mediator) to settle disputes is very common.

As for hybrid forms of dispute resolution, like Med-Arb, they are very rarely used. See 1.1, above, for adjudicators' decisions becoming final and binding.

1.7 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

A FIDIC Red Book 2017 type DAAB decision would be admissible in evidence in subsequent arbitral proceedings (and most probably litigation too) by virtue of the plain words of clause 21.6 of the FIDIC Red Book 2017, which states that *'Any decision of the DAAB shall be admissible in evidence in the arbitration'.* For proceedings under the Arbitration Act, section 34 provides the tribunal with a broad discretion to decide evidential matters, including the admissibility of any material. It is hard to see an arbitral tribunal (or a court) exercising its discretion to preclude the admission in evidence of a FIDIC Red Book 2017 type DAAB decision. Similarly, Option W3 of the NEC4 suite states that *'A Party is not limited in the tribunal proceedings to the information, evidence or arguments put to the [DAB]'.*

However, the weight or role of that DAB decision is another matter. The Court of Appeal in *Walker Construction (UK) Ltd v Quayside Homes Ltd and another* [2014] EWCA Civ 93 considered similar issues as to the treatment of prior adjudication decisions in subsequent court proceedings. The Court of Appeal made *obiter* comments to the effect that a party seeking to reverse an adjudicator's decision in subsequent court proceedings would bear the burden of proof in doing so. This, however, remains an uncertain area of the law with some commentators suggesting that the Supreme Court's decision in *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38*,* whilst not addressing the situation directly, suggests that an adjudicator's decision does not affect the burden of proof.

1.8 What form of ADR is considered to be cost effective for construction disputes in your jurisdiction? Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

Adjudication is considered by many to be the most cost effective form of ADR, helped by the short timescales usually involved. The parties normally bear their own costs (unlike in litigation where the unsuccessful party usually has to pay the successful party's costs). However, the unsuccessful party may be ordered by the adjudicator to pay all or part of his fees and expenses.

Mediation is also considered to be a cost effective form of ADR, although the allocation of costs is generally a matter for agreement between the parties. Often it is agreed that each party should bear their own costs of the mediation and share the fees of the mediator.

2. Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

For the Arbitration Act to apply (like the New York Convention), the arbitration agreement must be in writing, although this can include agreements which are only evidenced in writing or made by an exchange of written communications (section 5). An arbitration agreement which is not in writing is still binding but is governed by the common law rather than the Arbitration Act.

There is no requirement for an arbitration agreement to be set out in a separate document to the substantive contract.

There are no special or additional requirements for multi-party arbitration agreements.

Clause 21.6 of the FIDIC Red Book 2017 is a valid arbitration clause under English law (as is clause 20.6 1999 edition). It would not, of itself, prevent a party from seeking interim measures from a competent court in England. However, in order to grant such measures, and absent permission from the arbitral tribunal or the consent of all parties, it would need to be shown that the arbitral tribunal had no power or was unable for the time being to act under section 44(5) of the Arbitration Act. As the FIDIC arbitration clause incorporates the ICC Rules of Arbitration with its Emergency Arbitrator provisions, the scope for obtaining interim measures under this section may be reduced because the arbitral tribunal will have greater scope to provide urgent or emergency relief: *Gerald Metals SA v Timis* [2016]

EWHC 2327 (Ch). It should be noted however that the ICC Rules provide that the Emergency Arbitrator provisions will not apply where the parties have provided for any other pre-arbitral procedure for the granting of conservatory, interim or similar measures. Such measures are provided for in the standard Procedural Rules for DAB / DAAB proceedings annexed to the FIDIC contracts (Rule 5(j) in the 2017 conditions and 5(g) in the 1999 conditions). Accordingly, where the Procedural Rules are agreed in this form, the effect of the Emergency Arbitrator provisions is likely to be neutralised and recourse to section 44 will not be fettered as a consequence.

The power of the English courts to grant interim measures under section 44 of the Arbitration Act applies unless excluded by agreement of the parties.

See paragraph 1.3 above in relation to contractual expert determination provisions and whether such a clause could constitute an arbitration agreement.

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

Where one of the parties to the contract is a consumer, sections 89 to 91 of the Arbitration Act apply, giving effect to Part 2 of the Consumer Rights Act 2015. Under section 91, the arbitration agreement or clause is automatically deemed to be '*unfair*' when the claim is for a '*pecuniary remedy*'. The definition of a 'pecuniary remedy' is determined by statutory instrument, and at the time of writing it was set at a sum of £5,000 or less (article 3, SI 1999/2167). A clause or agreement which is unfair is not legally binding on consumers (section 62(1) of the Consumer Rights Act 2015). This Act does not automatically invalidate the clause/agreement, and therefore the consumer may still choose to arbitrate if they wish.

In the event that the claim is worth more than £5,000, the clause or agreement may still be found to be '*unfair*' if it falls foul of the requirements of Part 2 of the Consumer Rights Act 2015, although this is at the court or tribunal's discretion. Under section 62(4), a term is unfair if it is '*contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.*' The Competition and Markets Authority guidance notes on unfair terms provide further details on assessing the fairness of a term.

While a valid arbitration clause or agreement may lead to a stay of proceedings in the event litigation is commenced, this does not impede the right of access to the courts under the Human Rights Act 1998 (*Welex AG v Rosa Maritime Ltd* [2002] EWHC 762 (Comm)).

Similar comments also apply to adjudication provisions in consumer contracts. The statutory right of adjudication under the Construction Act does not apply to contracts involving a residential occupier. Adjudication clauses included in such contracts may

therefore be subject to challenge under the same legislation noted above (see *Picardi (t./a Picardi Architects) v Cuniberti* [2002] EWHC 2923 (TCC) which considered the now repealed Unfair Terms in Consumer Contract Regulations 1999). Under general English common law also, such clauses have been held to be unusual provisions in a consumer context and are therefore required to be specifically brought to the attention of the consumer if they are to be validly included within a consumer contract.

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

The two most commonly used suites of standard form contracts are the Joint Contracts Tribunal ('JCT') and New Engineering Contract ('NEC') suites. The JCT forms are by far the most popular.

JCT

Adjudication and litigation have been the default dispute resolution options in the JCT's forms since 1998. For arbitration instead of litigation, parties must specifically opt for it in the Contract Particulars. Even then, the enforcement of adjudicator's decisions is by way of litigation.

Where the parties opt for arbitration, the specified rules are the JCT 2016 edition of the Construction Industry Model Arbitration Rules (or earlier edition if an earlier JCT suite is used).

NEC

The NEC 4 standard form contains three sets of dispute resolution clauses: Options W1, W2 and W3 (the latter of which was not featured in previous NEC contract suites). Option W2 should be chosen when the Construction Act applies, and Options W1 and W3 should be chosen in all other scenarios.

Under Option W1 a dispute must be first referred to the '*Senior Representatives'*, and if they are unable to resolve the dispute it must be referred to adjudication (which is a mandatory step, unlike in the JCT). Under Option W2 a dispute may be referred to adjudication at any time, in line with the Construction Act. Under Option W3 a DAB is appointed at the '*starting date'* of the contract, with a view to resolving potential disputes before they become actual disputes. A dispute cannot be referred to the *'tribunal'* until it has been referred first to the DAB.

An award by an adjudicator or a DAB is binding unless and until revised by the '*tribunal*' (and it becomes final and binding if one party does not give a timely notice, which notice may also simultaneously commence arbitral proceedings, if arbitration is chosen).

The parties are free to select their tribunal, either court or arbitration. There is no provision in the event that the parties fail to make a selection in the Contract Data, although in that case an arbitration agreement would not be in place and therefore the parties would be free to refer the dispute to court. If arbitration is chosen the parties must follow the '*arbitration procedure*' included in the Contract Data. They are free to decide the rules, seat and the organisation (which has the right to appoint the arbitrator in the event that the parties cannot agree).

2.4 May arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances? Is this different for other forms of ADR?

In general, arbitration agreements do not bind non-signatories, following the doctrine of privity of contract. There are some limited exceptions to this rule, for example:

1. Where a party has transferred, assigned or novated its rights under the arbitration agreement to a third party.

2. In the event of subrogation, for example where an insurer enforces an insured party's claims against another party, the insurer would have the right to arbitrate under the agreement between the original parties (see *Starlight Shipping Co and another v Tai Ping Insurance Co Ltd, Hubei Branch and another* [2007] EWHC 1893 (Comm)).

3. Under section 1(1) of the Contract (Rights of Third Parties) Act 1999, a third party to a contract may in his own right enforce a term of the contract where the term purports to confer on him a benefit or otherwise indicates expressly that he may so enforce it. Any right or benefit conferred on the third party is subject to any arbitration agreement within the contract, both in respect of claims by the third party as well as those against him in relation to those rights or benefits (see *Fortress Value Recovery Fund I LLC and others v Blue Skye Special Opportunities Fund LP and others* [2013] EWCA Civ 367).

4. If the third party has the consent of the parties to join the proceedings, for example where the two matters are consolidated under section 35(1) of the Arbitration Act.

5. PFI projects will typically include "equivalent project relief" provisions which attempt to limit subcontractor entitlements to the amount of any equivalent entitlement established by the contractor or Project Company against the employer or public authority. Although not strictly an exception to the doctrine of privity, such subcontracts will usually contain an agreement by the subcontractor to be bound by the result of any arbitration between the Project Company and the public authority.

The Arbitration Act specifically deals with the possibility of third parties being bound by arbitration agreements, stating at section 82(2) that *'references in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement',* which could include agents acting for a party. This provision has, however,

been found to be insufficient to incorporate the so-called 'Group of Companies' doctrine within English law. The third party must legally claim through or under a party to the arbitration agreement: *"a mere legal or commercial connection is not sufficient"* (*City of London v Sancheti* [2008] EWCA Civ 1283).

Similar rules as those above for arbitration apply to other forms of ADR.

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

There is no specific legislation concerning expert determination. As a result, the nature of the decision made by the expert (i.e. either binding or non-binding) depends on the agreement made between the parties. Whether or not such an agreement is mandatory depends on the wording of the contract.

To make an expert determination agreement mandatory, parties should clearly state that expert determination is the only dispute resolution procedure. In *Douglas Harper v Interchange Group Ltd* [2007] EWHC 1834 (Comm), the Court decided that the parties were contractually bound to the agreed expert determination procedure, as it constituted a comprehensive agreement reflecting the parties' intentions. As the procedure contained a timetable for objections to be made and then referred to an expert, it was held to be mandatory and non-compliance invalidated the claim.

Of course, if the expert determination is non-binding, it will follow that by implication the parties accept that an alternative process will finally determine any disputes (with litigation being the default in the absence of provision to the contrary). If the expert determination is to be binding (which is usually treated as meaning final and binding), there is often still scope to challenge the determination, albeit on limited grounds (see 8.5 below).

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

The ability of a party to skip one or more tiers depends on the wording of the clause and in particular whether the first tier is described in mandatory language such as through the use of words "must" or "shall" rather than "may". If mandatory language is used, English law will generally enforce the parties' agreement. The primary exception to this rule is in relation to statutory adjudication under the Construction Act. Parties to domestic

construction contracts have the right under the Act to refer a dispute to adjudication *"at any time"*.

If drafted correctly and clearly there are not normally issues with multi-tiered dispute resolution clauses. To be enforceable, the requirements and processes outlined in the multi-tier clause must be *'clear and defined'* to allow the court to determine whether the clause had been complied with. If the clause is too *'equivocal'* and *'nebulous'* then the courts are unlikely to treat it as an enforceable condition precedent to the specified procedure (*Wah (Aka Alan Tang) and another v Grant Thornton International Ltd and others* [2012] EWHC 3198 (Ch)).

In *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC), the Technology and Construction Court found that the requirement to refer a dispute to a DAB in an amended FIDIC Yellow Book 1999 was a pre-condition to arbitration even in circumstances where the DAB had not yet been constituted.

Whether an agreement to negotiate is valid and enforceable is a grey area in English case law. For example, in *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm) Colman J noted that a clause merely requiring an *'attempt in good faith to negotiate a settlement'* would not be enforceable, but the clause before him had gone further and had specified a particular ADR procedure. There was therefore a binding obligation to participate in the applicable procedure. In *Emirates Trading Agency Llc v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) a clause requiring the parties to attempt to resolve a dispute by *'friendly discussions'* prior to arbitration was enforceable, although significant emphasis was placed on the fact that such discussions were to continue only for a limited period of time before the right to arbitrate arose. This case has not passed without criticism and may be said to represent the boundary within English law between unenforceable obligations to negotiate and enforceable obligations to participate in an ADR procedure.

Multi-tiered dispute resolution clauses are not particularly common in domestic construction contracts (in contrast to, for example, the FIDIC 2017 conditions). One exception to that is found, as indicated at 2.3 above, in the NEC3 and NEC4 forms which require a dispute to go to adjudication before it can be referred to litigation or arbitration (as the case may be). While the JCT forms do not follow this approach they do require *"serious consideration"* to be given to any request to refer a dispute to mediation. However, as indicated in the paragraph immediately above, such a provision is more helpful as a reminder to the parties to consider mediation – rather than as a term that might be enforced by one party against the other.

One problem with multi-tiered dispute resolution processes in England and Wales (as in many jurisdictions) arises with claims for which the limitation period is close to expiring – and for which time will only stop running when litigation or arbitration, as the case may be, is commenced (absent a standstill agreement). Ordinarily the parties will be treated as

having allowed for the extra time needed to fulfil any preconditions to litigation or arbitration when they agreed to the multi-tiered dispute resolution process (with the result that impending limitation difficulties may not be prayed in aid of skipping any such preconditions).

3. ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

The Arbitration Act refers at section 81(1)(a) to *'matters which are not capable of settlement by arbitration'*. However, the '*matters*' concerned are not set out.

There is limited case law on the types of case which are non-arbitrable:

1. Specific matters of public relevance which the courts have found cannot be determined within the limitations of a private contractual process, for example the compulsory winding up of a company (*Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, para 40).

2. Criminal proceedings leading to conviction, including the granting of custodial sentences or fines, can only be dealt with by the courts. The tribunal does, however, have jurisdiction to consider whether a criminal offence has been committed, as discussed further in relation to fraud below.

3. Although the matter is not yet settled, existing case law suggests that English courts will not enforce an arbitration agreement to prevent a party from enforcing an adjudication decision via court proceedings: see *MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] EWHC 2244 (TCC).

Subject to the above, all disputes regarding construction projects are likely in principle to be capable of resolution by ADR by agreement between the parties. Decennial liability does not arise under English law.

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

No, parties are free to agree that any type of civil matter may be referred to binding expert determination or other binding third party decision. The binding nature of such decisions

means, however, that matters cannot be the subject of a fresh determination if they have already been determined pursuant to the agreed procedure.

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

There are no general restrictions on the type of arbitral awards which may be issued. Under section 48(1) of the Arbitration Act, parties to an arbitration are free to decide the types of remedies available to the tribunal by written agreement (subject to public policy).

In the event that the arbitration agreement does not include such a term, then the provisions of section 48(3) to (5) of the Arbitration Act apply. These provisions provide the tribunal with power to:

1. Make a declaration;
2. Order payment of a sum of money;
3. Order a party to refrain from doing something;
4. Order specific performance of a contract, i.e. a mandatory order to carry out a specific obligation (provided that it does not relate to land); and
5. Order rectification, setting aside or cancellation of a deed or other document.

The exclusion for specific performance orders relating to land has been carried over from a series of older Arbitration Acts dating back to 1934. It is thought that the exclusion was introduced to reflect the complexity of conveyancing law including, in particular, issues of title relating to land associated with orders for specific performance of contracts for the sale or grant of land or interests in land: see *Telia Sonera Ab v Hilcourt (Docklands) Limited* [2003] EWHC 3540 (Ch). This pre-existing position was preserved as the default position in the Arbitration Act 1996, but as noted above the parties are able to stipulate for wider powers to be conferred in their arbitration clause.

There is no legislation governing DABs and, subject to any contrary agreement between the parties in the contract, there is no restriction on the issues which the DAB may decide. The same applies to expert determinations. However, while a DAB or expert might direct one of the parties either to do, or to refrain from doing, a particular act (i.e. replicate the substantive content of an injunction or a decree of specific performance) they cannot impose the same sanctions for disobedience as a court order (*Persimmon Homes Ltd v Woodford Land Ltd* [2011] EWHC 3109 (Ch), [22]).

3.4 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

There are no restrictions on public entities using ADR to settle disputes, and it is actively encouraged, for example by the Dispute Resolution Commitment of June 2011 (which replaced the UK government's original ADR Pledge of 2001) to choose processes proportionate in costs to the issues and avoid the high cost in time and resources of going to court. Court action may sometimes be required, but should only be sought when a genuine point of law exists or when people or organisations are at risk. The court has actively penalised public entities who have failed to engage in ADR processes, for example in *Royal Bank of Canada v Secretary of State for Defence [2003] EWHC 1841 (Ch))* in which a government department was penalised in costs despite being successful at litigation due to its failure to accept a mediation proposal.

3.5 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

Section 106 of the Arbitration Act provides that the provisions of the Act apply to the Crown.

Under the State Immunity Act 1978, a state is immune from the jurisdiction of the courts of England and Wales except as specifically provided for in the Act (section 1(1)).

There is an exception to this rule in relation to arbitration. Under section 9(1) of the State Immunity Act, where a state has agreed in writing to submit a dispute to arbitration, for example in an arbitration agreement, that state does not have the protection of immunity in relation to that arbitration. This rule is subject to any contrary provisions in an arbitration agreement, and does not apply in relation to arbitration agreements between states (section 9(2)). The provisions of section 9 also extend to enforcement proceedings concerning the treatment of the relevant arbitral award as such proceedings fall within the phrase "*which relate to arbitration*" in section 9 of the State Immunity Act (*Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529).

In relation to other forms of ADR, the state may have the protection of immunity unless the dispute falls into one of the specified exceptions in the State Immunity Act. Examples of exceptions include if the state has submitted to the jurisdiction by starting or intervening in the proceedings (section 2), or the subject matter of the proceedings relates to a commercial transaction entered into by the state (section 3(1)(a)).

3.6 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

The ability for procurement disputes to be decided by ADR depends on the nature of the contract in question.

In respect of public bodies, under regulation 91(2) of the Public Contracts Regulations 2015 (SI 2015/102), proceedings must be brought in the High Court, and the Regulations go on to state associated procedural requirements.

Disputes in relation to contracts which are not caught by the Regulations (i.e. private procurement) can be decided by ADR in the same way as any other commercial dispute.

3.7 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated '*The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it,*'. In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause? If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

In a situation with several interrelated contracts, the DAB would ordinarily only be able to decide issues within its jurisdiction, not those outside of the contracts with the DAB clauses. Despite this, the DAB could take into account the wider issues in terms of evidence where relevant to the dispute for which it has jurisdiction. For example, in a claim by a contractor against its employer based upon the contractor's liability to a subcontractor, the DAB might decide – as between the contractor and the employer – upon the contractor's liability to its subcontractor, without that decision being binding upon the subcontractor.

If the DAB attempts to make a decision on a matter that has not been referred to it, that matter will be outside its jurisdiction and will generally speaking be open to challenge. The scope of procedural rule 8(b) is uncertain under English law. A similar provision exists in the TecSA rules of adjudication applicable to Construction Act adjudications in the UK. The English courts have reached inconsistent conclusions as to whether such a rule enables an adjudicator to make a binding determination as to his own jurisdiction, effectively eliminating any ability for the decision to be challenged on jurisdictional grounds before the courts. The better view is thought to be that such clauses do not empower an adjudicator to make a binding decision as to his own jurisdiction and/or the scope of the adjudication, unless stated expressly with clear words: see Coulson, *Construction Adjudication (4thd Edition)* at paragraphs 5.93 to 5.95.

4. Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DABs) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

No special qualifications are required for arbitrators or adjudicators. Contracts may require certain qualifications which should be adhered to (for example having a certain level of experience in a specific sector). In addition, arbitrators appointed through institutions may be required to have certain qualifications to meet the institution's standards. Some Adjudicator Nominating Bodies vet and keep under review the individual adjudicators on their lists.

At the appointment stage it is common for parties to choose candidates based on the nature of the dispute itself, for example deciding whether a legal or technical background is preferable, or identifying individuals with PFI or international experience if there is such an element to the dispute. It is also important to ensure that the candidates are independent and do not have a conflict of interest, to avoid future challenges to their appointment and the validity of any decision.

The Arbitration Act makes provision for the involvement of the court where the arbitrator appointment fails (for example, where there is to be a sole arbitrator, the parties cannot agree on who s/he should be and no appointing body has been agreed).

Save as indicated above, there are no special rules on arbitrator appointment or the appointment of tribunals.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

There are no commonly used institutions (in the sense of a body that supervises the arbitral process) for domestic construction arbitrations. There are bodies like the Society of Construction Arbitrators who maintain lists of construction arbitrators. Similarly, the LCIA is an arbitral institution with a list of arbitrators from which it can select, when necessary, arbitrators for construction arbitrations.

Lists of arbitrators tend to be built up over time based upon suitable individuals offering their services or being invited to join.

The bodies which maintain lists of arbitrators have their own rules and procedures as to how their lists are used and maintained.

There is no general rule of law that requires arbitrators for construction arbitrations to be appointed from a particular list.

Where there is to be a sole arbitrator, usually the parties are free to agree who s/he is (including someone who is not on the list of any appointing body they have specified),

failing which an appointing body appoints the arbitrator (from any list it maintains or by going out to the marketplace). Where there are to be three arbitrators, usually the parties appoint (or nominate for an appointing body to appoint) one arbitrator each (again, this need not be someone who is on the list of any appointing body they have specified). Those two arbitrators may then appoint (or nominate) the third arbitrator, or an appointing body may appoint the third arbitrator without the two arbitrators nominating someone (again, from any list it maintains or by going out to the marketplace).

Where the parties agree to LCIA arbitration, only the LCIA Court is empowered to appoint arbitrators (under the LCIA Rules 2014, Article 5.7), although the parties may nominate candidates (who the LCIA Court often then appoints).

The position for adjudicators, mediators, etc. is similar to that set out above for arbitrators (save that adjudicators are often appointed by adjudicator nominating bodies rather than chosen by the parties).

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer? Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

While there is no requirement for arbitral tribunals to include a lawyer either on the tribunal itself or as the secretary, in practice most do. The background and qualifications of the members of the arbitral tribunal often depend on the nature of the dispute.

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and construction professionals possible/common? Is there a difference with other forms of ADR?

Arbitrators in domestic construction arbitrations are not infrequently construction professionals, like qualified surveyors, engineers or architects.

Mixed panels of lawyers and (other) construction professionals are possible.

There is little difference with other forms of ADR.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Arbitrators and other tribunals issuing binding decisions are required to reach their decisions based on the parties' submissions and the evidence put before them. To use their

own technical expertise in isolation and without consulting the parties before reaching their decision would likely lead to arguments that the rules of natural justice have not been met, which could render the decision unenforceable. In practice, therefore, if a tribunal uses his/her own experience or seeks the views of a third party, he/she will give both parties an opportunity to comment on this input. However, it is often said that in (binding and non-binding) expert determinations, the parties have implicitly (if not explicitly) agreed to the expert decision-maker deciding their dispute using his own technical knowledge and without consulting them regarding the results of using such expertise.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide 'ex æquo et bono', as 'amiable compositeur', or in 'equity'? Is there a difference with other forms of ADR?

Parties are free to agree how their disputes are resolved (section 1(b) of the Arbitration Act). In general, unless there is a specific clause in the arbitration agreement to the contrary, the arbitral tribunal has a duty to decide a dispute in accordance with the rules of law rather than 'ex æquo et bono', as 'amiable compositeur' or based upon what is fair and reasonable (section 46(1) of the Arbitration Act). Where such a specific clause is included it excludes any right of appeal on a point of law under section 69 of the Arbitration Act.

For other forms of ADR where a decision is to be given by a third party, there is nothing to prevent the parties from agreeing that the third party should decide the dispute 'ex æquo et bono'.

5. ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

The Arbitration Act includes mandatory provisions (listed in its Schedule 1) which the parties to an arbitration agreement seated in England or Wales may not contract out of.

One such provisions is section 33 which requires the arbitral tribunal to act fairly and impartially as well as to adopt procedures suitable to the circumstances of the particular case.

Section 36 of the Arbitration Act (which is not mandatory) provides that a party to arbitral proceedings may have legal representation, unless otherwise agreed by the parties.

A body of case law has developed in relation to adjudication, which requires the adjudicator to follow the same principles of fairness and impartiality. There is not a statutory right to legal representation in adjudication. However, paragraph 16(1) to Part 1 of the Scheme, which applies if parties to a construction contract fail to provide their own compliant adjudication procedure (or if they agree that it should apply – as often occurs), states that '*Subject to any agreement between the parties to the contrary … any party to the dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate'.*

5.2 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

Written submissions and oral presentations are both common. However, in adjudications there are often no oral presentations with disputes being dealt with on paper only. In arbitral and other processes the parties may agree – or the decision-maker/s may direct – that, for example, written submissions should be limited in their length.

5.3 Are there rules on evidence in the laws or your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

Under section 34 of the Arbitration Act, the arbitral tribunal is entitled to decide all procedural and evidential matters.

Adjudicators usually have similar powers to determine procedure. Section 108(2)(f) of the Construction Act requires construction contracts to empower the adjudicator to take the initiative in ascertaining the facts and the law. Paragraph 13 of Part 1 to the Scheme (which applies as set out in 5.1 above) states that the adjudicator *"may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication."*

Adjudicators also have the same power as arbitral tribunals to decide what weight to give to evidence. The requirements of natural justice and the compressed timetable in adjudication will usually require that all of the evidence submitted is considered by the adjudicator. Reflecting this, paragraph 17 of Part 1 to the Scheme requires the adjudicator to *"consider any relevant information submitted to him by any of the parties to the dispute"*.

5.4 Is a hearing mandatory for all forms of ADR?

Hearings or 'meetings' are not mandatory for any form of ADR, although parties are free to specify such a requirement. Where there is not such a requirement, a hearing or 'meeting' is at the discretion of the arbitrator or adjudicator. In practice, however, hearings or 'meetings' nearly always feature in construction arbitrations and mediations – but less often in adjudications.

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) *conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules*,'. Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of 'natural justice'? If so, what would this mean for conducting the hearing?

The DAB is bound to observe the rules of natural justice (save insofar as the parties expressly contract out of the same) but is not bound to conduct a hearing if those rules can be met without one. Generally speaking, natural justice would not require any hearing to be conducted on an adversarial basis, but if it were conducted on an inquisitorial basis the parties should be given a reasonable opportunity of being heard and of putting their cases.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

The types of expert mostly used in construction arbitrations are: (a) technical experts (e.g. structural engineers), (b) delay experts, and (c) quantum experts.

Expert witnesses are used in a similar manner before arbitral and other tribunals, including the courts. For expert determinations, while the tribunal is an "expert", the parties may still adduce evidence from expert witnesses for the expert to consider in reaching his determination.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

Experts are almost always party-appointed.

Section 37 of the Arbitration Act (like institutional rules, such as the LCIA Arbitration Rules, Article 21) empower arbitral tribunals to appoint tribunal experts – but this is rarely done in domestic construction arbitrations.

There is no difference in the evidential value between party or tribunal appointed experts (provided the former have been appointed as 'independent' experts, rather than as advocates for a party's case). However, in practice, there may less opportunity to cross-examine or otherwise challenge the evidence of a tribunal appointed expert.

Where the expert has been appointed under section 37 of the Arbitration Act, their fees and expenses are treated as expenses of the arbitral tribunal (section 37(2)). Otherwise, an

expert's fees and expenses are paid by the party instructing them and form part of the costs of the arbitration which may be awarded by the arbitral tribunal (depending on the outcome).

5.8 Is the expert supposed to be independent to the parties/counsel?

In litigation, independence is required by the CPR. In other processes, independence is invariably expected.

5.9 Does the expert normally give written evidence or oral evidence?

In litigation, under the CPR there is a presumption that expert evidence should be given in the form of a written report unless the court otherwise directs (rule 35.5(1)). The report/s form the expert's evidence in chief. Experts will, however, usually be cross-examined on their report. In other processes, expert evidence is almost never only provided orally.

5.10 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for following or not following the statement of an expert? Can part of the decision by the tribunal be 'delegated' to the expert?

While a tribunal is entitled to reject the evidence submitted by an expert witness, it must properly consider the evidence and give reasons for rejecting it (*Caribbean Steel Company Ltd v Price Waterhouse (a Firm)* [2013] UKPC 18).

Generally speaking parts of a decision may not be '*delegated*' to an expert because the decision should be that of the tribunal. However, such delegation may be permitted in expert determination.

5.11 Is 'hot tubbing' (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

The use of 'hot tubbing' is not uncommon in domestic construction arbitrations.

It is rarer in the courts where it is known as "concurrent evidence" and the court rules have recently been changed to provide for it (CPR PD 35, paragraph 11). The Technology and Construction Court Guide also makes specific provision for it (see paragraph 13.8.2 of the 2nd Edition 2015).

The informal nature of adjudication proceedings can often result in a form of ad-hoc 'hot tubbing'. Where hearings are held in adjudications, the parties' experts will usually attend and a dialogue may often develop between the experts and the adjudicator.

5.12 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

Site visits by arbitral and other tribunals are allowed, but are not mandatory. In relation to adjudications, paragraph 13 of Part 1 to the Scheme (which applies as set out in 5.1 above) empowers the adjudicator to make site visits and inspections. Site visits are not specifically regulated by law, but the usual rules apply (for example, the requirements of health and safety legislation).

5.13 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

There is no specific requirement for all parties to be present, although this will almost always be the case so as to avoid any suggestion that there has been a breach of the rules of natural justice.

5.14 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

Witness statements are both common and important.

There are no general restrictions on employees of a party providing witness statements. However, the relationship of a witness to one of the parties is something that may affect the weight given to their evidence.

It is possible for expert witnesses (despite the requirement for them to be independent) to be employees of a party (*Field v Leeds City Council* [1999] CPLR 833). However, lesser weight may be given to their evidence.

5.15 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

An arbitral or other tribunal usually has a wide discretion to decide the weight of evidence.

6. Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

All of these measures are possible and in arbitration cases can be granted by the arbitral tribunal or the English courts. However, section 44 of the Arbitration Act limits the power of the English courts to grant such measures to cases of urgency where the arbitral tribunal either has no power or is unable for the time being to act effectively, or where an application is made with the permission of the tribunal or the consent of the other parties to the arbitration.
As noted in question 2.1 above, the agreement of arbitration rules which provide for Emergency Arbitrators may make it more difficult to obtain interim measures from the English courts under section 44 as it may be harder to show that the arbitral tribunal is unable for the time being to act effectively.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated *(g) decide upon any provisional relief such as interim or conservatory measures (...)* The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

Procedural rule 8(g) is unlikely to lead to any problems under English law. The interpretation of the rule under English law is likely to be that a DAB is empowered to make interim orders pending the DAB's decision regarding the dispute referred to it. Any party required to comply with such an interim order would be required to do so as a matter of contractual obligation.

7. Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

Generally speaking, a final and binding decision given by a third party such as an expert or DAB would be recognized as a matter of contractual obligation in court or arbitration

proceedings (depending on whether the contract in question contains an arbitration clause).

Clause 21.7 of the FIDIC Red Book 2017 would not allow a final and binding DAB decision to be enforced directly through the courts skipping the arbitration agreement.

In relation to binding-but-not-final DAB decisions, whilst the point has not been decided in England, it is thought that an English court would be likely to reach a similar conclusion to that reached by the Singaporean Court of Appeal in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2015] SGCA 30. Much of the reasoning of the majority of the Court of Appeal could be applied under English law. Certain additional factors also exist under English law which could be said to support the majority's conclusion. For example:

- English law takes a pragmatic view of arbitration clauses, following the House of Lords decision in *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40. The interpretation of arbitration clauses under English law starts, *'from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.'*

- Article 28 of the ICC Rules 2017 may be taken as expressly permitting the making of provisional awards under section 39 of the Arbitration Act. This contrasts with the Singaporean International Arbitration Act which does not contain such a power (something specifically acknowledged by the Singaporean Court of Appeal).

7.2 Does the award or binding decision have to be reasoned?

Section 52(4) of the Arbitration Act states that an arbitration award must give reasons, unless it is an agreed (consent) award or the parties have agreed to dispense with reasons.

Adjudicators and DABs are usually required to give reasons.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

Dissenting opinions are often given in arbitration, although they have no legal effect. The same principles are likely to apply to other forms of ADR.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

Section 57 of the Arbitration Act 1996 deals with situations where there are errors or gaps in an arbitration award, allowing the parties to agree the powers of the tribunal to correct or make an additional award (section 57(1)). This section can be used if the parties would like to obtain clearer or better reasons, or if there is any uncertainty as to whether the tribunal has considered a specific part of a party's submissions (*Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787).

This section is non-mandatory, and so only applies in the absence of any agreement between the parties to the contrary in the contract or arbitration agreement.

If the parties do not make such an agreement, the tribunal also has the power under section 57(3) of the Arbitration Act to:

1. correct any clerical mistakes or errors arising from accidental slips or omissions;
2. remove any ambiguity; or
3. make an additional award in respect of any claim which was presented to the tribunal but which was not dealt with in the award.

There are set time limits in which the corrections and/or additional awards must be made.

In the event that the time limits of section 57 or the arbitration agreement are reached, a party could consider applying to court if the error constitutes a serious irregularity. The courts are reluctant to uphold such a challenge unless the section 57 procedure has been exhausted.

There is also a 'slip rule' for adjudications under the Construction Act.

8. Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

An arbitral award is enforceable through the English courts. The party wishing to enforce the decision must obtain leave of the court to use the summary procedure provided by section 66 of the Arbitration Act. There is a specific claim form which must be used, and it must be supported by evidence. The award may then be enforced in the same manner as a court order. This is available whether the award is made in England and Wales or in a foreign jurisdiction.

Part III of the Arbitration Act provides a separate regime for the recognition and enforcement of awards made in a foreign jurisdiction which is a party to the New York

Convention. The rules for recognizing, enforcing and challenging an award under the New York Convention are replicated in Part III. These provisions are in addition to, not in substitution for, the summary procedure provided by section 66 of the Arbitration Act.

It also remains possible for a party to bring "an action on the award" for the enforcement of arbitral awards not subject to the Arbitration Act.

Outside of arbitration, a special procedure exists within the English Technology and Construction Court for the enforcement of domestic adjudication decisions under the Construction Act. This procedure aims to resolve any objections to the enforceability of such decisions within a short timeframe consistent with the philosophy behind adjudication under the Construction Act. Parties are able to avail themselves of this procedure regardless of the presence of an arbitration clause: *MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] BLR 561.

For other forms of ADR, such as expert determination, enforcement is by way of court or arbitration proceedings, depending on whether an arbitration agreement applies to the contract in question. Such proceedings are similar to "an action on the award" and flow from the defaulting parties' breach of contract in failing to honour the determination made against it.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

It would be possible for a DAB award to be enforced through the New York Convention, in England and Wales, if the contractual arrangement referred to amounted to an arbitration agreement, such that the DAB was treated as an arbitration and its product as an award. As the provisions for DAB-type awards in general circulation (such as those in the FIDIC 2017 and NEC4 suites) clearly indicate that the awards are not arbitral awards, significant amendment would be needed for those provisions to achieve a contractual arrangement of the type referred to in the question above.

It is possible for parties to agree that DAB-features should apply to arbitral proceedings seated in England and Wales. For example, parties may agree that an award made by an arbitral tribunal pursuant to an arbitration agreement is not final and binding on the parties (section 58(1) of the Arbitration Act 1996).

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

Yes – subject to the usual (limited) bases on which an award might not be enforced.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

The requirements of natural justice under English law are likely to be imported into the DAB process by virtue of clause 6.2 of the Procedural Rules annexed to the FIDIC 2017 conditions, which provide that the DAB shall *"act fairly and impartially between the Parties"* and *"give each Party a reasonable opportunity (consistent with the expedited nature of the DAAB proceeding) of putting forward its case and responding to the other Party's case"* (a materially identical requirement also being included in clause 5(a) of the Procedure Rules annexed to the FIDIC 1999 conditions).

The effect of a breach of natural justice will depend on the severity of the breach and any prejudice caused to the parties. Such breaches can, however, be waived by the parties if with knowledge of the breach they continue to participate in the process without an adequate reservation of rights. For material breaches of natural justice causing significant prejudice to one or both of the parties, the whole of the DAB's decision may be unenforceable.

There may then be an issue as to whether the DAB process, as a precondition to arbitration, has been fulfilled. In any event, the arbitration agreement in clause 20.6 could not be ignored and the dispute that was referred to the DAB or the dispute about the DAB's decision referred to the courts – unless both parties allowed the same.

8.5 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

No, the English courts have no power to review the substance of a binding expert determination. Such determinations may, however, be found to be invalid in certain circumstances. For example:

1. Departure from Instructions: The expert may have materially departed from their instructions, to the extent that the determination was not made in accordance with their contractual jurisdiction (*Jones and Others v Sherwood Computer Services Plc* [1992] 1 W.L.R. 277). This is sometimes referred to as the expert answering the wrong question, rather than reaching the wrong answer to the right question. If this can be proved, the parties would not be bound by the determination. Materiality is given a broad definition, with the presumption that a departure from instructions would be material unless and until it could truly be shown to be trivial: *Veba Oil Supply & Trading GmbH v Petrograde Inc* [2001] EWCA Civ 1832.

2. Fairness and Due Process: The expert is under a duty to act fairly but the rules of natural justice will not usually be generally applicable. There is therefore some

flexibility as to the precise standards of fairness required, such as the extent to which an expert must allow a party an opportunity to comment on submissions received from an opposing party or any independent views reached by the expert outside the submissions received. Expert determinations take place in a wide variety of contexts and in each case the terms of the contract must be considered together with the relevant commercial background to conclude whether the process adopted by the expert was in accordance with the terms of the contract.

3. Fraud, Collusion and Bias: If there is fraud or collusion on the part of the expert, his determination will be set aside: *Campbell v Edwards* [1976] 1 WLR 403. Similarly for bias, although more is usually needed than a mere conflict of interest or apparent lack of independence.

9. Trends and developments

9.1 Please comment on any new trend or developments relating to ADR in construction in your country.

Increased court fees and mandatory cost budgeting in litigation have further promoted the resolution of disputes by ADR (often negotiation or mediation). Since the publication of the NEC4 suite of contracts featuring the new Option W3 including use of DABs, it is likely that there will be an increase in the use of DABs going forward.

10. Other Important Issues

10.1 Please comment on any other important topics affecting ADR in construction in your jurisdiction.

In 2015 the TCC introduced pilot schemes for shorter and more flexible trial procedures, providing for trials within 8 months of the first case management conference and for greater discretion as to directions respectively. These schemes have since been made permanent. While claimants using the schemes still face the usual commencement fee, the shorter procedure and confidence surrounding the enforceability of a court judgment may promote litigation over other forms of dispute resolution (despite the same court rules promoting settlement by mediation applying during such litigation).