IBA International Construction Projects Committee

ADR in Construction

Chile

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Introduction

For the last three decades, Chile has achieved a consistent and solid growth pattern. The Chilean engineering and construction industry has evolved accordingly and has become a key engine of this notable economic development, benefiting from the presence of large international and global contractors as well as major regional and local ones, all of which co-exist with a sizeable number of mid and small sized contractors and construction companies. Thus, engineering and construction contract standards have become increasingly sophisticated, including their dispute resolution mechanisms.

In Chile, arbitration is the only form –with few specific exceptions- of ADR that is regulated in Chilean legislation, through the Courts Organic Code, Civil Procedure Code and Law 19.971 on International Commercial Arbitration.

Parties are free to resolve any dispute through arbitration, provided that the matter does not refer to issues, which as a matter of public policy, cannot be subject to arbitration; i.e. criminal, family and labor law matters.

Arbitration awards, whether local or international, are binding and have the same force as an ordinary court ruling, making them a powerful and popular dispute resolution method.

Dispute boards, expert determinations and mediation are not regulated by Chilean legislation and there is little case law regarding them, if any. The applicability and boundaries of such dispute resolution mechanisms are not clear and the comments set out in this article are interpretations made by the authors, which are, for the most part, based on the premise that only tribunals and arbitrators are allowed by law to perform a jurisdictional function.

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?

Statistically, arbitration is the preferred dispute resolution method for construction matters in Chile and is deemed as the most cost-effective solution. This is because: (a) it is regulated by law and arbitration awards, whether local or international, are binding and have the same force as an ordinary court ruling, making them a very powerful dispute resolution method; (b) this method provides great flexibility to the parties, who may choose among different types of arbitrators, the substantive law that will decide the dispute, and the procedure that shall be followed; (c) parties may choose arbitrators who have specific knowledge in construction matters, and (d) sophisticated local institutional arbitration is available.

There are three different types of arbitrators: arbitrators at law, arbitrators *ex aequo et bono* and "mixed" arbitrators. Arbitrators at law must solve the dispute according to

Chilean law and are subject to the statutory procedural rules set out in the Civil Procedure Code. Arbitrators *ex aequo et bono* decide the dispute by applying the rules of prudence and equity, and follow the procedural rules set out by the parties, the arbitration institution or the arbitrator himself (as agreed by the parties). Mixed arbitrators resolve the dispute according to applicable law, but follow the procedural rules set out by the parties, the arbitration institution or the arbitrator himself (as agreed by the parties).

International commercial arbitration is regulated by Law 19.971 which applies, in most part, to international arbitration that takes place in Chile. This law is based on the Unicitral "Model Law".

Direct negotiations are almost always the first mechanism used by parties to solve their disputes, even when this path has not been contractually agreed upon. Sophisticated contracts and/or contracts for larger projects will typically include a multi-step negotiation procedure, involving several stages of negotiations that usually escalate upwards in companies' hierarchies.

Another commonly used system in dispute resolution are the so called ITO ("Inspección Técnica de la Obra"), which are specialized entities that supervise construction works from a technical perspective and generally approve or pre approve payment statements or progress payment requests, etc. Parties often give ITOs the power to issue determinations, clarifications, instructions and similar directions to the contractor on technical matters. Their scope of authority varies from contract to contract and they have been in use in Chile for decades. ITO determinations (interpreting this word broadly) are often binding, but may be challenged by arbitration. In the normal course of a construction project, many technical disputes are solved at the ITO level, usually with participation of the owner and other owner parties, such as architects.

1.2 If there have been changes in preference in the past ten years, what has caused this?

During the past ten years, in spite of the development of new ADR methods, arbitration has not been replaced as the industry's preference.

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

In general, there are no special laws on resolving construction disputes. Notwithstanding, disputes arising from contracts entered into with the State of Chile will normally be resolved through ordinary court litigation.

However, regarding public works contracts, disputes regarding acts of the administration must be resolved through administrative proceedings set out in Decreto 75 of 2004 of the Ministry of Public Works (MOP). Similarly, construction disputes in relation to concessions contracts of the MOP must be solved through special institutions and proceedings established in the Public Concessions Act (DFL MOP 164 of 1991, as amended).

1.4. 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?

No. However, non-statutory binding decisions may be considered to be part of a contractual agreement between the parties. As such, they are regulated by general contract law provisions, particularly those set out in the Chilean Civil Code.

1.5 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).

(a) Arbitral awards (sentencia arbitral or laudo arbitral); (b) court awards (sentencias judiciales); (c) administrative proceedings of MOP public works contracts, regarding acts of the administration (procedimientos administrativos); and (d) decisions made by the "Arbitration Commission" regarding MOP concessions (Comisión Arbitral).

Expert determinations, in the understanding that the ruling will be on technical matters (or issues of fact) may be considered a binding contractual obligation on the parties, as such situation is analogous to Civil Law provisions, i.e. Article 1809 of the Chilean Civil Code, which permits the price of a sale to be determined by a third party. As any contractual obligation, the expert determination will only be enforceable as a contractual obligation through an ordinary or arbitral tribunal.

Dispute Boards and Expert Determinations concerning issues of law may present a greater challenge. In this sense, the following legal scenarios may apply.

(i) If the ADR procedure establishes a period of time for challenging the decision, whether it is meant to be binding from the date of the decision (and revocable by challenge) or after, if such challenge does not occur (such as under ICC rules for Dispute Boards), the ADR ruling (on issues of fact and/or on issues of law) may be considered a contractual obligation between the parties whom, by not challenging the decision, the parties are agreeing through their silence on the result of the ADR, thereby transforming the decision into a contractual agreement that may be acknowledged and enforced by a court or arbitrator.

(ii) On the other hand, if an ADR procedure is meant to be immediately binding and does not establish a period or measures for challenging the decision, a party could attempt to directly refer such issue to court litigation or arbitration. The party would argue on the basis that the resolution of disputes is an exclusive power of courts and arbitrators and that the ADR mechanism is contrary to public policy. The contrary conclusion could be reached based on freedom of will and a narrow construction of public policy considerations around jurisdictional powers. To the best of our knowledge, the issue has not yet been tested in court.

1.6. What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)?

Arbitration tribunals, are in general, considered to be part of the judiciary and are systematically regulated in Chilean legislation whereas all other forms of ADR that may produce binding decisions are not regulated by law (except for MOP concession disputes).

Arbitration awards are binding and directly enforceable, while other ADR decisions may be binding only as contractual obligations, but are not directly enforceable and must be recognized by a court or arbitral ruling in order to be enforceable.

1.7. Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

Yes, arbitration is regulated in the Courts Organic Code, Civil Procedure Code and Law 19.971 on International Commercial Arbitration, while other ADR decisions are governed only by general contract rules.

1.8. 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?

Yes, regarding construction issues that arise in relation to MOP concessions, there are two special institutions that deal with the disputes that may arise between the parties of a concession contract. The first is the "Technical Panel", a unique form of dispute board for technical and economic matters integrated by distinguished professionals who remain in their position for six years. Such panel issues non-binding recommendations to the parties in order to solve their conflicts.

The second institution is the "Arbitration Commission", which may resolve controversies that arise from the interpretation, application or execution of a concession contract. The "Arbitration Commission" must be chosen by the parties to solve the dispute at the beginning of the concession (they may also choose litigation before the Court of Appeals) and will be formed by three distinguished professionals, selected from lists elaborated by the Supreme Court and the Antitrust Court. If the subject of the dispute is economical or technical, prior to resorting either to the "Arbitration Commission" or the "Court of Appeals" it is necessary for the parties to have the dispute subject to the review and recommendation of the "Technical Panel".

Please note that both the "Technical Panel" and the "Arbitration Commission" only settle disputes between the MOP and the Concessionaires.

Institutional arbitration is typically used in mid and large sized projects. The rules of the Santiago Chamber of Commerce Arbitration and Mediation Center ("CAM Santiago") are most frequently used. CAM Santiago offers specific rules for international or domestic arbitration and for both arbitration of law and *ex aequo et bono*.

As to the role of these special institutions, the Technical Panel issues recommendations regarding public concessions, while the Arbitration Commission resolves disputes that arise from them. The CAM Santiago appoints arbitrators and generally oversees arbitration (from an administrative standpoint) under their rules.

1.9. How prevalent is mediation for construction disputes in your country?

Although increasing, the use of mediation is still quite low. Institutional mediation services are available locally from the CAM Santiago. As mediation is not binding, parties still tend to see this method as time/cost consuming and not very different from direct negotiations.

1.10. What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)?

Dispute review boards are very rarely used and there is no legislation dealing with them.

Expert determinations are not frequently used and, when used, they are normally restricted to certain technical aspects that could lead to disputes. In most cases, the expert determination tends to be non-binding. In fewer cases, when the issue is technical, such determination is binding as a matter of contractual obligation.

Direct negotiations have an important role in dispute resolution, because it is common practice in the industry to exhaust all reasonable negotiation efforts before resorting to arbitration. There are rather very few key players in the Chilean contractor market, and these contractors will avoid, as much as possible, the negative effects that the initiation of arbitration disputes may have on their reputations. On the other hand, owners know that, for certain works, having issues with one contractor shortens the list of alternatives for future projects. Consistent with the above, many construction contracts, especially for medium-sized projects or larger, contemplate direct negotiations prior to arbitration.

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

Hybrid forms of dispute resolution are almost never used, but could be valid under our legal system, by incorporating the duty to abide by the decisions as a contractual obligation.

1.12. Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction?

To our knowledge, FIDIC Red Book type DAB decisions have not been presented as evidence in litigation or arbitration and thus there is no case law regarding this issue. Therefore it is unclear if they will/could be considered valid in such proceedings, absent express agreement by the parties in either direction.

1.13. What would the role of these DAB decisions be for further proceedings?

In arbitration *ex aequo et bono* and mixed arbitration, DAB decisions may or may not be considered valid evidence, depending on the arbitral agreement and/or the subsequent agreement of the parties related to procedural rules of the arbitration.

Generally, in such types of arbitration, the parties (or the arbitrator in default) can freely determine which type of evidence can be entered into the trial and what weight such evidence shall have.

On the other hand, in arbitration at law, the applicable rules of evidence are the same as those that must be applied in ordinary courts. This means that, in both arbitration at law and ordinary court proceedings, a statutory regulated proof system will be utilized, in which: (i) the type of proof to be presented is only that allowed by law; (ii) the manner of presentation of proof is regulated by law; and (iii) the weight assigned to the evidence is defined by law (including cases where for certain evidence or for conflicting evidence the law sends back the weight of the evidence to the criteria of the judge).

The interpretation given to such statutory evidence system is rather conservative, and we believe that is unlikely that DAB decisions will be considered valid evidence in further proceedings. As noted previously, DABs are very rarely used in Chile so the matter has not been tested in Court.

1.14. What form of ADR is considered to be cost effective for construction disputes in you jurisdiction?

Direct negotiation and arbitration are generally considered to be the most cost effective ADR mechanisms for construction disputes.

1.15. Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

When construction arbitration is usually institutional, the costs of proceedings are allocated according to the institution's rules. For example, in national arbitration before the CAM Santiago the costs are determined according to the institution's tariffs and by the expenses the parties have endured. The allocation of such costs must be decided by the arbitrator in his award, and varies from case to case. In court litigation, the costs are assigned to the losing party and theoretically cover both the procedural costs and attorney fees. Nevertheless, in practice, the costs assigned by courts are far below market conditions. The losing party may be exempted of paying all fees by the court when, in the opinion of the court, such party had sufficient cause to litigate or was not fully defeated.

2. Dispute Resolution Agreements

2.1. What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement?

The requirements for a valid arbitration agreement and for a valid multiparty arbitration agreement are the same: All parties involved must consent in submitting the dispute to such resolution mechanism.

Arbitration agreements in Chile are contractual and thus must comply with the general requirements of contract law.
Two forms of agreements are commonly used for this purpose: "Cláusulas Compromisorias" and "Compromisos".

"Cláusulas Compromisorias" are clauses that are inserted into contracts, in order to submit future disputes that arise from –or in relation to- such contract, to arbitration. Thus, the main focus of the clause is not the submittal of an actual dispute to arbitration. Such resolution mechanism is intended to determine the manner in which potential conflicts will be resolved. "Cláusulas Compromisorias" are binding for the parties and have no special formalities but almost always is recorded in writing.

"Compromisos", on the other hand, are agreements among the parties that actually have a dispute between them, who consent to submitting such conflict to arbitration. Therefore, the main focus of a "Compromiso" agreement is the resolution of the actual dispute through arbitration. "Compromisos" must be written and contain the following requirements in order to be valid: (i) identification of the parties; (ii) identification of the arbitrator; and (iii) subject matter of the dispute. Arbitration agreements can also contain: (i) the type of arbitrator (if omitted, the arbitrator shall be at law); (ii) length of the proceedings (if omitted, it shall be of 2 years); and (iii) location of the arbitration (if omitted, it shall be at the location of the agreement).

In addition, Law 19.971 on international commercial arbitration establishes that arbitration agreements must be made in writing (but including by exchange of communications, etc.) and contain: (i) the number or arbitrators (if omitted, there shall be three arbitrators); (ii) the procedure for the designation of the arbitrators (if omitted: (a) in case of three arbitrators, each party shall choose one arbitrator and both arbitrators shall choose the third and, if unable to reach an agreement, the remaining arbitrator shall be chosen by the relevant President of the Court of Appeals; and (b) in case of one arbitrator, the parties must reach an agreement in order to designate the arbitrator and if they are unable to do so, the relevant President of the Court of Appeals will choose); (iii) the arbitral proceedings (if omitted, the arbitrator shall conduct the arbitration as deemed appropriate); (iv) the location of the arbitration (if omitted, the arbitrator shall decide); and (v) language of the arbitration (if omitted, the arbitrator shall decide).

Parties may always empower a third party (i.e. CAM Santiago) to designate the arbitrator.

2.2. Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause?

Yes, as it complies with the requirements for "Cláusulas Compromisorias" and international commercial arbitration clauses.

2.3. Would this clause prevent a party from seeking interim measures from a competent court?

No. In general, arbitration agreements do not prevent the parties from resorting to ordinary courts (without invalidating the arbitration) to seek injunctions or interim measures, particularly prior to the establishment of the arbitration tribunal.

2.4. 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?

In Chile, there are no standard forms of construction contracts and there are no restrictions regarding the enforceability or validity of arbitration or other ADR clauses.

Nevertheless, under the Consumer Protection Act, litigation consumer class actions relating to defects in construction are specifically allowed and will be ruled on by ordinary courts, even if arbitration clauses have been included in construction purchase agreements. Also, if an arbitrator is designated in an adhesion contract, such designation may be challenged by the consumer.

2.5. In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration?

Construction contracts in Chile, especially in mid to large sized projects, generally include an arbitration clause that regulates disputes arising from -or in relation to- the contract. For such purpose, while there is no standard form of clause, the standard arbitration provisions of the CAM Santiago (http://www.camsantiago.cl/clausulasna.htm) and International Commerce Chamber ("ICC") (http://www.icc-chile.cl/) are commonly used, with or without modifications.

2.6. If so, is reference made to an arbitral institution and the rules of this institution?

It is common to include reference to arbitral institutions and their rules, particularly to the CAM Santiago (http://www.camsantiago.cl) and in a lesser degree to the ICC ("http://www.icc-chile.cl/").

2.7. Are other forms of dispute resolution more common in these standard conditions?

Clauses setting out other ADR mechanisms are not widely used, although it is common to encounter stipulations that establish direct negotiations prior to resorting arbitration.

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

According to the principles of Chilean civil law, it is broadly accepted that, as a general rule, contracts generate obligations and rights only for the parties that enter into them, and neither benefit nor affect third parties. Arbitration or other ADR agreements may not bind non-signatories, who are considered third-parties to the contract. Additionally, the Courts Organic Code states that in order to submit a matter to arbitration it is necessary to have the unanimous consent of all the parties interested in the dispute.

2.9. 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 expressly regulated by law in Chile but, in the understanding that the ruling will be on technical matters, the process and the decision will be binding if the parties have agreed to submit a dispute to it.

In order to ensure this, it is necessary for the contract to make it clear that the expert determination will rule on technical matters and not legal issues, as ADR mechanisms (other than arbitration) issuing binding decisions on matters of law are still in a grey area of law as have been noted already in connection with prior answers.

2.10. 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?

Parties are free to set out multi-tiered dispute resolution processes in construction contracts, which will be binding as long as the parties have agreed to them.

Parties will be able to skip one or more tiers only when the agreement enables them to do so and, having consented to the contrary, will be bound to respect all tiers set out in the procedure.

The only exception to this principle could be in connection with ADR mechanisms (other than arbitration) issuing binding and final determinations on issues of law as noted in the response to question 1.4., where a party could attempt to skip it and go directly to arbitration or the courts.

A key issue to consider is whether the breach of the multi-tier dispute resolution clause/obligations would be a contract breach. If it is a contract breach, then the breaching party is liable for just for damages (with challenging causation issues), whether the other party may impose “specific performance” or whether the compliance with early tiers of the process are a condition to the arbitration agreement, so that unless and until

exhausted the jurisdiction of the arbitration tribunal will not commence. To the best of our knowledge, the matter has not been resolved by case law in Chile, but excessive delay in "access to justice" derived from a overly heavy multi-tiered dispute resolution system could potentially render it unenforceable on the grounds of principles of public policy related to access to justice. More on this is matter is elaborated in the next question.

2.11. 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-tiered dispute resolution processes are not very common in Chile and will typically establish direct negotiations only prior to resorting to arbitration.
Notwithstanding, we believe that it would be possible to identify three main kinds of tiered dispute resolution clauses:

(i) Clauses in which the parties agree to a dispute resolution method, such as negotiation or mediation, followed by arbitration without stating that the exhaustion of the first is a condition to arbitration, or expressly stating that engagement in such ADR methods is a contract obligation. We will call these the "silent clauses"

(ii) Clauses in which the parties agree to a dispute resolution method followed by arbitration, stating that the exhaustion of the first is a contractual obligation, with or without tailor-made remedies. We will call these the "obligation clauses".

(iii) Clauses in which the parties agree to a dispute resolution method followed by arbitration, stating that the exhaustion of the first is a condition to commence arbitration. We will call these "condition clauses". This kind of clause may be subdivided into two categories: condition clauses that set explicit applicability and exhaustion boundaries, which we will call "confined condition clauses", and condition clauses that do not set explicit applicability and exhaustion boundaries, which we will call "open condition clauses".

The most typical problem with multi-tiered dispute resolution clauses is a party's delaying of an arbitration procedure through the unnecessary extension of the first tier mechanism that was set out. In this sense, open condition clauses present the highest risk, as their exhaustion boundaries are not clearly defined.

Notwithstanding the above, in the case of institutional arbitration, more often than not, a solution to such problem is foreseen. For example, in case of a multi-tiered dispute resolution mechanism that begins with mediation, the CAM Santiago's standard clause permits the mediator to give way to arbitration when he has concluded that the mediation will not lead to a dispute settlement and has issued a written statement on such decision.

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 arising from acts of the administration in public works contracts cannot be submitted to ADR and must be solved through general administrative proceedings.

Decennial liability may be –but is not typically- solved through arbitration.

Notwithstanding, consumer class actions are specifically allowed for decennial liability, in which case they will be ruled on by ordinary courts, even if arbitration clauses have been included in the agreement.

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?

Forms of ADR other than arbitration and the "Technical Panel" and "Arbitration Commission" are not regulated in Chile and are considered to be of a contractual nature.

Nevertheless, the same restrictions that affect arbitration will apply to such forms of ADR.

As noted in previous answers, binding decisions on issues of law by expert determination or Dispute Boards may present legal challenges.

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)?

Arbitration awards may rule on both factual and legal matters, provided that the dispute may be subject to arbitration as a matter of public policy.

Forms of ADR other than arbitration and the "Technical Panel" and "Arbitration Commission" are not regulated in Chile and are considered to be of a contractual nature.

Typically, third party binding decisions will be limited to questions of fact (such as technical expert determinations) but we believe it would be possible for such third parties to issue binding decisions on issues of law, as long as the parties consent to such decision, for example by not filing a subsequent dissatisfaction notice followed by arbitration. Please see also our response to question 1.4.

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

Disputes relating to construction contracts entered into by public entities are generally solved through litigation and not ADR. In some cases, this is because they are barred from using ADR as a dispute resolution method, as is the case of disputes regarding acts of the administration in public work contracts, in which general administrative proceedings must be used and remedies before ordinary courts apply.

However, in most cases, the use of litigation is favored by many public entities or publicly owned companies, as a matter of "corporate policy" rather than based on legal restrictions.

Recurrent users of litigation include Municipalities, the Armed Forces and entities related thereto, Ministry of Public Works in connection with public works; the Housing Ministry, etc.

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

In Chile, state parties do not enjoy immunities in the construction business context.

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?

Yes, procurement disputes can be solved through arbitration.

Nevertheless, if one of the parties is a public entity they will usually only accept litigation in ordinary courts.

Additionally, in the case of disputes regarding illegal or arbitrary acts or omissions of the State Administration in government procurement, the special Tribunal of Public Procurement shall resolve the dispute.

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

No, in Chile DAB procedures and decisions may be binding as contractual agreements between the parties and contracts are binding only upon the parties who entered into them.

The power of the DAB to decide upon its jurisdiction only applies to those contracts where the parties have specifically consented to such ADR mechanism and will not extend to interrelated contracts with no reference to the DAB.

3.8. 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?

Yes, any decision made by the DAB regarding a matter not referred to it will not be binding for the parties.

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?

There are no specific rules for the construction industry regarding the appointment of tribunals, arbitrators or entities issuing binding decisions.

General arbitration legal provisions state that when a dispute is submitted to arbitration, the parties must designate the arbitrator or empower a third party to do so. If the parties have not named the arbitrator or an appointing authority, the arbitrator shall be designated by a civil court.

In the case of international commercial arbitration, under Law 19.971, the procedure for the designation of the arbitrators shall be decided by the parties in the arbitration agreement. If omitted, the law sets out that the designation shall be as follows: (a) if there are three arbitrators, each party shall choose one arbitrator and both arbitrators shall choose the third and, if unable to reach an agreement, the remaining arbitrator shall be chosen by the relevant President of the Court of Appeals; and (b) if there is one arbitrator, the parties must reach an agreement in order to designate the arbitrator and if they are unable to do so, the relevant President of the Court of Appeals will make the appointment.

Chilean law does not regulate other forms of ADR issuing binding decisions. See however the Technical Panel and the Arbitration Commission in connection with public concessions as explained in section 1.8.

4.2. Do arbitrators, adjudicators etc. need to have special qualifications?

Yes. Arbitrators must be of legal age (18+), free to dispose of their assets and able to read and write.

Arbitrators at law and mixed arbitrators, in local arbitration, must be lawyers qualified to practice in Chile.

In the case of international arbitration, there has been some debate as to whether this restriction also applies. The majority of authors are of the opinion that it does not.

If decennial liability disputes are submitted to arbitration, the arbitrator must have at least 5 years of professional practice.

Regarding concessions of the MOP, the "Technical Panel" members must be composed of two engineers, two lawyers and one specialist in economical or financial science. The "Arbitration Commission" of MOP concessions must be composed of two lawyers and one professional with a university degree.

There is no regulation regarding the qualifications of members of other forms of ADR.

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

There are no special arbitral institutions for construction disputes.

Nevertheless, parties usually submit construction disputes to institutional arbitration under the CAM Santiago. The arbitrators must be chosen from a list of members of the arbitral body of such institution and can be directly appointed by the parties or chosen by the CAM Santiago.

Additionally, the Public Concessions Act states that controversies relating to a Concession Contract may not only be resolved through litigation (through the Court of Appeals) but also by the Arbitration Commission. The Arbitration Commission must be established at the beginning of the concession and subject to certain exceptions, its members shall remain in office for the duration of the concession contract. This commission must be integrated by three professionals; amongst whom at least two must be lawyers. These members are chosen by the parties of the concession contract from a list of 20 lawyers selected to that effect by the Supreme Court; and from a list of 10 professionals selected by the Antitrust Court. Both lists shall be partially renewed every 5 years and the commission members will be paid, in equal parts, by the bidder and the MOP.

4.4. 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?

Arbitrators at law and mixed arbitrators, in local arbitration, must be lawyers. In the case of international arbitration, most authors are of the opinion that such requirement would not apply.

Arbitrators *ex aequo et bono* do not have to be lawyers.

In practice, however, arbitrators tend to be lawyers in all the above cases.

Regarding concessions of the MOP, two members of the "Technical Panel" and the "Arbitration Commission" must be lawyers.

Other forms of ADR are not regulated in Chile.

4.5. In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession?

Arbitrators occasionally belong to the engineering/construction profession, but only when the arbitration is *ex aequo et bono*, which is not widely used and, even when used, the parties typically appoint lawyers. Non legal professionals acting as arbitrators *ex aequo et bono* tend to appear in smaller projects.

4.6. Are panels integrated both by lawyers and construction professionals possible/common?

Integrated panels are possible, but not common, since, to be on the safe side, the type of arbitration would have to be *ex aequo et bono*, as noted earlier in connection with the legal requirement of arbitrators being lawyers in local arbitration.

4.7. Is there a difference with other forms of ADR?

An Arbitration Commission of the MOP Concessions may be formed by two lawyers and one other professional.

The Technical Panel is composed of two engineers, two lawyers and one specialist in economical or financial science.

Other forms of ADR are not regulated in Chile.

4.8. 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?

As discussed above, it is uncommon to see arbitrators who are not lawyers. Thus, it is unlikely that arbitrators will have the technical knowledge to solve a dispute without consulting experts.

Additionally and even if the arbitrator has technical expertise, it may be argued that the use of such technical expertise without consultation with the parties is against minimum due process rules, as parties have a right to challenge expert determinations brought forth in procedures.

4.9. 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"?

Construction arbitrations are normally subject to the rules of mixed arbitration or arbitration at law, in which arbitrators apply the rules of law to the merits of the case.

Arbitration *ex aequo et bono* is occasionally found in smaller construction projects and it requires the specific and express consent of the parties.

4.10. Is there a difference with other forms of ADR?

Other forms of ADR are not regulated, and thus the parties may apply different rules to such dispute resolution mechanisms.

5. ADR Procedure

5.1. Are arbitrators and others making binding decisions required to follow any minimum due process rules?
Yes, arbitrators are required to follow minimum due process rules.

Arbitrators at law are required to follow all provisions of ordinary civil procedure.

Arbitrators *ex aequo et bono* and mixed arbitrators are bound to the following minimum due process rules: (a) the arbitrator must hear the interested parties; (b) the arbitrator must record all documents presented to him; (c) in the case of two or more arbitrators, all of them must be present during all acts of substantiation of the procedure and the entering into judgment; and (d) the arbitral award must be reasoned and delivered in accordance with the law, in the case of mixed arbitration, or the laws of equity and prudence, in the case of arbitration *ex aequo et bono*.

In addition, Law 19.971, regarding international commercial arbitration, states that the parties must be given equitable treatment and equal opportunities to exercise their rights.

Regarding local arbitration, it is also important to note that: (i) if arbitrators incur in gross abuse or fraud when rendering a ruling, such ruling may be challenged by the "*Recurso de Queja*"; and (ii) arbitrators may not act outside of their jurisdiction or grant awards in *ultrapetita*, which may be challenged by the "*Recurso de Casación en la forma*".

Regarding international commercial arbitration under Law 19.971, the remedy of annulment is available in connection with minimum due process aspects: (i) for such cases in which a party has not been given due notice of the appointment of the arbitrator, the acts of substantiation of the procedure or has been unable to exercise its rights for any reason; and (ii) for awards granted outside the scope of the arbitration agreement and (iii) cases of violation of public policy (which may include violation of elemental due process).

Note that the "*Recurso de Queja*" (described above) is not available against the arbitration award in international commercial arbitration and, interestingly, not even against the

ruling of the Court of Appeals hearing the remedy of annulment, as recently held by the Supreme Court in a couple of cases.

Other forms of ADR are not regulated, but it could be implied, as a matter of contract law, that minimum due process rules, including equal treatment of both parties, should also be followed by the entities or persons running such ADR systems.

5.2. Does a party usually have a right to have legal representation?

Yes, the right to a legal defense is a constitutional right. No authority or individual can prevent, restrict or disturb the lawful intervention of a lawyer if such has been required. This naturally applies to courts and arbitration. Other ADR systems are not regulated under Chilean law but the legality of a provision to excluding the right legal representation in such proceedings may be both debatable and could possibly poison the end result of the process.

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

Arbitration at law will follow the rules of ordinary Chilean civil procedures and thus will be mainly written.

Parties are free to determine a written or oral procedure in the case of arbitration *ex aequo et bono* and mixed arbitration. In absence of such regulation, the arbitrator shall decide. Notwithstanding, as a matter of local legal culture, arbitration procedures in Chile will be mostly written, with hearings for witness depositions or examination of experts and occasionally closing arguments.

Arbitration awards in Chile shall always be written.

Other ADR forms are not regulated by law and therefore the parties are free to determine either written or oral procedures.

5.4. Are there rules on evidence in the laws of 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?

In arbitration at law, the arbitrator must follow the legal evidence system established in Chile's civil procedure legislation, in which: (i) the type of proof to be presented is only such allowed by law; (ii) the manner of presentation of proof is regulated by law; and (iii) the weight assigned to the evidence is defined by law.

In arbitration *ex aequo et bono*, proof will be presented and valued in accordance with the provisions the parties have set out. If the parties are silent in this regard, the arbitrator, complying with the laws of equity and prudence, will decide which evidence will be allowed and how it will be weighed.

Regarding mixed arbitration and as further discussed in section 5.22., there has been debate regarding whether or not such arbitrators must follow the legal evidence system established for arbitrators at law.

Other forms of ADR are not regulated.

5.5. Is a hearing mandatory for all forms of ADR?

An oral hearing, as a procedural requirement, will be mandatory in arbitration at law only when the ordinary legal procedure requires one.

The necessity of a hearing, as a procedural requirement, will be decided by the parties in arbitration *ex aequo et bono* and mixed arbitration. If parties are silent in this regard, the arbitrator shall decide.

A hearing is mandatory regarding proceedings held before the Technical Panel.

The Arbitration Commission may freely decide whether a hearing is held or not.

Hearings will be mandatory in other forms of ADR only if the parties have agreed to such hearing.

5.6. 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?

Since DABs are not regulated by law in Chile, hearings will be mandatory only if the parties have agreed to such hearing or procedure.

5.7. What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)?

The type of expert used in construction arbitration will vary depending on the nature of the dispute. Thus, different technical experts will be required depending on the issues at hand. The most recurrent experts are delay/programming experts.

5.8. Is there a difference on this topic between arbitration and court litigation in your jurisdiction?

No, the type of expert used in court litigation will also depend on the nature of the dispute.

5.9. Are experts used in the same manner in procedures for tribunals issuing binding decisions?

In Chile, experts are used in a similar way in arbitration and in ordinary courts.

In connection with the Technical Panel (non-binding decisions) and Arbitration Commission mentioned in section 1.8., experts are used in the same manner, and in spite of the fact that these bodies are composed of technical professionals, we believe that they should not act as experts nor be allowed to rule a dispute based on their own technical knowledge. We were unable to find specific case law on the subject.

There are no other bodies issuing binding decisions regulated in Chilean law or otherwise of common use in Chile, other than courts or arbitrators.

5.10. Are these experts mostly party appointed or appointed by the tribunal?

In arbitration at law, an expert can be appointed by a party (expert *ex parte)* or the arbitrator (on its own accord or at the request of a party) may appoint an expert to issue a report (expert *ex officio).*

The appointment of the expert *ex parte* is made by the party who is presenting such report to the proceedings. In the case of experts *ex officio,* the parties shall agree to the number of experts to render a report and, if the parties cannot agree, the issue shall be decided by the arbitrator. As to the identity of the expert, the parties may agree on it but, in case they fail to do so, the expert shall be appointed by the arbitrator with the limitation that the first two names proposed by the parties may not be appointed.

Both types of experts nominations are often used.

In arbitration *ex aequo et bono* and mixed arbitration, the experts shall be appointed according to the proceedings set out by the parties or, by default, the arbitrator.

5.11. Is there a difference as to the evidential value?

In arbitration at law, the proceedings are governed by the rules applicable to ordinary court procedures, and thus are regulated by a legal evidence system in which the evidential value of the different types of evidence is defined.

Reports made by experts *ex parte* will be assimilated to witness testimonies. Reports made by experts *ex officio* will be weighed according to the rules of logic, experience and science.

In arbitration *ex aequo et bono*, expert reports will have the evidential value assigned to them by the parties or, in default, the arbitrator.

Regarding mixed arbitration and as further discussed in section 5.22., there has been debate regarding whether or not mixed arbitrators, in silence of the parties, must abide by

the evidence valuation rules set out by the Chilean Procedural Code or if the arbitrator is free to determine such aspects of the procedure.

It is important to note that arbitrators tend to assign more evidence value to experts *ex officio* than to those directly hired by the parties.

5.12. How are the costs of experts allocated?

In arbitration at law, the cost of an expert *ex parte* will be allocated to the party who presented the report to the procedure. Regarding the cost of experts *ex officio*, they will be assigned to the party who requested the report. However, the arbitrator may later allocate the expert report costs to the other party in the arbitration award.

In arbitration *ex aequo et bono* and mixed arbitration, the costs will be assigned according to the procedural rules set out by the parties or, by default, the arbitrator. The typical approach is the same as the one outlined previously.

5.13. Is the expert supposed to be independent to the parties/counsel?

Yes, its opinion is meant to be impartial and professional. Parties may request the tribunal to impede the participation of an expert in a procedure if such expert is a relative of one of the parties or has some other economic or personal interest in the result of the trial.

5.14. Does the expert normally give written evidence or oral evidence?

In arbitration at law, the expert's opinion is reflected in a written report. Notwithstanding, when the expert is *ex parte*, the party who brought the expert must have him summoned as a witness to authenticate the report and render testimony expressing the reasons for his statements.

In arbitration *ex aequo et bono,* mixed arbitration and international commercial arbitration under Law 19.971, the expert shall render its report according to the procedural rules established by the parties or, in default, the arbitrator. However, regarding international commercial arbitration, if the parties have not regulated the expert report proceedings, the expert can be summoned to a hearing in which the parties may ask questions and present other experts to inform on controversial issues.

5.15. Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert?

In arbitration at law, the arbitrator may ignore the expert statements, with the limitation that it must always weigh the evidence according to logic, experience and science.

In arbitration *ex aequo et bono* and mixed arbitration, the expert statement may be ignored by the arbitrator if allowed by the procedural rules established by the parties or, in default, the arbitrator.

5.16. Does the tribunal need to give reasons for following or not following the statement of an expert?

Yes, arbitration awards must be reasoned and contain an explanation of the basis that has been used in order to make the decision.

Notwithstanding the above and if agreed by the parties, international commercial arbitration awards under Law 19.971, do not need to be reasoned and therefore do not need a justification of the consideration given to expert reports.

5.17. Can part of the decision by the tribunal be "delegated" to the expert?

No. In Chile, arbitral decisions are an exercise of jurisdictional function, which is exclusive to courts and arbitrators, and thus cannot be delegated onto experts.

5.18. 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?

No, "hot tubbing" is not a common feature in arbitration, whether it be in the construction industry or otherwise. Nevertheless, Law 19.971 on international commercial arbitration states that, if the parties have not regulated the procedural rules on expert reports, an expert who has given its opinion in the procedure can be summoned to a hearing in which the parties may present other experts to inform on controversial issues.

5.19. 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 in arbitration at law are regulated by the Civil Procedure Code, which contains provisions regarding the moment, manner and value of such method of proof. In arbitration *ex aequo et bono* and mixed arbitration, site visits are allowed, but not mandatory, and will be regulated by the provisions of the parties and, if the parties are silent in this regard, decided by the arbitrator.

Other forms of ADR are not regulated.

5.20. 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 arbitration at law, parties are duly given notice of a site visit, and are allowed to be present and to comment on the findings of the tribunal.

In arbitration *ex aequo et bono* and mixed arbitration site visits are subject to the agreement of the parties on procedural matters, but in order to comply with minimum

due process rules, the parties must be duly given notice of a site visit, allowed to be present and given an opportunity to comment on the tribunal's findings.

Other forms of ADR are not regulated.

5.21. 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?

Under arbitration at law, where evidence is regulated by provisions of ordinary legal proceedings, witness testimonies are very common. In order to constitute fully valid evidence, it is necessary for the testimonies to be, in the opinion of the arbitrator, sufficiently serious and precise. If two witnesses coincide on the facts and their essential circumstances which are directly known to them (as opposed to gaining such knowledge by the word of others) their testimonies may be valued by the judge as full evidence.

Witness testimonies may be considered not admissible due to the personal characteristics or relations of the witness which the law considers to undermine its impartiality. For example, one party may oppose to the testimony of a witness who has a commercial relationship with the party of has an interest in the results of the case, or is an employee of the other party. (This later circumstance has been subject to case law declaring that based on the provisions of the Labour Code on employment stability; this witness "disqualification" circumstance should be now disregarded.)

Regarding the admissibility and weight of witness evidence, different rules shall be applicable depending on whether the contract is deemed to be ruled by the Civil Code or the Commerce Code.

In this sense, it is important to note that the Civil Code, in Article 1709, establishes that witness testimonies will not serve as sole evidence to prove obligations that must be recorded in writing (i.e. contracts that require public deeds for their execution or obligations over approximately USD 150) and has a rather strict "parol evidence rule" which states that witness testimonies may not add or alter what has been expressed in a written act or contract. Notwithstanding, such "parol evidence rule" is moderated by the legal rules on interpretation of contracts.

The Commerce Code is much more liberal and admits witness testimony generally, except for cases in which the law requires public deeds as a formality for contracts.

The conclusion regarding whether a construction contract is ruled by the Civil Code or the Code of Commerce is an issue that needs to be analyzed on a case to case basis, and the content of such analysis exceeds the scope of this article.

In arbitration *ex aequo et bono*, witness testimonies will have the value (and restrictions) assigned to them by the parties. If the parties are silent in this regard, the arbitrator will decide.

Regarding mixed arbitration, there has been debate regarding whether mixed arbitrators must, in absence to agreement to the contrary by the parties, abide by the evidence valuation rules set out by the Chilean Procedural Code or if there is freedom to determine such aspects of the procedure. Please see our response to question 5.22. on this matter.

Witness testimonies in other forms of ADR are not regulated in Chilean legislation.

5.22. 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?

In arbitration at law, the arbitrator is bound by the rules of procedure applicable to ordinary litigation. This means that the arbitrator must follow a strict set of evidence provisions which regulate the weight the law gives to each type of evidence that has been presented. In that sense, discretion for arbitrators is not too high, although in many cases the law sends back to the judge or arbitration the value of the evidence.

On the other hand, in arbitration *ex aequo et bono* and international commercial arbitration, the arbitrator is bound by the rules the parties have set out or –if the parties are silent in this regard- the arbitrator shall decide prudently and equitably. Thus, the degree of discretion in the weighing of evidence is considerably higher than in arbitration at law.

Regarding mixed arbitration, there has been debate regarding whether or not mixed arbitrators, if the parties are silent, must abide by the evidence valuation rules set out by the Chilean Procedural Code or if the arbitrator is free to determine such aspects of the procedure. According to an important sector of court jurisprudence, mixed arbitrators are bound by legal evidence valuation unless the parties have agreed otherwise, including by reference to institutional arbitration rules.

Other forms of ADR are not regulated.

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?

Yes. Both in arbitration and court litigation, there are a number of measures that may be adopted in order to preserve evidence or a situation of fact or law or to ensure an award's enforceability. These measures may be to anticipate evidence, to prevent entering into contracts, dispose of property, etc., and may be applicable before or during the course of the proceedings.

Pursuant to Article 349 of the Civil Procedural Code, a party may request the arbitrator to order the production of certain documents which relate directly to the matter at issue, provided the documents are not confidential. Such a request may be granted either against the opposing party or against a third person (who may request to display the document at his/her home or offices, and in which case the request must be executed through an ordinary court, given that the third party has not subscribed the arbitration agreement). The expenses related to document production must be paid by the petitioner.

Prior to instituting a proceeding, a party may file a pre-trial interim measure before an ordinary court. Such a request involves a petitioner (in most cases a potential plaintiff) asking the court to order a potential opposing party to: (a) provide sworn depositions related to the ability to stand trial, representation, and name or domicile of representatives; (b) exhibit an object to be claimed in trial; (c) exhibit certain documents; and/or (d) acknowledge a signature in a private document (which can also be requested by the future defendant).

Additionally, as a pre-trial interim measure for cases in which there is an imminent danger of damage or when evidence can easily disappear, the petitioner may request the judge to order an expert (appointed by the court) to draft a report, to personally inspect certain facts, or to order an attester's certificate related to relevant circumstances.

The future litigant may also request that the court orders the deposition of the opposing party or a witness if there is cause to believe such deposition might not be appropriately rendered at a later time.

Courts or arbitrators may also order prior to the commencement of the proceedings or during the course of the proceedings, the attachment of assets, or a prohibition to enter into acts or contracts related to certain assets if either such assets are the subject matter of the dispute or if the financial condition of the other party (typically the defendant) is too weak to ensure subsequent fulfillment of an adverse award or there is reasonable fear that defendant might hide its assets. The court will require production of prima facie evidence of the rights claimed and may require from petitioner a bond to secure the results of the injunction. Such bond will be asked if the injunction is sought as a pre-trial measure.

Chilean law also allows any request for an interim measure (even if the type of measure is not expressly contemplated by law), as long as it fulfills certain requirements established by the Civil Procedural Code including provision of a bond or security by petitioner.

In all cases, arbitrators may enforce their decisions over these matters through ordinary courts, and also, the parties may also resort to the courts to seek these measures, particularly prior to the establishment of the arbitration tribunal, without invalidating the arbitration agreement.

When the parties have resorted to the local courts to seek injunctions, once the arbitration tribunal is established, they will need to request the arbitrator to confirm the injunction issued by the local courts. Local courts will issue a term to the injunction applicant to file suit (not longer than 30 days) and as noted previously will also require a solid proof of the merits that warrant the measure and the provision of a security.

Injunctions issued by foreign arbitration entities over assets located in Chile have been traditionally difficult or impossible to enforce if not voluntarily complied with.

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?

In Chile, a DAB will not be able to decide on any interim or conservatory measures unless the parties have given it such ability. Thus, if the parties have consented to be ruled by the provisions of Annex procedural rules of the FIDIC Red Book, the DAB will be able to decide on provisional relief.

If the DAB mechanism is considered to be incorporated as a contractual obligation, any provisional relief ordered by the DAB will have to be voluntarily complied with because, if such voluntary compliance does not occur, the DAB cannot enforce said measure on its own. In spite of this, the interested party may choose to pursue the enforcement of the provisional relief before an arbitrator or an ordinary court as a contractual obligation. In fact, it might be better to seek a new injunction directly through the courts (or arbitrator) using as grounds for the petition, the “contractual” injunction already issued by the DAB.

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?

DAB decisions (and other ADR decisions different from arbitration or the Arbitration Commission) may be considered to be of contractual nature, in which case they are not directly enforceable in Chile and must be recognized by an ordinary court or an arbitral tribunal as a contractual obligation in order to be enforceable.

Local arbitration awards are enforced exactly like any regular court award. Nevertheless, when such awards are not voluntarily complied with, ordinary courts will assist the arbitration tribunal on this, for example, to foreclose and auction assets.

In the case of international commercial arbitration under Law 19.971 taking place in Chile, if such awards are not voluntarily complied with, ordinary courts will provide assistance. Note that arbitration awards rendered in international arbitration located in Chile may be challenged through an annulment remedy under the 19.971 act, the grounds of which are basically restricted to the following (in line with model law and NY Convention): (i) the party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the laws to which the parties have subjected it, or absent any indication as to such law, under the law of the country where the award was issued; (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (iii) the award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the Chilean law; or (ii) the recognition or enforcement of the award would be contrary to the public policy of Chile.

As to international arbitration awards rendered outside Chile, their enforcement requires an authorization procedure known as “exequatur”, which must be followed before the Supreme Court.

If such foreign award rules on a case of international commercial arbitration, the Supreme Court will look into the International Arbitration Act 19.971, notwithstanding any applicable international treaties (Chile is a party to the New York Convention; The Panama Convention of 1975; the Washington Convention of 1965 and the International Private Law Code also known as the “Bustamante Code” of 1928, so any arbitration awards coming from any of the countries that are signatories of such international treaties will be subject to the terms and conditions for enforcement set out in the

treaties). The International Commercial Arbitration Act provides requirements for recognition that are identical to those set forth on Section V of the New York Convention, thus foreign arbitration awards issued in another country may only be denied enforcement if: (a) the party against whom enforcement is being sought demonstrates that (i) the party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the laws to which the parties have subjected it, or absent any indication as to such law, under the law of the country where the award was issued; (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (iii) the award deals with a dispute not contemplated by, or not falling with the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or (b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the Chilean law; or (ii) the recognition or enforcement of the award would be contrary to the public policy of Chile.

If the foreign arbitration award is not commercial, the Supreme Court will first look for any applicable international treaty, and will confirm that the requirements for enforcement under such treaty are met. If no treaty is applicable with the country where the award was granted, the foreign award shall be given the same force as Chilean awards are given in such foreign country (reciprocity principle). If neither of the above situations is applicable, the award shall have the same force as if it was granted by a Chilean tribunal, provided: (a) the award does not contain anything contrary to Chilean public policy; (b) the award is not contrary to Chilean jurisdiction; (c) the party against which the ruling's enforceability is sought was given due notice of the proceedings; and (d) the award is a final and binding judgment in the country where it was granted.

International arbitration awards directly referring to or affecting assets located in Chile may be difficult to enforce on grounds of public policy given that Article 16 of the Chilean Civil Code provides that assets located in Chile are governed by Chilean law. Monetary awards are generally not a problem to enforce in Chile. However, please see in the final chapter a new approach that our Supreme Court has been taking on Chilean public policy, where it has concluded that not any public policy should suffice to prevent enforcement of a foreign arbitration award, it must be a very extreme situation which "burns the eyes of the judge" although there is no specific case law on "assets located in Chile" yet.

7.2. Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

The DAB decision is considered to be of contractual nature, thus it will not be directly enforceable in court, because it would previously require recognition as a binding contractual obligation by an ordinary court (or arbitrator).

7.3. Does the award or binding decision have to be reasoned?

Arbitration awards must be reasoned and comply with the elements set out in the Chilean Civil Procedure Code, which establishes that arbitration awards must contain a description of the petitions filed by the plaintiff, the defense of the respondent and the sources of law, equity or prudence that have been used. Arbitration at law awards must also contain the basis of fact and law that have been taken into consideration when pronouncing judgment.

International commercial arbitration awards under Law 19.971 must be reasoned, unless the parties have stated otherwise.

Both the Technical Panel's recommendations (non-binding) and the Arbitration Commissions' awards must be reasoned.

There is no regulation on other forms of ADR.

7.4. Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award?

Yes, dissenting opinions are allowed provided that the arbitral tribunal is composed of several members and are generally added separately at the end of the award. In *mixed arbitration* and *arbitration ex aequo et bono*, dissenting opinions will not be allowed if the parties have forbidden them when setting out the procedural rules for such arbitration.

7.5. Are they allowed in other forms of ADR?

Yes, for example in the "Arbitration Commission" regarding MOP concession contracts, the arbitrators are three and may have dissenting opinions.

Other forms of ADR are not regulated by law and may be structured freely by the parties.

7.6. 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?

In arbitration at law, the remedy "Recurso de Aclaración, Rectificación y Enmienda" established in the Civil Procedure Code will apply. Through this remedy the arbitrator may modify the award by clarifying its obscure or ambiguous points, cure its omissions and rectify its copy, reference or calculation errors, as long as they manifestly appear in the award. The arbitrator may execute these corrections on its own accord within 5 days

from first notice of the award. The parties may also request that the arbitrator make such corrections.

In arbitration *ex aequo et bono* and mixed arbitration, the parties are free to establish the procedures and remedies available against the award, and thus regulate whether or not a decision may be corrected, clarified or reconsidered.

Law 19.971 regarding international commercial arbitration, states that, during a period of 30 days from the granting of the award, the arbitration tribunal may, on its own accord, correct any errors of calculation, copy or typing contained in the award. Such correction may also be requested by the parties in a period of 30 days –by default– from the reception of the arbitral award. In addition, the parties may, within that same period of time, petition that the arbitrator interpret a specific part of the award or grant an additional award regarding issues that were discussed during the proceedings but omitted in the award.

In relation to national institutional arbitration, the CAM Santiago sets out a period of 15 days, as of the moment of notice of the ruling has been given to a party, for such party to request the clarification of the award's obscure or ambiguous points, the curing of its omissions and the rectification of its copy, reference or calculation errors.

With respect to international institutional arbitration, the CAM Santiago allows a period of 30 days, as of notice of the ruling, for the correction of calculation, copy or typographical errors in the award. Such correction may be carried out by the tribunal on its accord or by request of a party. Additionally, within such 30 day period, a party may request that the tribunal interpret a particular section of the award.

Regarding recommendations of the Technical Panel (non-binding), the parties may, within 30 days from the notification of such recommendation, request the Technical Panel to (i) clarify any of its obscure and doubtful points (ii) complete omissions, and/or (iii) rectify any copy, reference or calculation errors which manifestly appear in the recommendation.

No remedies are available against decisions of the Arbitration Commission, except the remedy of complaint ("*recurso de queja*").

Regarding binding decisions of other forms of ADR, the parties are free to establish procedures and remedies available and thus regulate whether or not a decision may be corrected, clarified or reconsidered.

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?

In case a third party decision is considered to be a contractual obligation, it would need to be recognized as such by an ordinary or arbitral tribunal in order to be enforceable. Thus, proceedings for that purpose would need to be initiated according to the general rules of

Chilean legislation. If and once recognized by an ordinary court, such ruling could be directly enforced by it. If the recognition was granted by an arbitral award, such award could be enforced with the assistance of ordinary courts.

The steps to enforce an arbitration award are explained in section 7.1.

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?

The issue has not been tested in Chile but we believe that it would not be directly enforceable since a DAB is not arbitration as per the express terms of the DAB provision.

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

Yes, to the extent that it otherwise meets general requirements for enforcing arbitration awards under the applicable international treaty or International Arbitration Act.

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)?

DAB decisions are not regulated in Chilean legislation and cannot be directly enforced in courts other than as a contractual obligation.

If a DAB decision is considered a contractual obligation, it would have to comply with all general contract requirements. Therefore, if the decision was reached through fraud or other irregularities it may be invalid due to defects of consent, unlawful object, etc., situation which it may be challenged when seeking its recognition or enforcement before a court or arbitrator.

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

As compliance with a binding technical expert determination is considered a contractual obligation, it could be reviewed accordingly by a court or arbitrator and could be challenged on general contractual grounds, including fraud, absence of consent, etc.

Normally a court or arbitrator will not review technical merits.

9. Trends and Developments

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

In the last years, some contractors have been trying to "convince" owners to include a new mechanism of direct negotiations, which consists in forming, as from the execution of the contract, a "claim/steering committee", comprised of senior representatives of contractor and owner (and agents or administrators, when applicable). Although contractors claim that this system tends to have the effect of reducing claims, such system presents problems to owners, as the contractor is in control of site, information, workers, etc. When this system has been incorporated, it is usually "not binding" and is designed as a step within the contract dispute mechanism.

Dispute Boards, in the form of Dispute Review Boards, have timidly begun to appear in certain projects in Chile.

At the time of this article's writing, a major legal reform of the Civil Procedure Code is being analyzed. Thus, in the near future, a whole new legal procedural system could significantly change local courts and other dispute resolution mechanisms. Such reform projects have centered on making a shift from written to oral proceedings, making a quicker and more efficient procedure, strengthening conciliation efforts, unifying the diversity of current procedures, simplifying remedies available against rulings, and creating a more flexible evidence valuing system, among others.

Lastly, our Supreme Court has been "modernizing" its approach to assess public policy violations as grounds to deny enforcement of international arbitration awards rendered outside Chile. Currently, not any public policy violation will suffice. Such violation must affect a public policy principle of such international weight and magnitude that it will "burn the eyes" of the judge. In the same direction, the Supreme Court has "declined" disciplinary authority over international arbitrators by not allowing the remedy of complaint (*Recurso de Queja*) against the award of the Court of Appeals that rules on the annulment remedy under the International Commercial Arbitration Act. As a matter of fact, the "abuse" here is meant to be made by the justices of the Court of Appeals who issue the award on the annulment remedy. Notwithstanding, so far the approach of the Court is to hear such remedy and conclude then that it is not applicable. These remarks are on the edge of our legal development as this article leaves the press, and they should be taken accordingly.