IBA International Construction Projects Committee

ADR in Construction

Germany

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Date: January 2014

Table of contents

1. Background 1

2 Dispute resolution agreements 4

3 ADR and jurisdiction 6

4 Arbitrators, adjudicators, dispute board members, mediators 8

5 ADR procedure 10

6 Interim measures and interim awards 13

7 Awards, decisions, recommendations, negotiated agreement 14

8 Enforcement of and challenges to awards and decisions 15

9 Trends and developments 16

10 Other Important Issues 16

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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?

Disputes in construction matters in Germany are most often finally resolved in litigation before ordinary German courts if settlement talks have been unsuccessful. Alternatively, arbitration appears to be the second choice. Non-binding expert determination is often used in both litigation and arbitration.

The German legal system provides for a reliable and effective court system. This might be due to the fact that there is no pre-trial discovery and a concept of comprehensive pleading which, *inter alia*, requires a statement of claim to be complete and to contain a concise description of the relevant facts including the evidence on which the Plaintiff is relying as well as an exact specification of the relief sought. In addition, costs of the litigation can be calculated due to court fees and statutory attorney fees being subject to the amount in dispute. The winning party may claim full reimbursement of costs on the basis of the statutory fees.

Some regional courts even have specialised chambers for construction disputes.

Finally, the advantage of litigation before ordinary courts is the possibility of joining third parties (in the context of construction disputes typically sub-contractors), which is usually not possible in commercial arbitration.

Nevertheless, arbitration is also widely used, in particular in complex matters where special expertise might be necessary. Arbitration is clearly the preferred option in the case of any international element in a construction dispute, whether the applicable law is foreign law, one party is foreign or the contract language is a foreign one.

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

There are currently no special laws for the resolution of construction disputes in Germany, in particular, statutory adjudication does not (yet) exist in Germany. Legislation regarding statutory adjudication has been discussed in the past and a draft had even been developed by a working group consisting of construction lawyers and judges in 2011. However, this initiative did not find sufficient support from the government. Irrespective of the aforementioned, adjudication as a means of dispute resolution on the basis of party autonomy is possible but rarely used at present.

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).

No such provisions apply to binding decisions of non-statutory dispute adjudicators. Since this is a contractual concept, any non-binding decision by a dispute adjudicator or an expert could only create an obligation on a party which would need to be confirmed by judgment or an arbitral award in order to become enforceable.

Binding decisions by experts (expert determination) are to be used as evidence in litigation and arbitration.

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?

Arbitration is governed by the provisions in the 10th Book of the German Civil Procedure Code (Zivilprozessordnung – "ZPO"). Awards in arbitration are not only binding but also enforceable, of course, subject to a confirmation of the enforceability by a state court, which is usually only a formality.

Such provisions do not apply to decisions by an adjudicator or an expert, even if they are binding (see the question here before).

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?

As outlined before, some courts have specialised chambers dealing with construction disputes. In the field of arbitration, there are several institutions in the construction industry which provide their own rules (not only for arbitration but also for other dispute settlement methods).

The Deutscher Beton- und Bautechnik-Verein e.V./ Deutsche Gesellschaft für Baurecht e.V., two associations of construction lawyers, recently issued a completely new set of rules, the Alternative Dispute Resolution Rules for the Construction Industry, where parties can choose between four different dispute resolution proceedings.

The Rules are available in English at http://dg-baurecht.de/fileadmin/user_upload/downloads/SL_Bau_english.pdf The Rules are often referred to as SL Bau.

The ARGE Baurecht is a working group for construction and real estate law of the German Lawyers' Assocation. Their rules, referred to as SO Bau, cover a sort of mediation process, arbitration proceedings as well as isolated proceedings for the purpose of securing evidence. Unfortunately, these rules are not available in English; the German version can be obtained at www.arge-baurecht.com/rechtsuchende/sobau/schiedsordnung.

The most important institution for commercial alternative dispute resolution is the German Institution for Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V. – "DIS").

Although DIS is not primarily focussed on construction disputes, it provides for an entire catalogue of rules for different dispute resolution processes such as mediation, adjudication and arbitration. The DIS website is very informative, with all of its institutional rules also available in English: www.dis-arb.de.

Generally, all these institutions do not interfere with the dispute resolution process itself but either only provide the rules or have some administrative tasks until the establishment of an arbitral tribunal. They also serve as nominating authority, if the parties cannot agree on a mediator, adjudicator or arbitrator.

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).

To date, mediation in construction disputes has rarely been used. Due to a more positive approach to mediation in general it might also find its place in construction disputes. Similarly, contractually agreed adjudication in the form of dispute boards is expected to be used more often in bigger projects.

However, in construction disputes, very often isolated technical questions are to be resolved which will remain the battlefield for experts/ expert determination.

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?

Without knowing of any particular decision in this respect, it can be assumed that DAB decisions would be considered valid evidence in subsequent arbitration or court proceedings in Germany. It needs to be tested whether such DAB decision would be sufficient for court proceedings based on documents only ("Urkundenverfahren").

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.

Any kind of early dispute resolution appears to be more cost-effective than litigation or arbitration, however, due to limited experience with mediation and adjudication in the construction industry it cannot be determined which process would be the most cost-effective. Even with ADR methods, in Germany it would be expected that the "cost follow the event" rule applies, which is comparable to court litigation.

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?

The requirements for a valid arbitration agreement have been relaxed for commercial entities. Any form which can provide evidence of its contents is sufficient. This could be done by a written and signed agreement, by respective correspondence, even by silent acceptance between merchants. If, however, one party is a consumer (which is hardly the case in construction disputes on the basis of FIDIC contracts, but applicable in case of private houses), an arbitration agreement has to be set out in writing and separate from an underlying contract (§ 1031 ZPO).

The same would apply to a multi-party arbitration agreement as long as all parties are subject to the agreement. However, for multi-party arbitration agreements the provisions regarding the constitution of the arbitral tribunal are of major importance. Several parties on one side would have to make a joint nomination.

Clause 20.6 of the FIDIC Red Book would be considered to be a valid arbitration clause. This clause would, however, not prevent a party from seeking interim measures from a competent court.

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?

Arbitration clauses in standard forms of contracts between commercial entities are valid. In contracts with consumers the formal requirements of § 1031 ZPO apply.

Similar restrictions are to be considered for other forms of ADR.

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?

Standard conditions used predominantly in German construction projects, in particular where public parties are involved, are the VOB-Rules, which contain contractual provisions in Part B. They do not provide for arbitration in case of disputes. Therefore, unless the parties have a separate arbitration agreement in place, their dispute would end up before ordinary courts. Public entities are very often shy of entering into arbitration agreements and try to argue that this is not allowed under budgetary rules. This is, however, not true for arbitration, but might be different for other forms of ADR with binding character.

Commentators on the VOB-Rules very often refer to the Rules of the Deutsche Beton-Verein e.V. and the Deutsche Gesellschaft für Baurecht e.V. which are the SO-Bau or the SL-Bau rules (depending on which organisations the authors belong to).

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

Non-signatories are not bound by arbitration agreements. The same applies for 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 mandatory process for expert determination. If expert determination is agreed upon, the resulting determination is generally binding on the parties. The contractual agreement should clearly define the binding effect or stipulate otherwise. It could also make reference to a specific provision in the German Civil Code (Bürgerliches Gesetzbuch – "BGB"), § 317, which stipulates that parties can agree that an obligation can be determined by a third party, the expert.

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?

Multi-tier dispute resolution clauses are not uncommon in construction contracts in Germany, in particular for bigger-sized projects. If a party does not perform the multi-tier approach it could be considered as being in breach of the contract and being subject to damages which might, however, be very difficult to establish. In such event, where one party basically jeopardises the multi-tier approach, the other party is entitled to directly opt for litigation or arbitration. In such case the other party will be estopped from reverting to the multi-tier dispute resolution clause.

Multi-tier dispute resolution clauses may foresee several levels, starting with friendly negotiations between the parties on a higher level than the operating level, providing for mediation and/ or adjudication, expert determination and finally litigation or arbitration.

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?)

Disputes regarding public law elements, e.g. approvals from authorities, may only be decided by an administrative court. Otherwise, there are no specific types of disputes which are not arbitrable.

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?

Expert determination is used for deciding factual questions. An expert should not be used and is subject to challenge if he or she decides on legal questions.

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 appear to be no restrictions on the type of arbitral awards or binding decisions that may be issued. A DAB on the basis of the FIDIC Red Book may rule on questions of fact as well as on questions of law.

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

As already stated above, public entities are not generally barred from settling disputes by arbitration, however, there might be restrictions for other dispute settlement procedures.

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

State parties enjoy immunity only with respect to performing sovereign functions. They are not protected by immunity if they enter into commercial contracts or are in the tendering process of public projects.

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?

Public procurements disputes, i.e. disputes related to the process of tendering and the placement of orders are not subject to ADR proceedings. Instead, there is special jurisdiction for participants in public bids before specific chambers of ordinary courts.

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?

The question whether a DAB would be allowed to decide on issues outside the contract with the DAB clause in the case of several interrelated contracts is a question of contract interpretation. It might be arguable that the DAB clause in one contract should be interpreted as an agreement on the overall dispute resolution process between the parties. This would, however, hardly have a chance if the other contracts provide for other jurisdiction clauses.

It goes without saying that if a DAB purports to make a decision on a matter not referred to its jurisdiction it is challengeable.

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 DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

With regard to arbitration, the provisions in the 10th Book of the German Civil Procedure Code apply. It contains rules regarding the appointment of arbitrators and potential challenges. This in particular applies to neutrality and independence requirements for an arbitrator. Insofar, § 1036 para. 1 ZPO provides that an arbitrator must disclose any circumstances which might create concerns with regard to his impartiality or independence. On the other hand, § 1036 para. 2 ZPO stipulates that an arbitrator can be rejected by a party only if there are circumstances which provide justified concerns regarding the impartiality or independence of the arbitrator or in case the arbitrator does not fulfil the requirements as set out by the parties in their arbitration agreement.

In general, there are no particular qualifications required for an arbitrator. This also applies to other persons involved in the dispute resolution process such as a mediator or an adjudicator. Currently, there are no statutory rules on mediator or adjudicator appointments.

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?

Arbitral institutions for construction arbitrations have unofficial lists with names of arbitrators whom they would recommend or from whom they would make appointments. In principle, it is up to the parties to nominate and appoint their arbitrators; however, if the parties cannot agree on a sole arbitrator or on the chairman, the institutions would serve as a nominating authority. Lists of arbitrators are non-binding, accordingly, parties are free to choose arbitrators who are not on the list.

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?

Most of the arbitral tribunals consist only of lawyers. Even dispute boards would usually have one lawyer on the board. There are no specific requirements as to a specific qualification. This also applies to a secretary to a tribunal. Even if the tribunals are to rule on issues of law, the presence of a lawyer is not required.

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?

As set out before, arbitration panels very often consist only of lawyers whereas other panels, such as dispute boards, have a greater mix.

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?

In particular for arbitration proceedings, the right to be heard is an essential right of each party. If the arbitrators take the parties by surprise by applying their own expertise without prior notification, their decision might be subject to challenge on the basis of the breach of the right to be heard. This might be less important for other panels even if they may make binding decisions which might not be final and may be subject to challenges in the proceedings following.

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?

Unless otherwise expressly agreed by the Parties, tribunals have to apply the rules of law to the merits of the case. This should be the same for other forms of ADR.

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?

Definitely in arbitration, but also even without statutory basis, adjudicators have to follow due process rules, e.g. give the parties an appropriate opportunity to be heard, otherwise their decision might be subject to challenge. Parties usually have the right to legal representation.

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

In Germany, the focus in arbitral procedures as well as other ADR procedures will be more on written submissions than oral presentations, with the exception of hearing witnesses on facts.

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?

Unless otherwise provided by the parties in their arbitration agreement or in applicable arbitration rules, and unless provided for by mandatory rules of the provisions in the 10th Book of the German Civil Procedure Code, the determination as to which rules of evidence should be applied is left to the discretion of the tribunal. In this respect there are hardly any mandatory rules. § 1049 ZPO provides that unless otherwise agreed, the Tribunal may appoint one or several experts to determine certain questions addressed to them by the tribunal. In general, questioning of witnesses and experts is primarily undertaken by the tribunal. In proceedings with international elements it more often happens that examination and cross-examination are used.

Regarding document production, this is usually limited to the extent as foreseen under German procedural law in litigation and the IBA Rules of Evidence, i.e. documents can be requested from the other party only if they are specific and their intended use is defined.

5.4 Is a hearing mandatory for all forms of ADR?

A hearing is not mandatory, even for arbitration. However, the tribunal has to order a hearing if requested by one party.

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?

There is no requirement to conduct a hearing.

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 majority of experts used are technical experts whose remit is to try to clarify whether goods or services are in conformity with technical specifications or fit for purpose. Technical experts are often also asked about the specific scope of supplies and services and warranty characteristics. Delay and disruption experts are used to a lesser extent. In principle there is no difference between arbitration, court litigation and dispute boards.

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?

Neutral experts are appointed by the tribunal. If parties appoint their own experts, they are more or less seen as party representatives. Accordingly, the evidential value is different.

If the parties bring their own experts, the parties have to bear their costs. The costs for a neutral expert will be advanced by the parties jointly and finally determined in a cost decision which follows the outcome of the dispute.

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

Any person serving as a real (=neutral) expert is supposed to be independent of the parties and their counsel.

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

Normally, the expert will provide a written report and can be requested to testify orally during a hearing.

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?

The tribunal is free to ignore the expert statements in its decision if it is convinced that the expert statements might not be correct or the expert is found to be not impartial or independent. It is recommended that the tribunal gives reasons for following or not following the statements by an expert, otherwise the tribunal's decision might be subject to challenge. A decision by the tribunal *per se* cannot be delegated to the expert; however, the tribunal can use findings of the expert and incorporate them into its own decision.

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?

"Hot tubbing" is a means of taking evidence which is subject to the discretion of the tribunal. It is used in Germany.

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 are not regulated as such by the laws of Germany, the rules of arbitration in the 10th Book of the German Civil Procedure Code or in other often-used arbitration rules. Site visits are, of course, allowed but never mandatory. It is within the discretion of a tribunal to decide whether site visits might be helpful in the proceedings.

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?

All parties need to be given the chance to participate during the site visit and also given an opportunity to comment on the findings of a tribunal. However, it is not mandatory to be present.

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 testimonies in construction disputes can be of great value. Questioning a witness during a hearing is preferred to written witness statements which are often

pre-formulated by counsel. Employees or consultants of a party can serve as witnesses, however, the tribunal will take into consideration any potential conflict of interest or dependency of such witnesses.

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?

The discretion of arbitrators or tribunals issuing binding decisions is generally wide. There are no specific rules on the valuation 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?

In Germany, interim measures are permitted. Interim measures can be ordered by the ordinary state court or the arbitral tribunals itself (§ 1041 ZPO).

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?

Interim measures of a DAB do not have any other effect than creating a contractual obligation, they are not enforceable. In any event, enforceability is subject to a specific order by a state court.

A distinction has to be made between the arbitral tribunal's power to order interim measures of protection according to § 1041 ZPO and an interim or interlocutory award.

From the wording of § 1041 ZPO it might be concluded that an interim measure of protection cannot be the subject of an arbitral award but rather must be issued as an order. However, it is acknowledged that there might be cases where an arbitral tribunal being generally allowed to conduct the arbitration in such manner as it considers appropriate (§ 1042 ZPO) can render an interim/interlocutory award. In particular in construction disputes where there is the typical need to protect the

otherwise unpaid contractor in the interim, i.e. before long lasting disputes are finally decided such interim/interlocutory awards in arbitration are assumed to be as binding and enforceable as final awards. Nevertheless, due to its preliminary nature they should be declared as only preliminarily enforceable subject to the provision of a security (e.g. bank surety).

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)?

A binding decision of a DAB is not directly enforceable in Germany. It would have to follow the contractual agreement. In the case of a FIDIC Red Book clause 20.7, the DAB decision has to be confirmed first in arbitration before it could be declared enforceable by a state court.

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

An arbitral award has to be reasoned unless the parties have agreed that no reasons are to be given or if it is an award on agreed terms (§§ 1054, 1053 ZPO).

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 in arbitral awards are allowed. They can be added as a separate opinion to the award. Failing any statutory regulation of other ADR forms, contractual regulations would almost always follow the arbitration practice.

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?

An arbitral award can be corrected or clarified. This applies in particular to calculating, writing or printing errors. Corrections can be made upon request of the parties or of the tribunal's own accord. In addition, upon request of a party, the award can be amended with regard to an interpretation of a specific part of the award or in case that claims have been made within the arbitral proceedings but have not been dealt with in the award (§ 1058 ZPO).

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?

If the decision is an arbitral award, the party seeking enforcement has to apply for a declaration for enforcement at the Higher Regional Court ("Oberlandesgericht") stipulated in the arbitral agreement. If such stipulation is missing, then the party must apply for the declaration in the district court of the place of arbitration (§ 1062 ZPO).

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?

No, the New York Convention allows recognition and enforcement only of arbitral awards. DAB-type decisions do not have the qualification of an arbitral award. It would need to be tested in Germany whether a contractual arrangement would be recognised whereby the parties agree upfront that any DAB decision should serve as an award on agreed terms. The likelihood is, however, minimal.

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

If the foreign arbitration award is the result of proper arbitration proceedings such arbitration award should be enforceable. If the arbitration is only done for the purpose of enforcing a FIDIC Red Book type DAB decision where a notice of dissatisfaction had been given and the merits are subject to further arbitration proceedings it should be done in the form of an interim or preliminary award, not in form of a final award as was done in the Singapore "Persero" case. Such interim or preliminary award would be enforceable.

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)?

In such obvious cases, an application may be made directly to a state court in order to have the DAB decision lifted and/or the necessity for going through arbitration proceedings waived.

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

If there are material procedural flaws to be considered, a binding expert determination may be declared void or invalid; otherwise it is not subject to review on the merits by a state court.

9 Trends and developments

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

Litigation and arbitration are seen as being the most important dispute resolution methods; however, the construction industry is more and more aware that project-accompanying early settlement procedures such as mediation or adjudication via dispute boards have their advantages, and hopefully these methods become more popular. Experience has shown that the early resolution of minor disputes during a project avoids deadlock situations and allows the parties to carry on performing their contracts. Even if ADR methods provide for binding but not directly enforceable decisions, or even non-binding recommendations, there is a high rate of acceptance which makes enforcement proceedings unnecessary.

A number of highly-disputed projects are underway in Germany where the various dispute resolution methods will be tested.

10 Other Important Issues

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

N/A