IBA International Construction Projects Committee

ADR in Construction

Malaysia

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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?

Arbitration is frequently used in construction matters in Malaysia.

Arbitration is most often used because the domestic standard forms of building contract, such as those published by the Public Works Department (PWD) and the Malaysian Institute of Architects (which is known as PAM, its acronym in the Malay language), expressly provide for arbitration.

Statutory adjudication is expected to be popular under the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012), which has just come into force on 15 April 2014, as it is perceived to be faster and less expensive than arbitration.

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

CIPAA 2012 provides for statutory adjudication of disputes arising from construction contracts.

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).

The Rules of Court 2012, which deals with civil procedure, applies to arbitration proceedings insofar as Order 69 of the Rules of Court 2012 provides for the procedure to be complied with when applications are made to court in relation to arbitration proceedings, for example for interim measures, to set aside or to enforce an arbitral award.

Apart from arbitration proceedings, the Rules of Court 2012 do not specifically provide for binding decisions of non-statutory dispute adjudicators. Although there are no specific provisions in the Rules of Court 2012 with respect to such decisions, in practice a party is likely to commence an action and apply for summary judgment based on such a decision under Order 14 of the Rules of Court 2012.

The type of binding decisions known in Malaysia that are used for construction disputes are judgments of the courts. Malaysia follows the common law system and applies the principle of binding precedent.

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 differences in Malaysia between arbitration and statutory adjudication are:

(a) Speed

An adjudication decision is required under section 12(2) of CIPAA 2012 to be made within 45 days of the last written statement by a party. An arbitral award is not required to be made within any prescribed period under the Arbitration Act 2005.

(b) Interim

An adjudication decision is intended to be interim and the dispute between the parties is to be finally decided by arbitration or the courts under section 13 of CIPAA 2012. An arbitral award is meant to be final and binding under section 36(1) of the Arbitration Act 2005.

(c) Inquisitorial

An adjudicator has the power to inquisitorially take the initiative to determine the facts and the law required for his decision under section 25(i) of CIPAA 2012. An arbitrator does not have such power under section 21 of the Arbitration Act 2005.

The rules of natural justice apply to both arbitration and statutory adjudication under section 20 of the Arbitration Act 2005 and section 24(c) of CIPAA 2012.

There are two aspects to natural justice. Firstly, that a decision maker should be disinterested in the outcome. And, secondly, that due process should be observed insofar as both parties should be heard on all issues to be determined. It is submitted that while the first aspect will apply to expert determination and DABs, the second aspect is unlikely to apply. This is because, generally and depending on the terms of their appointment, an expert or DAB is permitted to inject into the dispute resolution process their personal expertise and to make their own inquries without any obligation to seek the parties views or consult them. An expert or DAB is also not obliged to make a decision on the basis of the evidence presented to them. They can act on their subjective opinion.

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 Kuala Lumpur Regional Centre for Arbitration (KLRCA) deals with all type of disputes referred to arbitration in Malaysia, a large number of which are construction disputes, as the PWD standard form of contract provides for arbitration under the KLRCA Rules. The KLRCA is the appointing authority under the KLRCA Rules and the default appointing authority under the Arbitration Act 2005. The KLRCA is also the adjudication authority under CIPAA 2012. As the adjudication authority, the KLRCA will certify adjudicators and be the default appointing authority for adjudicators.

PAM is the appointing authority for disputes arising from the PAM standard form of contract.

Neither the KLRCA nor PAM supervises the conduct of arbitral proceedings in the way the International Chamber of Commerce (ICC) does.

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).

The PAM standard forms of contract provide for mediation but it is not compulsory. All commercial and contractual disputes in the courts of Malaysia may go for mediation before a Judge or member of the Malaysian Mediation Centre prior to trial under Practice Direction No 5 of 2010. Again this is not compulsory. However, mediation of construction disputes by a Judge, particularly those involving claims in tort, where liability is not in dispute, is becoming increasingly popular.

Apart from mediation, other forms of non-binding dispute resolution for construction disputes are rarely used in Malaysia.

The domestic standard forms of contract do provide for hybrid forms of dispute resolution for construction disputes. The PWD forms of contract provide that disputes will be referred to an officer of the Government and if his decision is not referred to arbitration within a prescribed period of time then it will be binding.

The PAM forms of contract similarly provide that disputes will be referred to an adjudicator and if his decision is not referred to arbitration within a certain time it will be 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?

In accordance with paragraph 3 of clause 20.6 of the FIDIC Red Book, the DAB decision will be admissible as evidence in arbitration proceedings in Malaysia. There is no reason why such a decision would not also be admitted as evidence in court proceedings in Malaysia. DAB decisions subject to a notice of dissatisfaction would in all likelihood be viewed as persuasive, depending on the quality of the particular decision, but not binding in subsequent proceedings.

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

Arbitration is no longer regarded as cost effective for construction disputes in Malaysia. Statutory adjudication under CIPAA 2012 is expected to be cost effective.

Generally, the principle that costs follow the event is applied by the arbitral tribunal, although section 44(1)(a) of the Arbitration Act 2005 gives the arbitral tribunal a wide and unfettered discretion. These costs normally include the fees of the arbitral tribunal, legal costs and expenses of the arbitral tribunal, witnesses and lawyers.

In practice, the costs awarded in arbitration approximate to the actual costs incurred by the party, while the costs adjudged by the courts amounts to a fraction of such costs.

Section 18 of CIPAA 2012 specifically provides that the adjudicator shall order that costs follow the event and that this mandatory provision shall prevail over any agreement between the parties.

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?

Essentially, based on section 9 of the Arbitration Act 2005, the requirements for an arbitration agreement are that it must be in writing and submit disputes to arbitration. The same requirements would apply to a multi-party arbitration agreement.

Clause 20.6 of the FIDIC Red Book would be considered a valid arbitration clause.

Clause 20.6 would not prevent a party from seeking interim measures from a competent court. However, where both the arbitral tribunal and the court have the same power to grant interim measures, a party should first apply for such an interim measure to the arbitral tribunal. See *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Power Sdn Bhd* (2009) Transcript, HC.

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?

There are no restrictions on the enforceability or validity of arbitration clauses in standard forms of building contracts. Section 4 of the Arbitration Act 2005 is extremely wide and allows "*any dispute*" to be determined by arbitration unless the arbitration agreement is contrary to public policy.

Under CIPAA 2012, disputes arising from construction contracts may be referred to adjudication for an interim decision before they are referred to arbitration for a final decision.

Other forms of ADR in contracts, which provide for a binding decision, should be carefully drafted so as not to oust the jurisdiction of the courts. This is because under section 29 of the Contracts Act 1950 "*Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals … is void to that extent*". An exception is made by the Contracts Act 1950 for arbitration but not for other forms of alternative dispute resolution.

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?

Both the PWD and PAM standard forms, which are the domestic standard forms most used for construction projects in Malaysia, have a clause on arbitration.

The PWD standard form refers to the KLRCA and the KLRCA Arbitration Rules. The PAM standard form refers to PAM and the PAM Arbitration Rules.

The PWD standard form provides for the reference of disputes to the officer named in the contract prior to the reference to arbitration. The PAM standard form provides for the reference of disputes to adjudication prior to the reference to arbitration, with mediation as an option.

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

An arbitration agreement will not bind a non-signatory, as he would not be privy to such an agreement.

However, a sub-contract may refer to the arbitration clause in the main contract and thereby effectively provide for an arbitration agreement between the main contractor and the sub-contractor under section 9(5) of the Arbitration Act 2005. The reference in the sub-contract must specifically be to the arbitration clause in the main contract.

A sub-contract may also include "name borrowing" provisions that enable the sub-contractor to borrow the name of the main contractor and thereby commence an arbitration under the arbitration clause in the main contract. For example, see clause 4 of the Conditions of PAM Sub-Contract 2006.

Similar principles would 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?

Expert determination is not supported by legislation in Malaysia. It is binding purely because of the contract between the parties. If expert determination is expressly provided for in the contract, it will be mandatory. The resulting determination will be binding except in the case of fraud, partiality and fundamental mistake. See *Chiew Sze Sun & Satu Lagi lwn Cast Iron Products Sdn Bhd & Lain-Lain* [1997] MLJU 332 at pp 9-11; *S&M Shopping Arcade Sdn Bhd v. Fui Lian-Kwong Sdn Bhd* [2003] MLJU 203 at p 16. The terms of the contract would have to be sufficiently certain in terms of procedure.

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?

In Malaysia, a party is unlikely to be allowed to skip one or more tier before starting litigation or arbitration. The tiers of dispute resolution prior to arbitration or litigation are likely to be characterized as conditions precedent.

Multi-tiered dispute resolution clauses are common in construction contracts in Malaysia. The PWD standard form provides, as a first tier, for the reference of disputes to an officer named in the contract prior to the reference to arbitration, as a second tier. The PAM standard form provides for the reference of disputes to adjudication, as a first tier, prior to the reference to arbitration, as a second tier, with mediation as an option.

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?)

As stated above, section 4 of the Arbitration Act 2005 is extremely wide and allows "*any dispute*" to be determined by arbitration provided the arbitration agreement is not contrary to public policy. It is unlikely that any arbitration clause in a construction contract will be contrary to public policy.

Under CIPAA 2012, disputes arising from construction contracts may first be referred to adjudication prior to arbitration.

Similar principles are likely to apply to other forms of ADR. However, provisions in relation to other forms of ADR should be carefully drafted so as not to oust the jurisdiction of the courts, as such provisions may be void under section 29 of the Contracts Act 1950.

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?

In the context of construction projects, there are no restrictions on matters that may be the subject of a binding expert determination or other binding third party decision in the context of construction projects.

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 restrictions on the type of arbitral awards or binding decisions that may be issued insofar as such awards or decisions may determine both questions of law and fact.

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

Public entities are not barred from settling disputes by ADR. On the contrary the PWD standard form of contract, which is used by the Government of Malaysia, expressly provides for arbitration under the KLRCA Rules.

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

Section 2 of the Public Authorities Protection Act 1948 provides that any proceedings commenced against any person for any act done in pursuance or execution of a written law, public duty or authority must be commenced within 36 months of the act complained of, which is shorter than the usual 6 years limitation period for actions based on contract or tort.

Section 95 of the Street, Drainage and Building Act 1974 provides that no state authority or officer will be personally liable for any matter or thing done or contract entered into bona fide for the execution of the Act. Section 95 also provides that no state authority, local authority or public officer will be liable for building or work carried out in accordance with the Act or subject to approval and inspection under the Act.

The Construction Industry Payment and Adjudication (Exemption) Order 2014 exempts certain Government construction contracts from the provisions of CIPAA 2012.

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?

Procurement disputes are rare in Malaysia because there is no legislation governing procurement. The few disputes that have arisen have been resolved by the courts. These disputes may be resolved by arbitration or ADR provided that the tender documents provide for such forms of dispute resolution.

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 DAB would be allowed to decide on issues outside the contract with the DAB clause provided that the contract with the DAB clause gave the DAB the power to decide issues arising from other contracts between the same employer and contractor.

If the DAB makes a decision on a matter not referred to it, the courts or arbitral tribunal will determine that the DAB made a decision outside its jurisdiction.

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?

Section 13 of the Arbitration Act 2005 effectively provides that, unless otherwise agreed, an arbitrator may be appointed by the Director of the KLRCA. Similarly, section 21(b) of CIPAA 2012 provides that, if the parties are unable to agree on an adjudicator within ten days, the Director of the KLRCA may appoint an adjudicator.

Arbitrators do not require any special qualifications. Adjudicators under CIPAA 2012 must meet the competency standards and criteria set by the KLRCA in accordance with section 32(a).

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?

The KLRCA and PAM have their respective panels of arbitrators. The parties are free to appoint arbitrators, failing which the Director of the KLRCA may appoint an arbitrator upon application of a party under section 13 of the Arbitration Act 2005. In the case of

proceedings under the PAM Arbitration Rules, the President or Deputy President of PAM may appoint an arbitrator upon the request of a party, if the parties are unable to reach agreement, in accordance with Article 4 of the PAM Arbitration Rules. The parties do not have to choose an arbitrator from the KLRCA or PAM panel.

Appointment to the KLRCA panel of arbitrators is by invitation or application to the Director of the KLRCA. The minimum requirements for an application for appointment to the KLRCA panel of arbitrators are tertiary education, fellowship with the Chartered Institute of Arbitrators and sufficient experience in arbitration as set out in the KLRCA's Policy on Appointment of Panellist.

The criteria for the appointment to the PAM panel of arbitrators is not published. However, as PAM is the national professional institute representing architects in Malaysia, their panel appears mostly, if not exclusively, made up of senior professional architects.

The KLRCA, the Malaysian Mediation Centre and PAM have their respective panels of mediators. The Malaysian Mediation Centre panel is composed of mediators accredited by this centre.

Adjudicators under CIPAA 2012 will have to meet the competency standard and criteria set by the KLRCA in accordance with section 32(a). The KLRCA is also the default appointing authority under section 21(b) of CIPAA 2012. The KLRCA conducts an Adjudication Training Programme. Individuals who pass the examination at the end of this programme are awarded a Certificate in Adjudication and are eligible to apply to be appointed to the KLRCA panel of adjudicators.

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?

In Malaysia, arbitral tribunals and tribunals issuing binding decisions regarding construction disputes often include a lawyer. However, it is not mandatory that a lawyer be included in such a tribunal. There is no requirement that the secretary added to the tribunal must be a lawyer. The presence of a lawyer, either as a member of the tribunal or as a secretary added to the tribunal, is not required for these tribunals to rule on issues of law.

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?

In construction industry arbitrations, arbitrators are often engineers, architects or quantity surveyors. In particular, in the context of arbitrations under the PAM Arbitration Rules, if the arbitrator is not agreed upon by the parties and is appointed by the President of PAM, the arbitrator is likely to be an architect.

Panels composed of lawyers and construction professionals are possible and common. There are also several arbitrators in Malaysia who are qualified both as lawyers and as architects, engineers or quantity surveyors.

There is no difference with other forms of ADR save that mediation is more often than not conducted by a lawyer. In the case of an adjudicator under CIPAA 2012, whether the person is a lawyer or a construction professional, he would need to be accredited by the KLRCA. Expert determination is usually done by a construction professional.

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?

Section 21(3)(b) of the Arbitration Act 2005 provides that, where the parties fail to agree on the procedure to be followed by an arbitral tribunal, the arbitral tribunal may draw on its own knowledge and expertise. However, an arbitral tribunal which draws on its own knowledge and expertise, must be mindful of section 20 of the Arbitration Act 2005, which provides that the parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case. The arbitral tribunal should, in accordance with section 20, notify the parties of any position it takes based on its own knowledge and expertise and allow the parties a fair and reasonable opportunity to submit their case based on this position.

Section 25(d) of CIPAA 2012 provides that an adjudicator shall have the power to draw on his own knowledge and expertise. Again, an adjudicator would need to be mindful of section 24(c) of CIPAA 2012, whereby he is required to declare at the time of his appointment that he will comply with the principles of natural justice. An adjudicator should accordingly notify the parties of any position based on his own knowledge and expertise in the manner set out above.

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?

Article 35(1) of the KLRCA Arbitration Rules provides that the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

Article 35(2) of the KLRCA Arbitration Rules provides that the arbitral tribunal shall decide as "amiable compositeur" or "ex aequo et bono" only if the parties have expressly authorised the arbitral tribunal to do so.

Similar principles should apply to other forms of ADR as the principles set out above are based on agreement between the parties.

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?

Arbitrators are required to follow a minimum due process. In this context, section 20 of the Arbitration Act 2005 provides that the parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

Adjudicators will also be required to follow a similar minimum due process, as section 24(c) of CIPAA 2012, requires him to declare at the time of his appointment that he will comply with the principles of natural justice.

Experts and DABs should be disinterested in the outcome but are unlikely to be required to follow a minimum due process in that both parties are to be heard on all issues to be determined.

A party would be entitled to appoint lawyers or other construction professionals to represent him or dispense with such 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?

The focus in arbitrations and other forms of ADR issuing binding decisions is written submissions with oral clarification, which is sometimes dispensed with.

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?

Evidence is usually left to the discretion of the arbitral tribunal. This is reflected in section 21(3)(a) of the Arbitration Act 2005 and Article 27(4) of the KLRCA Arbitration Rules, which both provide that the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. Section 2 of the Evidence Act 1950 also provides that the Evidence Act 1950 shall not apply to proceedings before an arbitrator.

Section 25 of CIPAA 2012 effectively leaves evidence to the discretion of the adjudicator.

The normal rules of evidence do not generally apply to experts and DABs.

5.4 Is a hearing mandatory for all forms of ADR?

A hearing is not mandatory for arbitration, unless the parties have agreed otherwise. Section 26(1) of the Arbitration Act 2005 provides that, unless otherwise agreed upon by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or oral arguments, or whether the proceedings shall be conducted on the basis of documents and other materials.

Section 25(g) of CIPAA 2012 provides that the adjudicator shall have the power to conduct any hearing and limit the hearing time. It is submitted that the adjudicator would also have the power to dispense with a hearing.

A hearing is not mandatory for expert determination, mediation, or DABs.

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 are two aspects to natural justice. Firstly, that a decision maker should be disinterested in the outcome. And, secondly, that due process should be observed insofar

as both parties should be heard on all issues to be determined. It is submitted that while the first aspect will apply to expert determination and DABs, the second aspect is unlikely to apply.

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 type of experts most used in construction arbitrations are technical experts for defects and variations, scheduling experts for delays and disruptions, and quantum experts for damages. There is no difference in this context between arbitration and litigation but experts do tend to be more frequently used in arbitrations.

Experts are likely to be used in adjudications under CIPAA 2012 and section 25(e) gives the adjudicator the power to appoint independent experts to inquire and report on specific matters with the consent of the parties.

Experts are seldom used before DABs or in expert 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?

The experts are mainly party appointed and rarely appointed by the tribunal.

It is submitted that there should not be a difference in evidential value between a statement given by a party appointed expert and a statement given by a tribunal appointed expert. In both cases, the expert is not part of the arbitral tribunal, which must exercise its own judgment on the advice given to it.

The costs of an expert are part of the party's costs which will usually be borne by the other party if the party succeeds and will be borne by the party himself if he fails.

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

The expert is meant to be independent of the parties and counsel.

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

The expert normally gives a written report, which he confirms in examination in chief and is then subject to cross examination and re-examination.

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?

It is submitted that an arbitral tribunal is entitled to ignore expert statements in their decision even if the tribunal has appointed the expert. This is because expert evidence is the opinion of an expert. The expert is appointed merely for his technical assistance or expert advice to understand complex technical matters to arrive at a proper decision. The expert is not a part of the arbitral tribunal, which must exercise its own judgment about the advice given to it by the expert even to the extent of ignoring such advice if justified.

Section 33(3) of the Arbitration Act 2005 provides that an award shall state the reasons upon which it is based. It is submitted that this would include reasons for following or not following the statement of an expert.

The arbitral tribunal cannot delegate its decision making function to the expert. The arbitral tribunal must exercise its own judgment in deciding the issues. The arbitral tribunal must form its own opinion and decide on the admissibility, relevance and weight of any expert evidence.

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?

Traditionally, "hot tubbing" has been infrequently used in construction arbitration and other procedures of tribunals issuing binding decisions in Malaysia. However, recently it has been become more popular.

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 the arbitral tribunal and tribunals issuing binding decisions are not regulated by the laws of Malaysia, the KLRCA or PAM Arbitration Rules. However, in the case of arbitration, and adjudication under CIPAA 2012, site visits would need to comply with the rules of natural justice. Site visits are allowed and are commonly held in the context of arbitrations.

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?

In the context of arbitration, and adjudication under CIPAA 2012, both parties would need to be present at the site visit and be given an opportunity to comment on the findings of the arbitrator or adjudicator in accordance with 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 testimony is common and important in construction arbitration. Such testimony is less common in mediation, expert determination or DABs. It is not expected to be common in adjudication under CIPAA 2012, due to the time limits.

There are no restrictions in the KLRCA or PAM Arbitration Rules on not admitting testimony or not giving value to the declarations of witnesses who are employees or consultants of the party on whose behalf they are called. In fact, most witnesses called in construction arbitrations are employees and consultants of the party concerned.

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?

As stated above, Article 27(4) of the KLRCA Arbitration Rules provides that the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. The PAM Arbitration Rules effectively leaves evidence to the discretion of the arbitrator under Article 14.

There are rules on the evaluation of evidence in the Evidence Act 1950. However, section 2 of this Act provides that it shall not apply to proceedings before an arbitrator.

There are no rules on the evaluation of evidence in the KLRCA or PAM Arbitration Rules and this is left to the discretion of the arbitrator.

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?

Section 11(1) of the Arbitration Act 2005 provides that a party may before or during the arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:

(a) security for costs;
(b) discovery of documents and interrogatories;
(c) giving of evidence by affidavit;
(d) appointment of a receiver;
(e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
(h) an interim injunction or any other interim measure.

Section 11(2) of the Arbitration Act 2005 further provides that, where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact by the arbitral tribunal as conclusive for the purposes of the application.

Section 19(1) of the Arbitration Act 2005 in turn provides that, unless otherwise agreed upon by the parties, a party may apply to the arbitral tribunal for any of the following orders:

(a) security for costs;
(b) discovery of documents and interrogatories;
(c) giving of evidence by affidavit; and
(d) the preservation, interim custody or sale of any property which is the subject-matter of the dispute.

Sections 11(1) and 19(1) of the Arbitration Act 2005 accordingly allow in Malaysia for 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.

The overlap between the powers of the High Court and the arbitral tribunal in sections 11(1) and 19(1) of the Arbitration Act 2005 has been interpreted by the High Court to mean that a party should first apply to the arbitral tribunal and later apply to the High Court where there is an overlap between these sections. See *Jiwa Harmoni* supra.

In accordance with this interpretation of the statutory provisions, applications for interim measures, where there is an overlap, are in practice usually made first to the arbitral tribunal. Where there is no overlap or where urgent ex-parte relief is required, applications for interim measures are made to the High Court.

Rule 7 of the KLRCA Arbitration Rules (as revised in 2013) now provides that a party in need of emergency interim relief prior to the constitution of the arbitral tribunal may apply for such relief in accordance with the procedures set out in the rules. There is accordingly now less reason for a party to seek such relief from the High Court in arbitrations governed by these rules.

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?

The DAB's decision on provisional relief will be binding under clause 20.4 of the FIDIC Red Book. If there is dissatisfaction with the DAB's decision on provisional relief, the dispute may be finally settled by arbitration under clause 20.6. This would not lead to problems in Malaysia.

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)?

In Malaysia, clause 20.7 of the FIDIC Red Book would prevent direct enforcement of a DAB's decision in the courts, as this clause provides that Party A's failure to comply with a DAB's decision shall be referred by Party B to arbitration. Therefore, if Party B commences proceedings in court based on the DAB's decision, Party A would apply to stay such proceedings pending arbitration under section 10 of the Arbitration Act 2005, and such an application by Party A will in all likelihood be allowed by the courts as clause 20.7 of the FIDIC Red Book is effectively an arbitration agreement.

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

Section 33(3) of the Arbitration Act 2005 provides that an award shall state reasons upon which it is based, unless:

(a) the parties have agreed that no reasons are to be given; or

(b) the award is an award on agreed terms under section 22.

Section 12(5) of CIPAA 2012 provides that an adjudication decision shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.

Therefore, reasons need to be provided for awards and adjudication decisions unless such reasons have been dispensed with. With respect to expert determination and DABs, reasons will only be required if the parties provide for this in the relevant agreement.

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?

Section 33(2) of the Arbitration Act 2005 provides that, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall be sufficient provided that the reason for any omitted signature is stated.

Therefore the dissenting arbitrator is required to state his reasons. The Arbitration Act 2005 is silent on whether such reasons should be stated in the form of a dissenting opinion. As the Act is silent, it is submitted that while the dissenting arbitrator is obliged to provide his reasons he is not required to provide a dissenting opinion as such but may choose to do so. It is submitted that, if a dissenting opinion is provided, it would not form part of the award under section 33(2), as it would not have been signed by a majority of the arbitral tribunal.

The issue of dissenting opinions does not arise in the context of adjudication, as CIPAA 2012 envisages a sole adjudicator.

In the context of expert determination and DABs, it would depend on the agreement between the parties.

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 award may be corrected, interpreted or supplemented by application of a party or by the arbitral tribunal on its own initiative under section 35 of the Arbitration Act 2005.

An adjudication decision may similarly be corrected at the request of a party or by the adjudicator's own initiative under section 12(7) of CIPAA 2012.

The correction of an expert determination or DAB's decision would depend on the agreement between the parties.

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?

A party would have to apply to the High Court for recognition and enforcement of an arbitral award by entry as a judgment in terms of the award under section 38(1) of the Arbitration Act 2005. This application must be supported by an affidavit exhibiting the arbitral award and the arbitration agreement under section 38(2) of the Arbitration Act 2005. Alternatively, a party may enforce an award by an action in the High Court.

Similarly, a party would have to apply to the High Court for an order to enforce an adjudication decision as if it is a judgment of the High Court under section 28 of CIPAA 2012. Alternatively, a party may enforce an adjudication decision by suspending or reducing the rate of performance under section 29 of CIPAA 2012 until payment is made. A party may also seek direct payment of the adjudicated amount against the principal of the party against whom an adjudication decision was made under section 30 of CIPAA 2012. Section 31 of CIPAA 2012 further provides that these three modes of enforcement may be exercised concurrently.

A decision by a DAB or expert may be enforced by action in the courts. A party would in practice apply for summary judgment based on such a decision.

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?

In my opinion, the New York Convention would allow the recognition and enforcement of FIDIC Red Book DAB type awards deemed to be the equivalent to an arbitral award by contract provided that the necessary amendments are made to clause 20.4 of the FIDIC Red Book, for example by deleting the statement in paragraph 3 that the "*DAB shall be deemed to be not acting as arbitrator(s)*" and by deleting the provisions enabling a reference to arbitration after the decision by the DAB. Such an amended clause 20.4 would, in my opinion, amount to an arbitration agreement under Article II(1) of the New York Convention and any award made pursuant to such an agreement should be recognized and enforced.

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

Malaysia would allow the enforcement of a foreign arbitral award which in turn enforces a FIDIC Red Book type DAB decision, where:

(a) pursuant to a notice of dissatisfaction under clause 20.4 of the FIDIC Red Book, the dispute in respect of the DAB's decision has been determined by the arbitrators by maintaining the DAB's decision; or

(b) in the absence of a notice of dissatisfaction, and pursuant to a reference to arbitration under clause 20.7 of the FIDIC Red Book, the arbitrators determine that the DAB's decision is final and binding under clause 20.4.

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)?

Clauses 20.6 and 20.7 of the FIDIC Red Book read together appear to effectively provide that the DAB's decision should be referred to arbitration in all circumstances i.e. whether the DAB's decision is the subject of a notice of dissatisfaction or even when a DAB's decision is final and binding. Therefore, a DAB's decision would need to be enforced by a reference to arbitration and a subsequent application to the High Court to enforce the award. There does not appear to be an avenue for direct recourse to the High Court to enforce a DAB's decision.

In an arbitration, where the DAB's decision is final and binding, it is submitted that such a decision by the DAB may only be challenged on the grounds of fraud, partiality or fundamental mistake. A declaration may be sought from the arbitral tribunal that the DAB's decision is not final and binding on these grounds.

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

A binding expert determination would not be subject to review on the merits by the courts of Malaysia.

A binding expert determination cannot be impeached except for fraud, partiality and fundamental mistake. A fundamental mistake would for example include a decision on the wrong subject. It does not include a simple error of fact or law. See *Chiew Sze Sun* supra; *S&M Shopping* supra.

9 Trends and developments

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

(a) Practice Direction on Mediation 2010

By Practice Direction No 5 of 2010 ("The Practice Direction on Mediation"), the Chief Justice of Malaysia directed that all Judges may give directions at pre-trial case management to facilitate the settlement of a matter through mediation. Mediation may be directed for commercial or contractual disputes and is in practice often ordered for construction disputes. The Practice Direction on Mediation provides for either Judge-led mediation or a mediator agreed upon by the parties. In practice, Judge-led mediation of construction disputes is preferred and is often successful due to the authority of the Judge acting as mediator.

(b) Construction Industry Payment and Adjudication Act 2012

CIPAA 2012 was given the Royal Assent on 18 June 2012 and was published in the Gazette on 22 June 2012. The Minister of Works appointed 15 April 2014 for CIPAA 2012 to come into effect. CIPAA 2012 brings Malaysia into the community of nations that have statutory adjudication for construction contracts.

(c) Construction Court 2013

The Construction Court was established on 1 April 2013 as a High Court in Kuala Lumpur and Shah Alam to hear cases based on or related to construction. Claims to be heard by the Construction Court are:

i. construction, engineering and building disputes including those arising from:
   - CIPAA 2012,
   - performance bonds, guarantees or insurance,
   - quality of goods, works or services,
   - environment;

ii. claims by and against engineers, architects, surveyors, accountants and other consultants in relation to the services provided;

iii. claims by and against local authorities in relation to statutory obligations with respect to building and development;

iv. proceedings in relation to arbitration; and

v. appeals from the subordinate courts on these matters.

(d) KLRCA Arbitration Rules (as revised in 2013)

The KLRCA has amended its arbitration rules which came into force on 24 October 2013.

Some of the important amendments in the KLRCA Arbitration Rules (as revised in 2013):

i. emergency arbitrator provisions. The emergency arbitrator provisions provide an option for parties where they require urgent interim relief, increasing party autonomy, providing certainty and minimizing judicial intervention. Parties are now able to obtain the full breadth of commercial remedies within the auspices of their KLRCA administered arbitration proceedings;

ii. the power for arbitrators to grant pre-award interest. Furthermore, new provisions have been added regarding consolidation of proceedings and concurrent hearings;

iii. confidentiality requirements have been strengthened in order to enhance the privacy of any proceedings. The only exclusions are where the matter falls under the public domain or the disclosure is necessitated by legal requirement; and

iv. the schedule of fees and administrative costs has been revised maintaining the KLRCA's cost advantage.

(e) Sulaiman Building 2014

The Government of Malaysia has approved the relocation and budget for the refurbishment and renovations works for the Sulaiman Building to be converted into new premises for the KLRCA. Located in Kuala Lumpur's historical enclave, the Sulaiman Building is an art deco heritage building that is very close to the city's central hub and tourist district. The proposed five-story building with state-of-the art facilities and world-class amenities, such as 19 hearing rooms, breakout rooms, a business centre, dining areas, and an auditórium, is expected to be ready by the third quarter of 2014.