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SOCIETY OF CONSTRUCTION LAW VIET NAM
HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

HICAC 2025

HICAC 2025 – HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Raising the Bar:

Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice

10th & 11th APRIL 2025

REX HOTEL SAIGON
141 Nguyen Hue, District 1, Ho Chi Minh City

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1 SCLVN

Society of Construction Law – Vietnam
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SCLVN is a socio-professional organization, voluntarily established by Vietnamese citizens and organizations operating in the field of construction law.

Purpose: support each other to improve knowledge and qualifications, information exchange on construction law, contribute to create the stable and sustainable environment for construction activities in Vietnam and the country's socio-economic development.

SCLVN is operating under the administrative management of the Ministry of Home Affairs, the sector management of the Ministry of Construction and other related Ministries and government agencies on the activities of the Society in accordance with laws and regulations.

Individual members: Engineers, Architects, Lawyers, legal expert, Quantity Surveyor, commercial expert and other experts who are Vietnamese citizens operating in fields related to construction law.

Organizational members: Vietnamese organizations established in accordance with Vietnamese law, operating in the field of construction and construction law.

2 VIAC

Vietnam International Arbitration Centre
Trung tâm Trọng tài Quốc tế Việt Nam

Vietnam International Arbitration Center (in Vietnamese: Trung tâm Trọng tài Quốc tế Việt Nam, abbreviation: VIAC) was established under Decision No. 204/TTg dated 22 April 1993 of the Prime Minister of the Socialist Republic of Vietnam on basis of the merger of the Foreign Trade Arbitration Council (established in 1963) and the Maritime Arbitration Council (established in 1964). Since the Ordinance on Commercial Arbitration 2003, then replaced by Law on Commercial Arbitration 2010 and up to present, under the applicable Charter, VIAC is an independent organization – a legal entity. Arbitral Awards rendered by Arbitral Tribunals at VIAC are final and enforceable within Vietnam and in over 170 countries and territories that are State members of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention 1958).

As the leading Vietnamese arbitration & mediation institution with international credibility and, VIAC has administered thousands of domestic and international disputes in various fields of commerce, such as sale of goods, logistics, insurance, construction, finance and banking, joint venture projects, energy, infrastructure, etc. with involvement of businesses coming from almost all provinces in Vietnam. VIAC is also the only arbitration institution in Vietnam known to handle international disputes with participation of disputing parties from many countries and territories that are important trade and investment partners of Vietnam. Throughout three decades of its operation, VIAC has been spreading its wing as a reputable international mediation and arbitration institution in Vietnam, gaining trust and becoming the destination for both domestic and international business communities.

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AGENDA

	Morning section	Afternoon section
08-09/04 Tuesday & Wednesday	**Training course on Construction Contract** Liberty Central Saigon Riverside Hotel, 17 Ton Duc Thang Street, District 1, HCMC	**Training course on Construction Contract (cont.)** Liberty Central Saigon Riverside Hotel, 17 Ton Duc Thang Street, District 1, HCMC
09/04 Wednesday	**Workshop on The Effective Conduct of a Construction Arbitration – Tools and Tips for Counsel** Novotel Saigon Centre Hotel, No.167 Hai Ba Trung Street, District 3, HCMC **Workshop on Effective Cost Management Techniques for Construction Disputes at SIAC** Conference Hall room (10th floor), Vien Dong Hotel, 275A Pham Ngu Lao, District 1, HCMC	**Asian Construction & ADR Roundtable 2025** Sunflower Ballroom (1st floor – Executive Wing, Rex Hotel), 141 Nguyen Hue, District 1, HCMC
11/04 Friday		**Workshop on Practices and Experiences in Resolving Construction Disputes by Arbitration at VIAC** VIAC HCMC Branch, 171 Vo Thi Sau, District 3, HCMC **Workshop on Urban Railway Development and Transit-Oriented Development (TOD) Real Estate Projects** LNT&PARTNERS, level 21, Bitexco Financial Tower, No 2 Hai Trieu, District 1, HCMC
12/04 Saturday	**Networking event: Ho Chi Minh City tour** (for Speakers, Sponsors, Delegates and Paid Guests)	

TENTATIVE AGENDA

GENERAL SESSION

Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects

8.30 AM – 12.00 PM, 10 April 2025 (Thu)
Lotus Ballroom, Rex Hotel Saigon

Duration	Content	
08.30 – 09.00 AM	**Opening speech** Representative from Society of Construction Law – Vietnam (SCLVN) Representative from Vietnam International Arbitration Centre (VIAC)	
09.00 – 09.30 AM	**KEYNOTE SPEECH: A Spectrum of Dispute Resolution Choices : What does Strategic Thinking Inform?** **Dr. Hamish Lal** – *Partner, Hamish Lal Partners, Immediate-Past Chairman of the Society of Construction Law and of The Adjudication Society*	
Session P1: Enhancing Quality in Construction Arbitration: Experiences from International Practitioners		
09.30 – 09.50 AM	**Enhancing Quality in Construction Arbitration: Experiences and Expectations of a Repeat User** **Mr. Elliott Geisinger** – *Partner, Schellenberg Wittmer Ltd*	
09.50 – 10.10 AM	**Tea-break**	
10.10 – 10.30 AM	**Dispute Avoidance – Is it realistic?** **Mr. Gerard P. Monaghan** – *Chartered Engineer; Chartered Arbitrator; Accredited Mediator, FIEI, FCIArb*	
10.30 – 10.50 AM	**Enhancing Expert Evidence in Modern Arbitration** **Mr. Ho Chien Mien** – *Co-Head of the Allen & Gledhill's Construction & Engineering Practice*	
Session P2 – Roundtable Discussion: Raising the Bar in Dispute Resolutions for Construction Projects in Vietnam		
10.50 – 12.00 PM	**Moderator**	**Mr. Nguyen Nam Trung** – *Chairman of the Society of Construction Law - Viet Nam (SCLVN)*
	Panelists	**Dr. Hamish Lal** – *Partner, Hamish Lal Partners, Immediate-Past Chairman of the Society of Construction Law and of The Adjudication Society*
		Mr. Elliott Geisinger – *Partner, Schellenberg Wittmer Ltd*
		Mr. Gerard P. Monaghan – *Chartered Engineer; Chartered Arbitrator; Accredited Mediator, FIEI, FCIArb*
		Mr. Ho Chien Mien – *Co-Head of the Allen & Gledhill's Construction & Engineering Practice*
12.00 PM	**End of General Session**	
12.00 – 1.30 PM	**Lunch time**	

Ho Chi Minh City International Construction Arbitration Conference 2025

A Spectrum of Dispute Resolution Choices -

What does Strategic Thinking Inform

Dr. Hamish Lal[1]

1. It is a real privilege for me to give this Lecture. I thank the Vietnam International Arbitration Centre for the generous invitation to spend some time with the 2025 Conference.

2. I am pleased to see many friends and esteemed colleagues here today. In particular, I am delighted to see and thank Mr Huu Huynh of the Vietnam International Arbitration Centre and Mr Trung Nguyen of the Society of Construction Law. It is wonderful to be here in Saigon.

A Scenario

3. Imagine the following scenario. I am a Contractor working internationally but Head Quartered in Vietnam. The Project has been subject to Change Orders, Access has been delayed, parts of the Project were impacted by bad geotechnical conditions which were outlined in the Rely Upon Information, and there were delays in the testing and commissioning because the Engineer was replaced during the Project. Such issues are common in international construction projects. The Owner / Employer says he has right

[1] Partner, Hamish Lal Partners hamish.lal@hamishlalpartners.com

to Delay Damages which he says ought to be greater than the 10% limit in the Contract because I acted with "manifest error" when conducting certain tests. The Project Ledger shows that I have losses greater than USD 50 Million excluding the Delay Damages. I also have not been paid the last 3 IPCs (in fact the Owner had stopped issuing IPCs). I have a Dispute.

4. There is an array of dispute resolution methods. But, what is the General Manager and Board of Directors thinking:

    a. Speed is important. The s-curve is ahead of the payment curve.
    b. How much will Dispute Resolution Cost and is that Cost recoverable?
    c. How will Dispute Resolution impact the Project Team and Management – is the Dispute winnable – do we have access to key people; documents; and messages.
    d. If we go to Arbitration, will we win and be able to enforce the Final Award?

5. Strategy is important. Strategy provides the lens through which Parties view the various dispute resolution methods:

    a. Mediation
    b. Adjudication
    c. Dispute Boards
    d. Expert Determination
    e. Arbitration

6. In my view, the fundamental point that informs Strategy on both sides is having "a trusted expert assessment viewed through the lens of an arbitral process". Very very often, experts will look at matters through the 'lens' of a "quick but very approximate" adjudication or a 'friendly' standing DAB. This is wrong.

ADJUDICATION

7. Adjudication can be contractual or Statutory. For example, Singapore's Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed). Statutory adjudication may not be an option for the Scenario above. Put simply, Adjudication is at its core a fast and inexpensive method of deciding "disputes" but on a provisional basis, with the full merits of the dispute deferred to arbitration or court process. Costs are not recoverable. Discovery and Document Production is not a feature. Adjudicators can get the law wrong, get the facts wrong or both, and still the Decision is deemed enforceable. Improvement of cash flow for contractors underlies statutory adjudication. The temporary answer given by statutory adjudication is often accepted by parties as a "good enough" outcome for everyone. People often adopt this "good enough" answer and move on without the time, effort and trouble of a full trial. This fact has demonstrated that a quick rough and ready answer given within a few months may in fact be more useful to businesses in the construction industry than an in-depth and forensically meticulous answer achieved only years later. In my Scenario, Adjudication is not an option.

DISPUTE BOARDS

8. Dispute Board mechanisms pre-date statutory adjudication. Dispute Boards, meaning, Dispute Review Board; Dispute Adjudication Board; Dispute Avoidance & Adjudication Board:

   a. At best provide Binding Decisions subject to Arbitration that then renders a Final & Binding Award.

   b. FIDIC has been the ambassador or promotor of Dispute Boards.

c. Some will advocate very strongly in favour of DABs. Others are afraid to challenge such opinions. Undoubtedly, there are success stories. There are also cases where:

   i. DAB is used a 'stepping-stone' in the Multi-Tier Process as the final step pre-Arbitration.

   ii. Cost of a standing DAB become too high.

   iii. DAB Decisions are interrelated such subsequent Decisions lead to odd results or there is 'break down' in the overall system because a challenge to one Decision in the sequence impacts related Referrals.

9. One concern with contractual adjudication is that the enforcement of a determination may be cumbersome and convoluted. Typically, decisions and determinations of a dispute board must first proceed to an arbitration award and only after that to court enforcement. One cannot directly grant judgment for the money that has been contractually adjudicated because that would be a final decision and would raise an issue estoppel if the dispute proceeds for fuller determination on its merits.

10. FIDIC Gold Book has formulated a solution. However, there are concerns that such Arbitral 'enforcement' Awards are not enforceable in certain Civil Law Jurisdictions.

11. Another conceptual answer is for a court to be asked to grant specific performance of the obligation to comply with the temporary determination of how much should be paid. That would be a final order, but its result is simply that the paying party has performed

its obligation to comply. Later, there could be an adjustment that would take account of that compliance in the same way as when the obligation is complied with voluntarily. The contract could include a clause providing for this. For example, it could state that parties are obliged to comply with the outcome of the contractually mandated adjudication process pending a final resolution of the dispute. It should also state that this obligation may be specifically enforced either in a chosen court or in any court of competent jurisdiction.

12. In my Scenario, let us assume that the General Manager mindful that his legal and expert costs will not be recoverable; that the Employer will most likely not comply with the Decision; that the DAB does not have strong case management powers and that Arbitration is the only route to get full and proper relief, has decided to 'side-step' this Multi-Tier step and proceed with all its claims to Arbitration. This decision also raises questions of jurisdiction and admissibility.

13. Here, care is needed: In *Maeda Kensetsu Kogyo Kabushiki Kaisha (Maeda Corp) v Bauer Hong Kong Ltd* [2020] HKCA 830 the claimants formed a joint venture, which was the main contractor under two contracts for the construction of railway tunnels. The joint venture subcontracted the diaphragm wall works for each tunnel to Bauer. The subcontracts contained a clause requiring Bauer to state the contractual basis of its claim within 28 days of giving initial notice of a claim for any additional payment or expense:

> *"21. Claims*
>
> *21.1 If the sub-contractor intends to claim any additional payment or loss and expense due to:*
>
> *21.1.1 any circumstances or occurrence as a consequence of which the contractor is entitled to additional payment or loss and expense under the main contract; …*

> *21.1.6 any variation or subcontract variation, as a condition precedent to the sub-contractor's entitlement to any such claim, the sub-contractor shall give notice of its intention to the contractor within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the sub-contractor…*
>
> *21.2 If the subcontractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under clause 21.1, the sub-contractor shall as a condition precedent to any entitlement, within twenty eight (28) days after giving of notice under clause 21.1, submit in writing to the contractor:*
>
> *21.2.1* ***the contractual basis*** *together with full and detailed particulars and the evaluation of the claim; [and various other supporting documents] …*
>
> *21.3 The sub-contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any clause of the subcontract or at common law unless clauses 21.1 and 21.2 have been strictly complied with."*

14. A dispute arose under the subcontracts, which was referred to arbitration. Bauer's primary case was that unforeseen ground conditions had given rise to a variation of the scope of the works under the express variation provisions of the subcontracts. In the alternative, Bauer made a 'like rights' or 'equivalent rights' claim under Clause 21.1.1. The arbitrator rejected Bauer's primary claim, and the issue between the parties became whether the 'like rights' claim had been properly notified pursuant to Clause 21.2 – there was no dispute that Bauer's Clause 21.2 notice did not make express reference to a claim under Clause 21.1.1, and referred only to the variation claim under Clause 21.1.6. The arbitrator made an award in favour of Bauer, holding that the contractual basis stated in the notice did not have to be the contractual basis on which the party in fact succeeded at arbitration. The claimant appealed.

15. Both the Court of First Instance and the Court of Appeal disagreed with the arbitrator's assessment. The wording of Clause 21.2.1 was held to be clear and unambiguous. Both the Court of Appeal and the court below considered that the arbitrator's construction of it – that the principal purpose of the clause was to enable the joint venture to know the

factual basis of the claim, so that it could decide what steps to take – was contrary to commercial common sense. The Court of Appeal held, at [60]-[61]:

> *"…[t]he arbitrator's interpretation of Clause 21.2.1 would negate the commercial purpose of achieving finality, as a claim can be advanced on a different contractual basis in an arbitration which may be years down the line.*
>
> *61. The other commercial purpose for this provision is similar to what was mentioned above in The Yellow Star. In a chain contract situation, the Contractor would wish to know whether the Sub-Contractor's claim would need to be passed up the line. If the claim is based on other matters, such as breach of the Sub-Contract by the Contractor (cl.21.1.2), it would not need to be. The arbitrator's interpretation may prejudicially affect this commercial purpose as well."*

16. In the Scenario. The Contractor will need to check if the "claims notification requirements" are so strict. If so, the strategy will need to reflect the claims made and notified. This conundrum impacts *both* Arbitrators and the Parties. Arbitrators seeking to provide relief even there is imperfect compliance with the Contract struggle. It may mean that good entitlement based on the merits may need to be left on the cutting-floor. Claims outside of the Contract, such as unjust enrichment or quantum meruit may need to be pleaded as alternatives by a contractor in a situation as Bauer was in.

ARBITRATION

17. In the Scenario, the Contractor is driven by recovery of all its legal and expert fees, a final, binding and enforceable Award and an arbitral process that will improve the prospects of getting to the truth. I want to look at four questions that the Board of Directors raise:

a. **Is the Arbitration Agreement "solid". What does this mean?** Let assume the Seat is defined; that the law of the arbitration agreement is also defined; and that Rules are specified together with the Arbitral Institution. Counsel explains that we are good. We may have issues with compliance with the Multi-Tier Process but the Arbitration Agreement is well constructed.

18. The General Managers' concern may have come from *Baker Hughes Saudi Arabia Company Limited v Dynamic Industries & Others* No 23-30827 (5th Cir, 27 January 2025)[2] Here the Arbitration Agreement made reference to the DIFC-LCIA Rules. One Party argued that this meant that the only Arbitration Institution that could administer the Arbitration was the DIFC-LCIA. This had been closed by Dubai Decree 34 and so that Party argued that in the absence of the DIFC-LCIA Institution, the Parties were free to commence Court Litigation in the US. The US Fifth Circuit Court of Appeals decided that reference in the arbitration agreement to "Arbitration Rules of the DIFC-LCIA" did not mean that the arbitration had to be administered by the DIFC-LCIA Arbitration Centre but that another institution could happily administer the arbitration.

19. The Second issue raised by the Board concerned **the dangers of the Arbitrators failing due process or exceeding jurisdiction**. The concern came from a recent Singapore Court of Appeal Judgement of Wan *Sern Metal Industries Pte Ltd v Hau Tian Engineering Pte Ltd* [2025] SGCA 5 Here, Chief Justice Sundaresh Menon giving judgement explained the need for increased vigilance when an Arbitrator is handling a

[2] *Baker Hughes Saudi Arabia Company Limited v Dynamic Industries, Incorporated; Dynamic Industries International, L.L.C.; Dynamic Industries International Holdings, Incorporated*, Case: 23-30827, Filed 27 January 2025 https://www.ca5.uscourts.gov/opinions/pub/23/23-30827-CV0.pdf

"Documents Only" procedure. Here, put simply, the Arbitrator was found to have breached rules of natural justice because she decided a point raised very late by one Party, without giving the other party to respond on that specific point. International Construction Arbitrations can raise complex and overlapping issues and so this is a natural hazard for Parties and Arbitrators. A good expert is able to assist. The technical or expert Arbitrator must be careful – the Award needs to reflect the contours of the Parties legal arguments rather than 'this is the correct valuation' based on the Arbitrator's expertise. The General Manager is still keen on Arbitration.

20. The Singapore Court of Appeal looked at a similar issue in the context of international construction arbitration. The case is *CAJ V CAI APPEAL [2021] SGCA 102*. Here, CAI commenced Singapore-seated arbitration proceedings against claiming liquidated damages because of a 144-day delay in mechanical completion. CAJ argued that the mechanical work was completed on time, that any delay was a result of the rectification measures and that CAI had waived its right to claim liquidated damages or, alternatively, was estopped from making a claim on this basis. In closing submissions, CAJ advanced the argument for the *first time* that it was contractually entitled to an extension of time, which would reduce liquidated damages (the "EOT Defence"). CAI objected to the EOT Defence on the basis that raising it at this stage was procedurally unfair as it prevented CAI from addressing the issue during document production, witness evidence or cross-examination of witnesses. CAI asked the tribunal to dismiss this new argument.

21. In its final award, the arbitral tribunal found that CAJ did not achieve the mechanical completion by the stipulated date. The tribunal also rejected the estoppel defence but *accepted* the EOT Defence on the basis that CAI had been granted the opportunity to

respond to the defence in its written closing submissions. As a result, the time for mechanical completion was extended by 25 days such that CAI was entitled to receive liquidated damages for 74 instead of 99 days.

22. CAI applied to the Singaporean High Court to set aside the final award in part on the following grounds: (i) in allowing the EOT Defence, the tribunal had exceeded its jurisdiction arising out of the parties' submission to arbitration; and (ii) the final award was in violation of the principles of natural justice. The High Court allowed the set aside application on three grounds, namely that: (i) CAI did not have a fair opportunity to respond to the EOT Defence, as it was a "completely new defence which was factually and conceptually distinct from the Estoppel Defence"; (ii) the tribunal had relied substantially on its "professed experience" in reaching its decision on the EOT Defence, without explaining how this was relevant to the parties' positions and (iii) the EOT Defence was beyond the scope of the parties' submission to arbitration.

23. CAJ appealed, arguing that the Judge ought to have found that the EOT Defence fell within the scope of the Tribunal's jurisdiction. According to the appellants, (i) the Judge took too narrow a view of the scope of the parties' submission to arbitration, as well as the Terms of Reference, the pleadings and the draft Lists of Issues; (ii) there had been no breach of natural justice in the making of the Award. The Court of Appeal dismissed the Appeal. It held that the Tribunal's decision on the EOT Defence had been made in excess of jurisdiction:

- The EOT Defence was a creature of a contractual provision. There is the procedural requirement that the appellants submit a notice of a claim for an extension of time, along with the requisite particulars justifying such extension. It also goes without saying that such a defence must be pleaded [31].

- The court should not construe the parties' pleadings, the Lists of Issues and the Terms of Reference too narrowly. However, it was impermissible for the appellants to invite the court to adopt a broad reading of the pleadings, the Lists of Issues and the Terms of Reference in order to read into them a defence which was not pleaded. It was untenable for the appellants to suggest that the EOT Defence fell within the scope of the submission to arbitration simply because it would have a bearing on the respondent's claim for liquidated damages [45].

- The respondent did not have a fair and reasonable opportunity to respond to the EOT Defence and this breach of natural justice was connected to the making of the Award and materially prejudiced the respondent's rights. If the respondent had been given the opportunity to lead further evidence, test the appellants' evidence and tender further legal submissions, this could have reasonably made a difference to the Tribunal's determination [54].

- So long as the Tribunal's decision on the EOT Defence was based in part on its "unarticulated experience" in relation to which the respondent had not been afforded any opportunity to address, that in itself constituted a breach of natural justice. The Tribunal's prior experience dealing with extension of time claims for other construction projects would be immaterial in deciding on the appropriate extension of time in this case without the benefit of pleadings, specific evidence (both factual and expert) and arguments to determine the proper extension of time to be granted. Once this glaring fact is placed in the correct perspective, it would be immediately apparent that the failure of the Tribunal to inform the parties as to how its "experience" would bear on the extension of time issue was another classic case of breach of natural justice [55].

24. The conundrum for an arbitrator is clear: she has "expertise" in delay claims; understands that a party has not actually pleaded a claim for an extension of time; wants to give the correct answer; and thus applies the facts to arrive at such an answer. The trend in some Seats that the direct and bright red arrow piercing through and tying, specific claims, determinations, NODs, DAB decisions, and then to the precise causes of action in Arbitration, suggests that Arbitrators must be very careful.

ENFORCEMENT

Transnational issue estoppel in relation to arbitration challenges.

25. The next point concerning the Contractor is enforcement. In other words, working on the assumption that the Arbitral Tribunal finds in favour of the Contractor, there was a concern that the Award would not ultimately lead to monies being paid. This raises two legal questions: would an Award be set aside at the Seat or could the Award be held to be unenforceable at a jurisdiction where enforcement was sought? This brings into play transnational issue estoppel.

26. This is where a court considers an issue concerning the status or validity of an Award *after* the same issue has been considered by another court in another jurisdiction. In practical terms, one needs to consider what (if any) preclusive effect should be given to prior decisions made by courts in other jurisdictions. The further deeper question is whether the answer differs depending on whether the *first* court is the seat court or an enforcing court.

27. There are two competing legal theories concerning how arbitration relates to national courts. The first is the "delocalisation theory" – here arbitration is seen as a transnational legal process operating independently of national law. On this view, "no single state, not even the seat of the arbitration, has the final say on the validity or

enforceability of an award."[3] The arbitral process and award is subject to judicial scrutiny only at the place of enforcement.[4] This is an approach favoured in Civil Law jurisdictions. For example, in the *Putrabali* case, the French *Cour de cassation* held that "[a]n international arbitral award, *which does not belong to any state legal system*, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought".[5]

28. Most common law jurisdictions take a different view: The "territorialist" or "jurisdictional" theory of arbitration.[6] It treats every arbitration as connected to a particular jurisdiction – that is, the seat – so that the process is subject to a dual system of control. This is important. The setting-aside of an award at the seat will generally be regarded as being universal in effect, so that once set aside at the seat there is no award to enforce.[7]

29. A recent example of this jurisprudence is *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56. Here, Deutsche Telekom had obtained an order enforcing an award against the Republic of India ("India"). India then applied to set that enforcement order aside on the ground that there was no valid arbitration agreement. India had previously applied (unsuccessfully) to set the award aside in Switzerland. In

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[3] The Honourable the Chief Justice Sundaresh Menon, Supreme Court of Singapore, "The Role of the National Courts of the Seat in International Arbitration", keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre (17 February 2018) ("*The Role of the National Courts of the Seat in International Arbitration*") at para 8.

[4] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 7th Ed, 2023) ("*Redfern and Hunter*") at para 3.89.

[5] *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnugotia Est Epices* [2007] Rev Arb 507 at 514, as translated in *Redfern and Hunter* at para 3.90.

[6] *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 ("*Deutsche Telekom*") at [121].

[7] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [77]; *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [46]; *Deutsche Telekom* at [77].

those proceedings, the Swiss Federal Supreme Court rejected the same arguments that India was advancing in the Singapore enforcement proceedings. The Singapore Court of Appeal applied the doctrine of transnational issue estoppel and held that India was precluded from contesting the enforcement of the award on grounds that had already been rejected by the Swiss seat court. The Court of Appeal also endorsed – albeit in *obiter* – what it termed the "Primacy Principle". That principle holds that a seat court's decision on matters going to the validity of an award should be treated as presumptively determinative, so that the onus is on the party resisting enforcement to prove otherwise.

30. The Primacy Principle stems from the notion that the seat court occupies a special position within international arbitration. It is the court that the parties have chosen to vest with supervisory jurisdiction over the arbitration, and so it would follow that the seat court's decisions on matters pertaining to the validity of an award should be regarded as presumptively determinative. In *Deutsche Telekom*, it was said that the basis for the Primacy Principle lies in "the New York Convention read with the Model Law and the [International Arbitration Act], which recognise the special role and function of the seat court". The Court of Appeal identified three situations where the seat court's decision might be held not to be determinative, namely: where that decision conflicts with the public policy of Singapore; where there were serious procedural flaws in the seat court's decision-making process akin to breach of natural justice; and where the decision is shown to have been perverse. The Court of Appeal stressed that this list was not intended to be exhaustive.

31. Where the Primacy Principle is grounded in the scheme of the New York Convention and the Model Law, transnational issue estoppel is a common law doctrine of wider

and general application. It reflects a particular application of the issue estoppel doctrine which, together with cause of action estoppel and the rule in *Henderson v Henderson* (the so-called "*Henderson* principle"), gives the law of *res judicata* most of its content. Jurisprudential thinking then tends to the conclusion that there is nothing internal to the logic of issue estoppel that compels a distinction between the seat court and enforcement courts. On that view, a *prior* decision of an enforcement court can give rise to an issue estoppel precluding the relitigation of issues not only before parallel enforcement courts, but also before the seat court.

32. The Singapore Court of Appeal acknowledged these difficulties in *Deutsche Telekom* and suggested that if the doctrine of transnational issue estoppel is to be disapplied in relation to prior enforcement court decisions, then that may be a result defensible on policy grounds. Currently, whether a transnational issue estoppel can arise out of a prior enforcement court decision remains an open question in Singapore.

33. English law has fully embraced conventional *res judicata* principles in relation to the relitigation of issues post-award. Under English law, an issue estoppel may arise out of not only prior seat court decisions,[8] but also prior enforcement court decisions (so far as the issues in question relate to the validity of the award).[9] The English courts have also endorsed the *Henderson* principle as a further control which is "consistent with the policy of sustaining the finality of decisions of the supervisory courts".

[8] See, *eg*, *Carpatsky Petroleum Corpn v PJSC Ukrnafta* [2020] EWHC 769 (Comm) ("*Carpatsky*").
[9] *Diag Human SE v Czech Republic (No 2)* [2014] EWHC 1639 (Comm) ("*Diag Human*") at [51]–[63].

34. Australian law, by contrast, has articulated and adopted a doctrine akin to the Primacy Principle. The Federal Court of Australia's decision in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468 ("*Gujarat NRE*"), held that "it will generally be inappropriate for this court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration".

35. As has been seen, there is general agreement that weight should be accorded to the prior decisions of courts from other jurisdictions concerning the status or validity of an award. Unresolved reservations remain where the prior decision is one of an enforcing court and the matter now comes before the seat court on a challenge to the award.

THE ADVERSE INFERENCE

36. So, having looked at the law of the seat and the risks of an enforcing jurisdiction deciding something different, the Board in the Scenario are content to proceed. The General Manager then asks **what happens if the Owner / Employer does not provide evidence or documents that it is ordered to provide by the Arbitrators during the Document Production process**,?

37. Contemporaneous evidence isolated in contemporaneous documents such as letters, emails, notes, messages, and minutes of meetings is vital in international arbitration.. The Document Production process is complex. The orthodox arbitral rules and soft law are open to abuse such that a party can participate in the Document Production process but then elect to ignore the Tribunal's Order on Production; make only selective disclosure; and/or fail to provide documents that patently exist and correspond with other factual

exhibits. The Tribunal's power to make an adverse inference in respect of such behaviours lacks 'teeth' and thus raises concerns.

37. Some advocate a robust strategic re-think of the Tribunal's powers when its Document Production Orders are blithely ignored. Should institutional rules be amended such that ignorance is visited by costs orders and strike-out of claims and defences? Should the 2010 IBA Rules on the Taking of Evidence in International Arbitration be now revised to supplement the adverse inference proposition in Article 9(5) with discretion to strike out relevant claims and defences?

38. The Document Production phase is important. Marieke Van Hooijdonk and Yves Herinkckx[10] explain that the process "*is an invaluable tool for demonstrating to an arbitral tribunal facts that a party could not prove if it had to rely only on the documents already in its possession before commencement of the case. Despite clear disallowance of fishing expeditions under the IBA Evidence Rules, the process can help a claimant whose own records are initially less than convincing*". Van Hooijdonk and Herinkckx make another compelling observation that is often overlooked: "*Conversely, and this is a worthwhile feature of the system as well, the knowledge that one will have to disclose detrimental documents to the opponent can somewhat refrain prospective claimants from making overly enthusiastic demands or fanciful assertions*".

39. Article 3(3) of the IBA Rules requires (i) that document requests be specific, (ii) that the requested documents are relevant to the case and material to its outcome, and (iii) that the requested documents are not in the possession, custody or control of the requesting

[10] The Impact of IBA Guidelines and Rules, Marieke Van Hooijdonk and Yves Herinkckx in Do Arbitral Awards Reveal the Truth? Reports from the Third Joint CEPANI-NAI Colloquium held 21 March 2019 in Brussels.

party. A request must explain the relationship between the requested documents and the issues in the case with sufficient specificity.[11]

40. Relevance relates to the well-known standard that the documents sought relate to issues closely connected or appropriate to what is being considered in the dispute. Materiality has been explained as: "*a document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn*"[12] or more broadly: "*to be 'necessary', to the case being made does not mean that the case cannot be won without it, but that the case cannot be presented optimally without it*".[13]

41. Some civil law practitioners may also cite the burden of proof factor. The IBA Rules contain no requirement that the requesting party must have the burden of proof with respect to the issue about which documents are sought. Rather, the fact that document requests are used to ventilate consideration of facts tends toward analysis of the relevance and materiality of the documents sought (not which party bears the burden of proof on the issue).

42. Consequences for Non-Production: Article 9(5) of the IBA Rules provides that a tribunal can draw adverse inferences when a party has failed to comply with a tribunal's order. Article 9(5) states:

> *If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document*

[11] Commentary of the IBA Rules of Evidence Review Subcommittee ("IBA Commentary"), 2010 IBA Rules of Evidence Review Subcommittee, at p. 9 et seq.
[12] Reto Marghitola, 'Document Production in International Arbitration', International Arbitration Law Library, Volume 33 'Chapter 5: Interpretation of the IBA Rules', at pp. 52-53.
[13] Jeffrey Waincymer Procedure and Evidence in International Arbitration Part II: The Process of an Arbitration, Chapter 11: Documentary Evidence at para. 859.

> *ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.*[14]

43. Under Article 9(7) of the IBA Rules, non-compliance with procedural orders can also be considered in the allocation of costs.[15] For instance, the tribunal can allocate the full costs of the document production procedure to the party, which did not comply, even if that party was successful on the merits.[16] However, whether costs alone act as a sufficient deterrent to misbehavior in production remains in question.[17]

44. The Ciarb Guidelines on Managing Arbitrations and Procedural Orders include sanctions in instances where a party deliberately causes delays by repeatedly failing to comply and/or frustrates the proceedings through non-production of documents including peremptory orders; costs orders and excluding evidence from the record.[18]

45. There are a number of practical problems with the adverse inference. Many scholars have recognized that the problems inherent with the adverse inferences have led tribunals away from drawing adverse inferences and instead relying on the evidence (or lack of evidence) presented to them. An abstract power to draw adverse inferences does not address the serious abuse of the document production process. The following provides examples of the problems for the adverse inference:

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[14] IBA Rules, Article 9(5).
[15] Gary Born, International Commercial Arbitration, 2316 (Kluwer 2014).
[16] Reto Marghitola, 'Document Production in International Arbitration', International Arbitration Law Library, Volume 33 'Chapter 9: Sanctions', pp. 179-180.
[17] Jeffrey Waincymer Procedure and Evidence in International Arbitration Part II: The Process of an Arbitration, Chapter 11: Documentary Evidence at p. 880.
[18] Ciarb, Guideline on Managing Arbitrations and Procedural Orders, Article 3.2.

(a) Commentators argue an adverse inference should only be drawn at the end of the proceedings.[19]

(b) An adverse inference requires proof by the requesting party that there are reasonable grounds to believe the documents exist and are not being produced.[20] This leaves easy arguments open to the misbehaving party that the documents simply do not exist.

(c) Tribunals are reluctant to draw adverse inferences:

i. The adverse inference is only an evidential *inference*. It is not as strong as actual evidence (which is being withheld). Therefore, tribunals may be more inclined to make rulings based upon the evidence available rather than the evidentiary inference of what *might* exist, but has not been seen.[21] Further, arbitrators perceive an increased risk of challenge to an award if it is based upon adverse inferences.[22]

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[19] Simon Greenberg and Felix Lautenschlager, 'Part I: International Commercial Arbitration, Chapter 9: adverse inferences in International Arbitral Practice', in Stefan Michael Kroll, Loukas A. Mistelis, et al. (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution. *See also*, Sam Luttrell, 'Ten Things to Consider When Seeking Adverse Inferences in International Arbitration', in Carlos González-Bueno (ed), 40 under 40 International Arbitration (2018).

[20] This derives from three of the five criteria of the "Sharpe test" to be met in order to draw adverse inferences in international arbitration: (i) the party seeking the adverse inference must produce all available evidence corroborating the inference sought; (ii) the requested evidence must be accessible to the inference opponent; (iii) the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld; (iv) the party seeking the adverse inference must produce *prima facie* evidence; and (v) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought. (Jeremy Sharpe, 'Drawing Adverse Inferences from the Non-Production of Evidence' Arbitration International 22, no. 4 (2006), at p. 551).

[21] C. Reymond 'The Practical Distinction between the Burden of Proof and Taking of Evidence: A Further Perspective' in (1994), 10 Arb. Int'l, 323 at p. 325. ("*On balance, I tend to think that the arbitrator has the duty and the authority to indicate to the parties that if they want to prove or disprove a fact or a set of facts that is central in the arbitration, they have to adduce the evidence that he considers as appropriate, documents v. witnesses, contract with a third party v. letters referring to that contract, expert evidence v. declarations of witnesses, etc. It is always awkward for an arbitrator to dismiss a claim on the basis of the failure of a party to bring evidence which it had the burden of providing unless there was a clear indication to that effect beforehand.*")

[22] Sam Luttrell, 'Ten Things to Consider When Seeking Adverse Inferences in International Arbitration', in Carlos González-Bueno (ed), 40 under 40 International Arbitration (2018), at p. 294.

ii. It is difficult for the tribunal to know the contours of the adverse inference to be drawn. Put simply, the inference is based upon evidence which is presumed to exist but has not been seen. Is the non-production *fatal* to the claim, defence or point of fact being asserted or is the non-production only tending to show that the claim, defence or point of fact may not be as strong as it is asserted?

46. There are other tools available to the tribunal to address misbehaviours. Institutional rules and/or laws of the seat are fundamental. National courts enjoy power to sanction procedural non-compliance through the dismissal of particular claims or defences (or even the whole case). Should Tribunals also have the power to terminate all or part of the proceedings under national laws for procedural non-compliance but also when the result of such procedural misbehaviour is serious legal defects in the claims or defences which are no longer salvageable (something akin to summary judgement). So, the risk that key documents will not be disclosed by the Employer / Owner is a risk in the above Scenario. Lawyers working closely with Experts need to draft precise Requests and then hope that the Tribunal Orders production of such Documents. The use of Final Orders is good. The skill is to make strategic use of Adverse Inferences.

End Note

47. Parties to Disputes need to think strategically. The key is getting early involvement of Experts – especially Delay Experts – to look at the claims through the lens of an arbitral process. This means Lawyers and Experts have to examine what the Client says, the documents that the Client has in its possession but also assess what is missing and the consequent risks. All Dispute Resolution Methods have risks – to win needs strategic thinking.

Ho Chi Minh City International Construction Arbitration Conference 2025

A Spectrum of Dispute Resolution Choices -

What does Strategic Thinking Inform

Dr. Hamish Lal[1]

1. It is a real privilege for me to give this Lecture. I thank the Vietnam International Arbitration Centre for the generous invitation to spend some time with the 2025 Conference.

2. I am pleased to see many friends and esteemed colleagues here today. In particular, I am delighted to see and thank Mr Huu Huynh of the Vietnam International Arbitration Centre and Mr Trung Nguyen of the Society of Construction Law. It is wonderful to be here in Saigon.

A Scenario

3. Imagine the following scenario. I am a Contractor working internationally but Head Quartered in Vietnam. The Project has been subject to Change Orders, Access has been delayed, parts of the Project were impacted by bad geotechnical conditions which were outlined in the Rely Upon Information, and there were delays in the testing and commissioning because the Engineer was replaced during the Project. Such issues are common in international construction projects. The Owner / Employer says he has right

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to Delay Damages which he says ought to be greater than the 10% limit in the Contract because I acted with "manifest error" when conducting certain tests. The Project Ledger shows that I have losses greater than USD 50 Million excluding the Delay Damages. I also have not been paid the last 3 IPCs (in fact the Owner had stopped issuing IPCs). I have a Dispute.

4. There is an array of dispute resolution methods. But, what is the General Manager and Board of Directors thinking:

    a. Speed is important. The s-curve is ahead of the payment curve.
    b. How much will Dispute Resolution Cost and is that Cost recoverable?
    c. How will Dispute Resolution impact the Project Team and Management – is the Dispute winnable – do we have access to key people; documents; and messages.
    d. If we go to Arbitration, will we win and be able to enforce the Final Award?

5. Strategy is important. Strategy provides the lens through which Parties view the various dispute resolution methods:

    a. Mediation
    b. Adjudication
    c. Dispute Boards
    d. Expert Determination
    e. Arbitration

6. In my view, the fundamental point that informs Strategy on both sides is having "a trusted expert assessment viewed through the lens of an arbitral process". Very very often, experts will look at matters through the 'lens' of a "quick but very approximate" adjudication or a 'friendly' standing DAB. This is wrong.

ADJUDICATION

7. Adjudication can be contractual or Statutory. For example, Singapore's Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed). Statutory adjudication may not be an option for the Scenario above. Put simply, Adjudication is at its core a fast and inexpensive method of deciding "disputes" but on a provisional basis, with the full merits of the dispute deferred to arbitration or court process. Costs are not recoverable. Discovery and Document Production is not a feature. Adjudicators can get the law wrong, get the facts wrong or both, and still the Decision is deemed enforceable. Improvement of cash flow for contractors underlies statutory adjudication. The temporary answer given by statutory adjudication is often accepted by parties as a "good enough" outcome for everyone. People often adopt this "good enough" answer and move on without the time, effort and trouble of a full trial. This fact has demonstrated that a quick rough and ready answer given within a few months may in fact be more useful to businesses in the construction industry than an in-depth and forensically meticulous answer achieved only years later. In my Scenario, Adjudication is not an option.

DISPUTE BOARDS

8. Dispute Board mechanisms pre-date statutory adjudication. Dispute Boards, meaning, Dispute Review Board; Dispute Adjudication Board; Dispute Avoidance & Adjudication Board:

   a. At best provide Binding Decisions subject to Arbitration that then renders a Final & Binding Award.

   b. FIDIC has been the ambassador or promotor of Dispute Boards.

c. Some will advocate very strongly in favour of DABs. Others are afraid to challenge such opinions. Undoubtedly, there are success stories. There are also cases where:

   i. DAB is used a 'stepping-stone' in the Multi-Tier Process as the final step pre-Arbitration.

   ii. Cost of a standing DAB become too high.

   iii. DAB Decisions are interrelated such subsequent Decisions lead to odd results or there is 'break down' in the overall system because a challenge to one Decision in the sequence impacts related Referrals.

9. One concern with contractual adjudication is that the enforcement of a determination may be cumbersome and convoluted. Typically, decisions and determinations of a dispute board must first proceed to an arbitration award and only after that to court enforcement. One cannot directly grant judgment for the money that has been contractually adjudicated because that would be a final decision and would raise an issue estoppel if the dispute proceeds for fuller determination on its merits.

10. FIDIC Gold Book has formulated a solution. However, there are concerns that such Arbitral 'enforcement' Awards are not enforceable in certain Civil Law Jurisdictions.

11. Another conceptual answer is for a court to be asked to grant specific performance of the obligation to comply with the temporary determination of how much should be paid. That would be a final order, but its result is simply that the paying party has performed

its obligation to comply. Later, there could be an adjustment that would take account of that compliance in the same way as when the obligation is complied with voluntarily. The contract could include a clause providing for this. For example, it could state that parties are obliged to comply with the outcome of the contractually mandated adjudication process pending a final resolution of the dispute. It should also state that this obligation may be specifically enforced either in a chosen court or in any court of competent jurisdiction.

12. In my Scenario, let us assume that the General Manager mindful that his legal and expert costs will not be recoverable; that the Employer will most likely not comply with the Decision; that the DAB does not have strong case management powers and that Arbitration is the only route to get full and proper relief, has decided to 'side-step' this Multi-Tier step and proceed with all its claims to Arbitration. This decision also raises questions of jurisdiction and admissibility.

13. Here, care is needed: In *Maeda Kensetsu Kogyo Kabushiki Kaisha (Maeda Corp) v Bauer Hong Kong Ltd* [2020] HKCA 830 the claimants formed a joint venture, which was the main contractor under two contracts for the construction of railway tunnels. The joint venture subcontracted the diaphragm wall works for each tunnel to Bauer. The subcontracts contained a clause requiring Bauer to state the contractual basis of its claim within 28 days of giving initial notice of a claim for any additional payment or expense:

> *"21. Claims*
>
> *21.1 If the sub-contractor intends to claim any additional payment or loss and expense due to:*
>
> *21.1.1 any circumstances or occurrence as a consequence of which the contractor is entitled to additional payment or loss and expense under the main contract; …*

> *21.1.6 any variation or subcontract variation, as a condition precedent to the sub-contractor's entitlement to any such claim, the sub-contractor shall give notice of its intention to the contractor within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the sub-contractor…*
>
> *21.2 If the subcontractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under clause 21.1, the sub-contractor shall as a condition precedent to any entitlement, within twenty eight (28) days after giving of notice under clause 21.1, submit in writing to the contractor:*
>
> *21.2.1* ***the contractual basis*** *together with full and detailed particulars and the evaluation of the claim; [and various other supporting documents] …*
>
> *21.3 The sub-contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any clause of the subcontract or at common law unless clauses 21.1 and 21.2 have been strictly complied with."*

14. A dispute arose under the subcontracts, which was referred to arbitration. Bauer's primary case was that unforeseen ground conditions had given rise to a variation of the scope of the works under the express variation provisions of the subcontracts. In the alternative, Bauer made a 'like rights' or 'equivalent rights' claim under Clause 21.1.1. The arbitrator rejected Bauer's primary claim, and the issue between the parties became whether the 'like rights' claim had been properly notified pursuant to Clause 21.2 – there was no dispute that Bauer's Clause 21.2 notice did not make express reference to a claim under Clause 21.1.1, and referred only to the variation claim under Clause 21.1.6. The arbitrator made an award in favour of Bauer, holding that the contractual basis stated in the notice did not have to be the contractual basis on which the party in fact succeeded at arbitration. The claimant appealed.

15. Both the Court of First Instance and the Court of Appeal disagreed with the arbitrator's assessment. The wording of Clause 21.2.1 was held to be clear and unambiguous. Both the Court of Appeal and the court below considered that the arbitrator's construction of it – that the principal purpose of the clause was to enable the joint venture to know the

factual basis of the claim, so that it could decide what steps to take – was contrary to commercial common sense. The Court of Appeal held, at [60]-[61]:

> *"…[t]he arbitrator's interpretation of Clause 21.2.1 would negate the commercial purpose of achieving finality, as a claim can be advanced on a different contractual basis in an arbitration which may be years down the line.*
>
> *61. The other commercial purpose for this provision is similar to what was mentioned above in The Yellow Star. In a chain contract situation, the Contractor would wish to know whether the Sub-Contractor's claim would need to be passed up the line. If the claim is based on other matters, such as breach of the Sub-Contract by the Contractor (cl.21.1.2), it would not need to be. The arbitrator's interpretation may prejudicially affect this commercial purpose as well."*

16. In the Scenario. The Contractor will need to check if the "claims notification requirements" are so strict. If so, the strategy will need to reflect the claims made and notified. This conundrum impacts *both* Arbitrators and the Parties. Arbitrators seeking to provide relief even there is imperfect compliance with the Contract struggle. It may mean that good entitlement based on the merits may need to be left on the cutting-floor. Claims outside of the Contract, such as unjust enrichment or quantum meruit may need to be pleaded as alternatives by a contractor in a situation as Bauer was in.

ARBITRATION

17. In the Scenario, the Contractor is driven by recovery of all its legal and expert fees, a final, binding and enforceable Award and an arbitral process that will improve the prospects of getting to the truth. I want to look at four questions that the Board of Directors raise:

a. **Is the Arbitration Agreement "solid". What does this mean?** Let assume the Seat is defined; that the law of the arbitration agreement is also defined; and that Rules are specified together with the Arbitral Institution. Counsel explains that we are good. We may have issues with compliance with the Multi-Tier Process but the Arbitration Agreement is well constructed.

18. The General Managers' concern may have come from *Baker Hughes Saudi Arabia Company Limited v Dynamic Industries & Others* No 23-30827 (5th Cir, 27 January 2025)[2] Here the Arbitration Agreement made reference to the DIFC-LCIA Rules. One Party argued that this meant that the only Arbitration Institution that could administer the Arbitration was the DIFC-LCIA. This had been closed by Dubai Decree 34 and so that Party argued that in the absence of the DIFC-LCIA Institution, the Parties were free to commence Court Litigation in the US. The US Fifth Circuit Court of Appeals decided that reference in the arbitration agreement to "Arbitration Rules of the DIFC-LCIA" did not mean that the arbitration had to be administered by the DIFC-LCIA Arbitration Centre but that another institution could happily administer the arbitration.

19. The Second issue raised by the Board concerned **the dangers of the Arbitrators failing due process or exceeding jurisdiction**. The concern came from a recent Singapore Court of Appeal Judgement of Wan *Sern Metal Industries Pte Ltd v Hau Tian Engineering Pte Ltd* [2025] SGCA 5 Here, Chief Justice Sundaresh Menon giving judgement explained the need for increased vigilance when an Arbitrator is handling a

[2] *Baker Hughes Saudi Arabia Company Limited v Dynamic Industries, Incorporated; Dynamic Industries International, L.L.C.; Dynamic Industries International Holdings, Incorporated*, Case: 23-30827, Filed 27 January 2025 https://www.ca5.uscourts.gov/opinions/pub/23/23-30827-CV0.pdf

"Documents Only" procedure. Here, put simply, the Arbitrator was found to have breached rules of natural justice because she decided a point raised very late by one Party, without giving the other party to respond on that specific point. International Construction Arbitrations can raise complex and overlapping issues and so this is a natural hazard for Parties and Arbitrators. A good expert is able to assist. The technical or expert Arbitrator must be careful – the Award needs to reflect the contours of the Parties legal arguments rather than 'this is the correct valuation' based on the Arbitrator's expertise. The General Manager is still keen on Arbitration.

20. The Singapore Court of Appeal looked at a similar issue in the context of international construction arbitration. The case is *CAJ V CAI APPEAL [2021] SGCA 102*. Here, CAI commenced Singapore-seated arbitration proceedings against claiming liquidated damages because of a 144-day delay in mechanical completion. CAJ argued that the mechanical work was completed on time, that any delay was a result of the rectification measures and that CAI had waived its right to claim liquidated damages or, alternatively, was estopped from making a claim on this basis. In closing submissions, CAJ advanced the argument for the *first time* that it was contractually entitled to an extension of time, which would reduce liquidated damages (the "EOT Defence"). CAI objected to the EOT Defence on the basis that raising it at this stage was procedurally unfair as it prevented CAI from addressing the issue during document production, witness evidence or cross-examination of witnesses. CAI asked the tribunal to dismiss this new argument.

21. In its final award, the arbitral tribunal found that CAJ did not achieve the mechanical completion by the stipulated date. The tribunal also rejected the estoppel defence but *accepted* the EOT Defence on the basis that CAI had been granted the opportunity to

respond to the defence in its written closing submissions. As a result, the time for mechanical completion was extended by 25 days such that CAI was entitled to receive liquidated damages for 74 instead of 99 days.

22. CAI applied to the Singaporean High Court to set aside the final award in part on the following grounds: (i) in allowing the EOT Defence, the tribunal had exceeded its jurisdiction arising out of the parties' submission to arbitration; and (ii) the final award was in violation of the principles of natural justice. The High Court allowed the set aside application on three grounds, namely that: (i) CAI did not have a fair opportunity to respond to the EOT Defence, as it was a "completely new defence which was factually and conceptually distinct from the Estoppel Defence"; (ii) the tribunal had relied substantially on its "professed experience" in reaching its decision on the EOT Defence, without explaining how this was relevant to the parties' positions and (iii) the EOT Defence was beyond the scope of the parties' submission to arbitration.

23. CAJ appealed, arguing that the Judge ought to have found that the EOT Defence fell within the scope of the Tribunal's jurisdiction. According to the appellants, (i) the Judge took too narrow a view of the scope of the parties' submission to arbitration, as well as the Terms of Reference, the pleadings and the draft Lists of Issues; (ii) there had been no breach of natural justice in the making of the Award. The Court of Appeal dismissed the Appeal. It held that the Tribunal's decision on the EOT Defence had been made in excess of jurisdiction:

- The EOT Defence was a creature of a contractual provision. There is the procedural requirement that the appellants submit a notice of a claim for an extension of time, along with the requisite particulars justifying such extension. It also goes without saying that such a defence must be pleaded [31].

- The court should not construe the parties' pleadings, the Lists of Issues and the Terms of Reference too narrowly. However, it was impermissible for the appellants to invite the court to adopt a broad reading of the pleadings, the Lists of Issues and the Terms of Reference in order to read into them a defence which was not pleaded. It was untenable for the appellants to suggest that the EOT Defence fell within the scope of the submission to arbitration simply because it would have a bearing on the respondent's claim for liquidated damages [45].

- The respondent did not have a fair and reasonable opportunity to respond to the EOT Defence and this breach of natural justice was connected to the making of the Award and materially prejudiced the respondent's rights. If the respondent had been given the opportunity to lead further evidence, test the appellants' evidence and tender further legal submissions, this could have reasonably made a difference to the Tribunal's determination [54].

- So long as the Tribunal's decision on the EOT Defence was based in part on its "unarticulated experience" in relation to which the respondent had not been afforded any opportunity to address, that in itself constituted a breach of natural justice. The Tribunal's prior experience dealing with extension of time claims for other construction projects would be immaterial in deciding on the appropriate extension of time in this case without the benefit of pleadings, specific evidence (both factual and expert) and arguments to determine the proper extension of time to be granted. Once this glaring fact is placed in the correct perspective, it would be immediately apparent that the failure of the Tribunal to inform the parties as to how its "experience" would bear on the extension of time issue was another classic case of breach of natural justice [55].

24. The conundrum for an arbitrator is clear: she has "expertise" in delay claims; understands that a party has not actually pleaded a claim for an extension of time; wants to give the correct answer; and thus applies the facts to arrive at such an answer. The trend in some Seats that the direct and bright red arrow piercing through and tying, specific claims, determinations, NODs, DAB decisions, and then to the precise causes of action in Arbitration, suggests that Arbitrators must be very careful.

ENFORCEMENT

Transnational issue estoppel in relation to arbitration challenges.

25. The next point concerning the Contractor is enforcement. In other words, working on the assumption that the Arbitral Tribunal finds in favour of the Contractor, there was a concern that the Award would not ultimately lead to monies being paid. This raises two legal questions: would an Award be set aside at the Seat or could the Award be held to be unenforceable at a jurisdiction where enforcement was sought? This brings into play transnational issue estoppel.

26. This is where a court considers an issue concerning the status or validity of an Award *after* the same issue has been considered by another court in another jurisdiction. In practical terms, one needs to consider what (if any) preclusive effect should be given to prior decisions made by courts in other jurisdictions. The further deeper question is whether the answer differs depending on whether the *first* court is the seat court or an enforcing court.

27. There are two competing legal theories concerning how arbitration relates to national courts. The first is the "delocalisation theory" – here arbitration is seen as a transnational legal process operating independently of national law. On this view, "no single state, not even the seat of the arbitration, has the final say on the validity or

enforceability of an award."[3] The arbitral process and award is subject to judicial scrutiny only at the place of enforcement.[4] This is an approach favoured in Civil Law jurisdictions. For example, in the *Putrabali* case, the French *Cour de cassation* held that "[a]n international arbitral award, *which does not belong to any state legal system*, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought".[5]

28. Most common law jurisdictions take a different view: The "territorialist" or "jurisdictional" theory of arbitration.[6] It treats every arbitration as connected to a particular jurisdiction – that is, the seat – so that the process is subject to a dual system of control. This is important. The setting-aside of an award at the seat will generally be regarded as being universal in effect, so that once set aside at the seat there is no award to enforce.[7]

29. A recent example of this jurisprudence is *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56. Here, Deutsche Telekom had obtained an order enforcing an award against the Republic of India ("India"). India then applied to set that enforcement order aside on the ground that there was no valid arbitration agreement. India had previously applied (unsuccessfully) to set the award aside in Switzerland. In

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[3] The Honourable the Chief Justice Sundaresh Menon, Supreme Court of Singapore, "The Role of the National Courts of the Seat in International Arbitration", keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre (17 February 2018) ("*The Role of the National Courts of the Seat in International Arbitration*") at para 8.

[4] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 7th Ed, 2023) ("*Redfern and Hunter*") at para 3.89.

[5] *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnugotia Est Epices* [2007] Rev Arb 507 at 514, as translated in *Redfern and Hunter* at para 3.90.

[6] *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 ("*Deutsche Telekom*") at [121].

[7] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [77]; *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [46]; *Deutsche Telekom* at [77].

those proceedings, the Swiss Federal Supreme Court rejected the same arguments that India was advancing in the Singapore enforcement proceedings. The Singapore Court of Appeal applied the doctrine of transnational issue estoppel and held that India was precluded from contesting the enforcement of the award on grounds that had already been rejected by the Swiss seat court. The Court of Appeal also endorsed – albeit in *obiter* – what it termed the "Primacy Principle". That principle holds that a seat court's decision on matters going to the validity of an award should be treated as presumptively determinative, so that the onus is on the party resisting enforcement to prove otherwise.

30. The Primacy Principle stems from the notion that the seat court occupies a special position within international arbitration. It is the court that the parties have chosen to vest with supervisory jurisdiction over the arbitration, and so it would follow that the seat court's decisions on matters pertaining to the validity of an award should be regarded as presumptively determinative. In *Deutsche Telekom*, it was said that the basis for the Primacy Principle lies in "the New York Convention read with the Model Law and the [International Arbitration Act], which recognise the special role and function of the seat court". The Court of Appeal identified three situations where the seat court's decision might be held not to be determinative, namely: where that decision conflicts with the public policy of Singapore; where there were serious procedural flaws in the seat court's decision-making process akin to breach of natural justice; and where the decision is shown to have been perverse. The Court of Appeal stressed that this list was not intended to be exhaustive.

31. Where the Primacy Principle is grounded in the scheme of the New York Convention and the Model Law, transnational issue estoppel is a common law doctrine of wider

and general application. It reflects a particular application of the issue estoppel doctrine which, together with cause of action estoppel and the rule in *Henderson v Henderson* (the so-called "*Henderson* principle"), gives the law of *res judicata* most of its content. Jurisprudential thinking then tends to the conclusion that there is nothing internal to the logic of issue estoppel that compels a distinction between the seat court and enforcement courts. On that view, a *prior* decision of an enforcement court can give rise to an issue estoppel precluding the relitigation of issues not only before parallel enforcement courts, but also before the seat court.

32. The Singapore Court of Appeal acknowledged these difficulties in *Deutsche Telekom* and suggested that if the doctrine of transnational issue estoppel is to be disapplied in relation to prior enforcement court decisions, then that may be a result defensible on policy grounds. Currently, whether a transnational issue estoppel can arise out of a prior enforcement court decision remains an open question in Singapore.

33. English law has fully embraced conventional *res judicata* principles in relation to the relitigation of issues post-award. Under English law, an issue estoppel may arise out of not only prior seat court decisions,[8] but also prior enforcement court decisions (so far as the issues in question relate to the validity of the award).[9] The English courts have also endorsed the *Henderson* principle as a further control which is "consistent with the policy of sustaining the finality of decisions of the supervisory courts".

[8] See, *eg*, *Carpatsky Petroleum Corpn v PJSC Ukrnafta* [2020] EWHC 769 (Comm) ("*Carpatsky*").
[9] *Diag Human SE v Czech Republic (No 2)* [2014] EWHC 1639 (Comm) ("*Diag Human*") at [51]–[63].

34. Australian law, by contrast, has articulated and adopted a doctrine akin to the Primacy Principle. The Federal Court of Australia's decision in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468 ("*Gujarat NRE*"), held that "it will generally be inappropriate for this court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration".

35. As has been seen, there is general agreement that weight should be accorded to the prior decisions of courts from other jurisdictions concerning the status or validity of an award. Unresolved reservations remain where the prior decision is one of an enforcing court and the matter now comes before the seat court on a challenge to the award.

THE ADVERSE INFERENCE

36. So, having looked at the law of the seat and the risks of an enforcing jurisdiction deciding something different, the Board in the Scenario are content to proceed. The General Manager then asks **what happens if the Owner / Employer does not provide evidence or documents that it is ordered to provide by the Arbitrators during the Document Production process**,?

37. Contemporaneous evidence isolated in contemporaneous documents such as letters, emails, notes, messages, and minutes of meetings is vital in international arbitration.. The Document Production process is complex. The orthodox arbitral rules and soft law are open to abuse such that a party can participate in the Document Production process but then elect to ignore the Tribunal's Order on Production; make only selective disclosure; and/or fail to provide documents that patently exist and correspond with other factual

exhibits. The Tribunal's power to make an adverse inference in respect of such behaviours lacks 'teeth' and thus raises concerns.

37. Some advocate a robust strategic re-think of the Tribunal's powers when its Document Production Orders are blithely ignored. Should institutional rules be amended such that ignorance is visited by costs orders and strike-out of claims and defences? Should the 2010 IBA Rules on the Taking of Evidence in International Arbitration be now revised to supplement the adverse inference proposition in Article 9(5) with discretion to strike out relevant claims and defences?

38. The Document Production phase is important. Marieke Van Hooijdonk and Yves Herinkckx[10] explain that the process "*is an invaluable tool for demonstrating to an arbitral tribunal facts that a party could not prove if it had to rely only on the documents already in its possession before commencement of the case. Despite clear disallowance of fishing expeditions under the IBA Evidence Rules, the process can help a claimant whose own records are initially less than convincing*". Van Hooijdonk and Herinkckx make another compelling observation that is often overlooked: "*Conversely, and this is a worthwhile feature of the system as well, the knowledge that one will have to disclose detrimental documents to the opponent can somewhat refrain prospective claimants from making overly enthusiastic demands or fanciful assertions*".

39. Article 3(3) of the IBA Rules requires (i) that document requests be specific, (ii) that the requested documents are relevant to the case and material to its outcome, and (iii) that the requested documents are not in the possession, custody or control of the requesting

[10] The Impact of IBA Guidelines and Rules, Marieke Van Hooijdonk and Yves Herinkckx in Do Arbitral Awards Reveal the Truth? Reports from the Third Joint CEPANI-NAI Colloquium held 21 March 2019 in Brussels.

party. A request must explain the relationship between the requested documents and the issues in the case with sufficient specificity.[11]

40. Relevance relates to the well-known standard that the documents sought relate to issues closely connected or appropriate to what is being considered in the dispute. Materiality has been explained as: "*a document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn*"[12] or more broadly: "*to be 'necessary', to the case being made does not mean that the case cannot be won without it, but that the case cannot be presented optimally without it*".[13]

41. Some civil law practitioners may also cite the burden of proof factor. The IBA Rules contain no requirement that the requesting party must have the burden of proof with respect to the issue about which documents are sought. Rather, the fact that document requests are used to ventilate consideration of facts tends toward analysis of the relevance and materiality of the documents sought (not which party bears the burden of proof on the issue).

42. Consequences for Non-Production: Article 9(5) of the IBA Rules provides that a tribunal can draw adverse inferences when a party has failed to comply with a tribunal's order. Article 9(5) states:

> *If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document*

[11] Commentary of the IBA Rules of Evidence Review Subcommittee ("IBA Commentary"), 2010 IBA Rules of Evidence Review Subcommittee, at p. 9 et seq.
[12] Reto Marghitola, 'Document Production in International Arbitration', International Arbitration Law Library, Volume 33 'Chapter 5: Interpretation of the IBA Rules', at pp. 52-53.
[13] Jeffrey Waincymer Procedure and Evidence in International Arbitration Part II: The Process of an Arbitration, Chapter 11: Documentary Evidence at para. 859.

> *ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.*[14]

43. Under Article 9(7) of the IBA Rules, non-compliance with procedural orders can also be considered in the allocation of costs.[15] For instance, the tribunal can allocate the full costs of the document production procedure to the party, which did not comply, even if that party was successful on the merits.[16] However, whether costs alone act as a sufficient deterrent to misbehavior in production remains in question.[17]

44. The Ciarb Guidelines on Managing Arbitrations and Procedural Orders include sanctions in instances where a party deliberately causes delays by repeatedly failing to comply and/or frustrates the proceedings through non-production of documents including peremptory orders; costs orders and excluding evidence from the record.[18]

45. There are a number of practical problems with the adverse inference. Many scholars have recognized that the problems inherent with the adverse inferences have led tribunals away from drawing adverse inferences and instead relying on the evidence (or lack of evidence) presented to them. An abstract power to draw adverse inferences does not address the serious abuse of the document production process. The following provides examples of the problems for the adverse inference:

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[14] IBA Rules, Article 9(5).
[15] Gary Born, International Commercial Arbitration, 2316 (Kluwer 2014).
[16] Reto Marghitola, 'Document Production in International Arbitration', International Arbitration Law Library, Volume 33 'Chapter 9: Sanctions', pp. 179-180.
[17] Jeffrey Waincymer Procedure and Evidence in International Arbitration Part II: The Process of an Arbitration, Chapter 11: Documentary Evidence at p. 880.
[18] Ciarb, Guideline on Managing Arbitrations and Procedural Orders, Article 3.2.

(a) Commentators argue an adverse inference should only be drawn at the end of the proceedings.[19]

(b) An adverse inference requires proof by the requesting party that there are reasonable grounds to believe the documents exist and are not being produced.[20] This leaves easy arguments open to the misbehaving party that the documents simply do not exist.

(c) Tribunals are reluctant to draw adverse inferences:

i. The adverse inference is only an evidential *inference*. It is not as strong as actual evidence (which is being withheld). Therefore, tribunals may be more inclined to make rulings based upon the evidence available rather than the evidentiary inference of what *might* exist, but has not been seen.[21] Further, arbitrators perceive an increased risk of challenge to an award if it is based upon adverse inferences.[22]

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[19] Simon Greenberg and Felix Lautenschlager, 'Part I: International Commercial Arbitration, Chapter 9: adverse inferences in International Arbitral Practice', in Stefan Michael Kroll, Loukas A. Mistelis, et al. (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution. *See also*, Sam Luttrell, 'Ten Things to Consider When Seeking Adverse Inferences in International Arbitration', in Carlos González-Bueno (ed), 40 under 40 International Arbitration (2018).

[20] This derives from three of the five criteria of the "Sharpe test" to be met in order to draw adverse inferences in international arbitration: (i) the party seeking the adverse inference must produce all available evidence corroborating the inference sought; (ii) the requested evidence must be accessible to the inference opponent; (iii) the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld; (iv) the party seeking the adverse inference must produce *prima facie* evidence; and (v) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought. (Jeremy Sharpe, 'Drawing Adverse Inferences from the Non-Production of Evidence' Arbitration International 22, no. 4 (2006), at p. 551).

[21] C. Reymond 'The Practical Distinction between the Burden of Proof and Taking of Evidence: A Further Perspective' in (1994), 10 Arb. Int'l, 323 at p. 325. ("*On balance, I tend to think that the arbitrator has the duty and the authority to indicate to the parties that if they want to prove or disprove a fact or a set of facts that is central in the arbitration, they have to adduce the evidence that he considers as appropriate, documents v. witnesses, contract with a third party v. letters referring to that contract, expert evidence v. declarations of witnesses, etc. It is always awkward for an arbitrator to dismiss a claim on the basis of the failure of a party to bring evidence which it had the burden of providing unless there was a clear indication to that effect beforehand.*")

[22] Sam Luttrell, 'Ten Things to Consider When Seeking Adverse Inferences in International Arbitration', in Carlos González-Bueno (ed), 40 under 40 International Arbitration (2018), at p. 294.

ii. It is difficult for the tribunal to know the contours of the adverse inference to be drawn. Put simply, the inference is based upon evidence which is presumed to exist but has not been seen. Is the non-production *fatal* to the claim, defence or point of fact being asserted or is the non-production only tending to show that the claim, defence or point of fact may not be as strong as it is asserted?

46. There are other tools available to the tribunal to address misbehaviours. Institutional rules and/or laws of the seat are fundamental. National courts enjoy power to sanction procedural non-compliance through the dismissal of particular claims or defences (or even the whole case). Should Tribunals also have the power to terminate all or part of the proceedings under national laws for procedural non-compliance but also when the result of such procedural misbehaviour is serious legal defects in the claims or defences which are no longer salvageable (something akin to summary judgement). So, the risk that key documents will not be disclosed by the Employer / Owner is a risk in the above Scenario. Lawyers working closely with Experts need to draft precise Requests and then hope that the Tribunal Orders production of such Documents. The use of Final Orders is good. The skill is to make strategic use of Adverse Inferences.

End Note

47. Parties to Disputes need to think strategically. The key is getting early involvement of Experts – especially Delay Experts – to look at the claims through the lens of an arbitral process. This means Lawyers and Experts have to examine what the Client says, the documents that the Client has in its possession but also assess what is missing and the consequent risks. All Dispute Resolution Methods have risks – to win needs strategic thinking.

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Ho Chi Minh City International Construction Arbitration Conference – HICAC 2025

Enhancing Quality in Construction Arbitration: Experiences and Expectations of a Repeat User

Elliott Geisinger
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Geneva, Zurich Singapore

Introduction: Where do we stand?

- Theme of this conference = "*enhancing*"… not "*fixing*"
- Generally speaking: international arbitration = a good tool for resolving international construction disputes
  - Specialised arbitrators
  - Flexibility of the procedure
  - Generally good record of enforceability of awards
  - One-shot process ➔ overall process generally takes less time to get final decision

2/17

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Introduction: Where do we stand? (cont'd)

- But… (justified) complaints
  - "Drowning in teacups"
  - Average duration of the proceedings
  - Average cost of the proceedings
  - Long time needed for drafting of the award(s)
- Therefore: certainly room and need for improvement
- This presentations aims to bring you
  - Thoughts on improvement
  - Seen from the perspective of a repeat user (my clients' / my own views as counsel or arbitrator)
  - Aim = to trigger reactions during Q&A session

3/17

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Introduction: Where do we stand? (cont'd)

- This presentation = divided into three parts

1. Potential for improvement upstream from the arbitration proceedings
2. Potential for improvement during the arbitration proceedings
3. Thoughts on what happens after the arbitration proceedings

4/17

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1. Potential for improvement upstream from the arbitration proceedings

- First area for improvement: better contract management (even for sophisticated parties)
  - Better up-front legal analysis of the contract provisions for the usual "traps", for instance
    - "Guillotine" deadlines
    - Requirements as to form for certain notices
    - Substantive requirements, e.g., for documentation to submitted with claims / for delay analysis techniques to be used
  - Better advance training of project teams regarding these usual "traps"
  - Better record-keeping, for instance
    - Where systems such as Aconis are used
    - For successive electronic versions of programmes of works

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1. Potential for improvement upstream from the arbitration proceedings (cont'd)

- (Better contract management, cont'd)
  - Better use of qualified in-house legal teams or outside counsel
    - To monitor the project (e.g., to verify that MoMs, etc. do not contain "time bombs" or to ensure that notices are sent timely)
    - To give advance notice of upcoming contractual / legal issues in critical project phases (e.g., managing events leading to taking-over)
    - To draft key correspondence (e.g. claims) when necessary
    - In all cases: legal teams must have strong experience of construction arbitration

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1. Potential for improvement upstream from the arbitration proceedings (cont'd)

- Second area for improvement: more frequent and more intelligent use of DAABs, etc. (covered by Gerry Monaghan)
  - Can be very effective tool
  - Example: construction of new railway tunnels through the Swiss Alps
    - Total value of the construction: approximately CHF 22.8 billion (USD 26.4 billion)
    - Not one single major dispute went to court: all disputes resolved before compulsory DABs
  - However: careful not to over-do a good thing
    - Risk of multiple parallel processes involving different parts of the same disputed question between the same parties ➔ e.g., timelines under 2017 FIDIC Conditions of Contract
  - Also: potential for waste of time if one party challenges everything

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2. Potential for improvement during the arbitration proceedings

- Better advocacy by counsel
  - Responsibility for "drowning in a teacup" syndrome ➔ lies mainly with counsel
  - Tendency to tell the whole (long) factual narrative in excessive detail
  - ➔ Let the arbitral tribunal sort the relevant from the irrelevant
  - Leads to
    - Unnecessary length and complication of written submissions
    - Unnecessary volume of documentary evidence
    - Unnecessary number of fact witnesses
    - (Over-use of experts… addressed later)
    - Unnecessarily long – and sometimes confusing – examination of witnesses and experts at the hearing

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2. Potential for improvement during the arbitration proceedings (cont'd)

- (Better advocacy by counsel, cont'd)
  - Need for more discipline
    - One must first conduct a thorough analysis of contractual / legal bases for claims / defences
    - Then (and only then) identify the facts that are relevant for these contractual / legal bases
    - Identify irrelevant and/or non-contested facts
  - All of this narrows down the scope of facts requiring evidence-taking
    - ➔ fewer documents
    - ➔ fewer fact witnesses (and narrower scope of testimony)
    - ➔ more focused expert evidence
    - ➔ shorter examination time at hearings (very important!)

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2. Potential for improvement during the arbitration proceedings (cont'd)

- Pro-active, hands-on arbitral tribunal
  - (Where possible) identify main issues and prioritise decisions on those issues, for instance
    - Highest-value claims
    - Issues that are potentially dispositive of certain claims
  - Intermediate Case Management Conferences after each main phase of the proceedings and before the hearing, with pro-active guidance from arbitral tribunal on
    - How the arbitral tribunal understands the parties' positions (no opinions, just tribunal's understanding)
    - Which issues require further briefing / clarification from the parties
    - Which issues truly require expert evidence

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2. Potential for improvement during the arbitration proceedings (cont'd)

- (Pro-active, hands-on arbitral tribunal, cont'd)
  - More hands-on approach to hearings
    - Provide parties with list of issues of main interest to the arbitral tribunal before the hearing
    - Proactive role in determining which issues / witnesses / experts truly require time at hearing (subject of course to due process, etc.)
    - Take the lead for examination of witnesses, experts? (can raise "cultural issues")
    - At a minimum: take active role and engage with counsel, witnesses and experts at the hearing

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2. Potential for improvement during the arbitration proceedings (cont'd)

- (Pro-active, hands-on arbitral tribunal, cont'd)
  - Availability for settlement facilitation (**not** mediation or conciliation)
    - On entire dispute
    - On only certain parts of the dispute
  - Can also be "culturally sensitive"

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2. Potential for improvement during the arbitration proceedings (cont'd)

- Better approach to expert evidence (only a few thoughts… covered mainly by Ho Chien Mien)
  - Expert witnesses (instructed by parties' counsel)
    - Involve them (internally) as early as possible
    - Wait for the crystallisation of the factual issues in dispute to file the expert evidence
    - Never hesitate to order joint reports before or after hearing
    - Never hesitate to "hot-tub" experts at the hearing
  - My experience: usefulness of arbitral tribunal's "technical advisor" (with consent of the parties)

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2. Potential for improvement during the arbitration proceedings (cont'd)

- The potential of AI in construction arbitration
  - Used extensively as internal tool by counsel
  - What about use in case management? (with consent of the parties, of course)
  - What about use in accelerating drafting of the awards? (with consent of the parties, of course)
  - No strong personal views… welcoming audience's thoughts during Q&A

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3. Potential for improvement after the arbitration proceedings have ended

- Finally… enforcement of the award
  - This presentation = an example of what **not** to do
  - Never, ever wait until the award has been rendered to give thought to enforcement
  - Always address enforcement before even bringing arbitration
    - Generally not an issue with large international construction & engineering firms based in New York Convention jurisdictions
    - But careful: not all parties to the NYC are arbitration-friendly when it comes to enforcement against their nationals and/or have slow-moving judicial system
    - Can be tricky ➔ always explore possibilities of obtaining pre-award freezing orders, attachments, etc.
    - Should always be the very first item on any arbitration checklist
    - Not specific to construction arbitration

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Thank you.

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Enhancing Expert Evidence in Modern Arbitration

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Abstract: This paper examines the key problem areas relating to expert evidence, from the perspective of parties and the tribunal, with a focus on costs and impartiality. Then, it evaluates three primary solutions that tribunals have adopted to appointing experts – namely, joint experts, tribunal-appointed experts, and party-and-tribunal experts. Finally, it recommends that parties and tribunals alike must carefully consider the appropriateness of each solution, to accommodate the real-world demands of complex issues.

Keywords: Appointment of experts, Joint expert evidence, Tribunal-appointed experts

1. Introduction

Expert evidence has always been integral part of arbitration. High stakes commercial disputes, especially those involving construction and energy, often involve multitudes of witnesses playing decisive roles in guiding the tribunal through difficult and technical issues.

In recent years, however, a new perception has developed, fuelled by arms races of experts, ballooning costs and resulting procedural complexities. Courts have begun to tighten standards and procedures to discourage the use of expert witnesses as hired guns. In Singapore, for example, the new Rules of Court 2021 provide that "*as far as possible, parties must agree on one common expert*".[1]

However, whilst these civil litigation rules endeavour to regulate the use of expert evidence, the commercial reality is that parties nevertheless feel compelled to deploy multiple experts for fear of being outmanoeuvred. Indeed, as highlighted by Chua Lee Ming J:

> "*Anecdotally, [Order 12 r 3(1) of the ROC 2021] has not given rise to any significant issues and* ***common experts are the exception***."[2]
>
> (emphasis added)

Additionally, with party autonomy as the most fundamental in arbitration, arbitral rules have also historically been less prescriptive with respect to rules surrounding the appointment of experts. Indeed, most institutional rules include provisions which expressly tribunals to appoint experts,[3] but they do not establish a preference for party-appointed or tribunal-appointed experts; nor are there any prescriptive rules regulating the use of expert evidence. One example is the UNCITRAL Notes on Organising Arbitral Proceedings, a set of non-binding guidelines for

[1] Order 12 r 3 of the Singapore Rules of Court 2021.
[2] Justice Chua Lee Ming, "The Rules of Court 2021: Perspectives from the Bench (The General Division of the High Court)" (2024) 36 SAcLJ at para 44.
[3] Article 25(3) of the International Court of Commerce ("**ICC**") 2021 Rules of Arbitration; Article 41.1 of the Singapore International Arbitration Centre ("**SIAC**") 2025 Arbitration Rules; See also Article 26(1)(a) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (2006 Amendment) ("**UNCITRAL Model Law**").

best practices, which encourages parties to consider using a single joint expert as an efficient alternative to duelling experts.[4]

This paper examines the key problem areas relating to expert evidence, from the perspective of parties and the tribunal. Then, it evaluates three primary solutions that tribunals have adopted to appointing experts – namely, joint experts, tribunal-appointed experts, and party-and-tribunal experts. Finally, it recommends that parties and tribunals alike must carefully consider the appropriateness of each solution, to accommodate the real-world demands of complex issues.

2. Key issues relating to expert evidence

2.1. "Bouquets and Brickbats"

Well-prepared expert evidence can be a double-edged sword in arbitration. On the positive side, party-appointed experts often provide crucial clarity on complex matters outside the tribunal's own expertise. For example, in technical construction disputes, experts help dissect issues of project delays, specialised defects, and the quantification of delay-related claims.

A skilled delay expert can illuminate the causes of project overruns, identify the extent of critical delay on the schedule, attribute responsibility for those delays, and even assist in quantifying the financial impact. In this way, a well-prepared expert report serves as a "bouquet" – it can greatly assist both parties and arbitrators in understanding highly technical evidence and evaluating the merits of claims and defences. Indeed, almost every complex business or construction arbitration today relies on expert testimony to some degree, reflecting the indispensable role experts play in helping tribunals reach informed decisions on specialised issues.

On the other hand, expert evidence also attracts "brickbats". In this regard, A common criticism is the perceived partiality of party-appointed experts. Indeed, the opinions of delay expert witnesses usually support the interests of the parties who call them. As the learned author Tristram Hodgkinson explains:

> "*It has long been recognised by the courts that bias is not the preserve of lay witnesses, and that experts may display it in their evidence. Indeed, in many respects the incentives for experts to favour one party contrary to their actual belief are substantial. First, expert witnesses are paid for their evidence. Secondly, they may be retained on a regular basis by a particular client or group of clients in different cases. Thirdly the expert may hope to gain favour with a client generally, perhaps because he hopes that non-legal professional engagements may be forthcoming or continue*."[5]

[4] United Nations Commission on International Trade Law, *UNCITRAL Notes on Organising Arbitral Proceedings* (2016) at [98].
[5] Hodgkinson, T., Expert Evidence: Law & Practice (Sweet & Maxwell, 1990) at p 213, cited in *Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng* [2004] SGHC 158 at [81].

Unlike court-appointed neutral experts, party experts are engaged and paid by one side, which can lead to the impression that they act as that party's additional advocate. Critics frequently characterise such experts as **"**hired guns**"** whose opinions invariably support the case of the side retaining them.[6] In fact, in the 2021 BCLP Survey, 51% of respondents agreed that "party-appointed [experts] are "hired guns" or "advocates in disguise"".[7] This raises doubts about the true independence of some experts and whether tribunals are really getting objective assistance or merely partisan submissions in another form.

2.2. Issues from the Parties' Perspective

Significant Time and Costs

From the parties' point of view, the use of experts in arbitration is rife with practical and strategic dilemmas. A first concern is the significant time and costs involved in engaging experts across multiple disciplines. Large-scale construction disputes in Singapore often require an army of experts to cover the gamut of issues in contention – delay experts, quantum (damages) experts, and various technical specialists, such as experts in ACMV systems, M&E engineering, or water-proofing, just to name a few.

While this may be necessary to do justice to highly technical claims, the financial burden is considerable. Parties must fund multiple expert investigations and reports, sometimes incurring millions in expert fees, and endure the extended timelines needed for these experts to analyse data and prepare opinions.

Appointment of Experts as a Prisoner's Dilemma

Adding to this is a strategic conundrum often likened to a **"**Prisoner's Dilemma". Parties who forgo engaging an expert would be (or at least would perceive themselves to be) in a weaker position, as opposed a counterparty who has appointed one. For example, in the 2025 Singapore Court of Appeal decision in *Palm Grove v Hilton*, a central issue in the underlying arbitration turned on the fact that the claimant had failed to adduce independent expert reports to prove the standard of what a "*prudent international hotel operator*" would have done under the contract.[8] The tribunal found that industry data alone was insufficient and, in the absence of expert testimony on the issue, it was "*unable to assess*" the counterclaim.[9]

No party wants to be the only one at the hearing without expert support on a critical technical issue, lest the tribunal accept the other side's expert evidence by default. This creates a strong incentive for both sides to deploy experts pre-emptively on all possible issues, even if some might ultimately prove unnecessary. As Professor Doug Jones observes:

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[6] See, for example, Markus Altenkirch, "Quo Vadis Party-appointed Experts?" (18 December 2018) https://www.globalarbitrationnews.com/2018/12/18/quo-vadis-party-appointed-experts/, last accessed 2025/03/31.
[7] Bryan Cave Leighton Paisner, *BCLP Arbitration Survey 2019: Expert Evidence in International Arbitration* (the "**2021 BCLP Survey**"), at p 9.
[8] *Palm Grove Beach Hotels Pvt Ltd v Hilton Worldwide Manage Limited and Hilton Hotels Management India Private Limited* [2025] SGCA 14 ("***Palm Grove v Hilton***") at [37].
[9] *Palm Grove v Hilton* at [37].

> "*There often arise situations where one party wishes to adduce expert evidence on a certain topic while the other party has not thought it necessary, or where one party has called a multitude of experts on the topic, where the other has only called one. Such asymmetric use of experts creates perceptions of unfairness between the parties, causing the other party to call expert evidence despite the fact that it may be wholly superfluous. This leads to greater, usually unnecessary, reliance on experts.*"[10]

In other words, neither party can risk unilaterally disarming in the expert battle, for fear of losing an important issue by default.

However, an aggressive strategy of over-appointing experts can backfire if the quality or impartiality of the evidence suffers. Parties often assume that piling on more experts will inevitably strengthen their case. In reality, tribunals value the cogency and reliability of expert testimony over sheer quantity. An expert who strays into advocacy or lacks credibility can do a party's case more harm than good. Likewise, duplicative or unfocused expert opinions will not impress a tribunal; they will simply prolong the proceedings. In some instances, over-reliance on experts is "*nothing more than a drain on [the] time, money and efficiency of the arbitral process*".[11] Moreover, there is also a risk of diminishing returns – the tenth expert report might add very little value beyond the first nine, despite the extra cost.

2.3. Issues from the Tribunal's Perspective

Difficulties in making a determination between opposing expert views

From the Tribunal's perspective, a key difficulty is how to evaluate diametrically-opposed expert opinions on highly technical questions. It is not uncommon for two well-qualified experts to arrive at completely contradictory conclusions, each bolstering their respective client's narrative in areas like delay causation or defect responsibility. The tribunal, usually comprising legally trained arbitrators rather than subject-matter specialists, may experience a form of decision paralysis when confronted with these polarised expert views.

With no neutral baseline and little overlap between the opposing testimonies, the tribunal must somehow discern the truth or at least prefer one opinion over the other. Cross-examination is meant to pressure-test expert theories, but many experienced arbitrators admit that traditional cross-examination alone is often inadequate to determine which expert is right. As the late Professor Martin Hunter explained:

> "*One side's expert says, with great conviction, "faulty design of the bridge". Equally convincingly, the other side's expert says "defective materials used in construction of the bridge". Cross-examination of*

[10] Jones, D., "Ineffective Use of Expert Evidence in Construction Arbitration" (16 November 2020) https://dougjones.info/content/uploads/2017/07/Ineffective-Use-of-Expert-Evidence-in-Construction-Arbitration-1.pdf, last accessed 2025/03/31, at p 5.
[11] Jones D., supra n 10, at p 5.

experts by counsel is considered by many international arbitrators as an inadequate tool to assist them in making a determination between the opposing views of such experts."[12]

In practice, a tribunal might end up favouring the expert who appeared more persuasive or withstood cross-examination better, rather than the one who is necessarily correct on the merits.

Managing parties' expectations and the risks of setting aside applications

Tribunals must also manage the parties' expectations regarding the admissibility and weight of expert evidence. Arbitrators are acutely aware that if they exclude expert evidence or give it little weight, an aggrieved party may later invoke natural justice and due process grounds in an attempt to challenge the award.

For example, in the 2021 Singapore High Court decision of *Year Sun v Gunvor*, the claimant commenced an application to set aside an SIAC award, on the ground that it was "*not given a full or reasonable opportunity to be heard*" under Article 18 of the UNCITRAL Model Law due to the tribunal's direction "*not to submit expert evidence on certain aspects of industry practice*".[13] Although the Court eventually found that there was no breach of natural justice since "*the arbitrator's decision was reasoned and arrived at after considering the arguments raised by both parties*",[14] good tribunals must be acutely aware of such risks and aim to avoid further setting aside actions after the arbitration.

3. Strategies for Appointment of Experts

As earlier explained, there is much flexibility in the way expert evidence in international arbitration is presented. Institutions rarely impose prescriptive rules, and several models exist for appointing experts. This section evaluates three main models of expert appointment – (A) joint party-appointed experts, (B) tribunal-appointed experts only, and (C) both tribunal-appointed and party-appointed experts.

3.1. Joint Party-Appointed Experts

Under this model, both parties agree to appoint a single joint expert who provides an opinion on the issues for both sides. As described earlier, institutional rules do not mandate or prohibit joint appointments, as this is simply a matter of party agreement. In practice, the parties share responsibility for choosing the expert and tribunals may facilitate discussions for a joint expert at early case management conferences.[15]

While the option for joint experts has always been open to parties, they remain rare in international arbitration. The biggest hurdle is that it is difficult for parties with conflicting interests to agree on a single expert.

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[12] Hunter, M., "Techniques for Eliciting Expert Testimony, Expert Conferencing and New Methods" (2006) http://cdn.arbitration-icca.org/s3fs-public/document/ media_document/media01223294014605 0jmh-techniques-for-eliciting-expert-testimony.pdf, last accessed 2025/03/31, at p 2.
[13] *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* [2021] SGHC 229 ("***Year Sun v Gunvor***") at [19].
[14] *Year Sun v Gunvor* at [66].
[15] Chartered Institute of Arbitrators, *Party-appointed and Tribunal-appointed Experts* (2015) at p 13.

Furthermore, the use of a joint expert may not be appropriate for deeply contested issues. For example, where the subject matter is highly complex or the experts might adopt fundamentally different methodologies, relying on a single opinion can be problematic.[16] A joint expert may end up choosing one analytical approach, and important alternative theories might not be fully explored. This is particularly true in construction disputes for issues such as delays, where multiple methodologies exist (time-impact analysis, as-planned vs as-built, etc.). Where there is only a joint expert, his views are not tested by an opposing expert peer, so mistakes or biases may go unchecked.

3.2. Tribunal-Appointed Experts Only

In this model, the arbitral tribunal itself appoints one or more experts to address specific issues, and no party-appointed experts are used. The tribunal's power to appoint experts is well-established in international arbitration. Apart from its inherent powers, major institutional rules and national laws explicitly authorise tribunal-appointed experts.[17]

Procedurally, a tribunal-appointed expert is typically selected by the arbitrators (often after inviting the parties to comment on potential candidates to ensure neutrality).[18] Additionally, institutional rules usually prescribe for the tribunal-appointed expert to be questioned at an oral examination.[19]

Although this model is cost-effective and theoretically neutral, in practice, tribunal-appointed experts have been more commonly used only in civil law traditions. Common law-trained arbitrators and counsel, such as those in Singapore, have historically been more hesitant, preferring party-driven evidence. Such common law-trained counsel often prefer the ability to present and shape expert evidence, even if this comes at a higher cost.

Furthermore, there is also the risk that the tribunal may lean too heavily on its appointed expert, thereby fettering its own discretion.[20] If the arbitrators uncritically accept the expert's conclusions, the award may be vulnerable to challenge for delegating the decision.

A practical point to note is that parties may "double up" and engage shadow or supplemental experts anyway, to review the tribunal expert's report and assist in formulating questions or critiques, especially if they distrust the tribunal-appointed expert. This undermines the very cost and time savings intended.[21]

3.3. Both Tribunal-Appointed and Party-Appointed Experts

[16] Justice Chua Lee Ming, supra n 2.
[17] Article 25(3) of the ICC 2021 Rules of Arbitration; Article 41.1 of the SIAC 2025 Arbitration Rules; See also Article 26(1)(a) of the UNCITRAL Model Law.
[18] Chartered Institute of Arbitrators, *Party-appointed and Tribunal-appointed Experts* (2015) at p 6.
[19] See, for example, Art 41.6 SIAC 2025 Arbitration Rules.
[20] NB: This concern is less prominent in jurisdictions like Singapore, which has well-established arbitrators and institutions. However, see, for example, Ian Meredith, "Expert Evidence in International Arbitration: Common Criticisms and Innovative Solutions" https://www.klgates.com/Expert-Evidence-in-International-Arbitration-Common-Criticisms-and-Innovative-Solutions-8-24-2021, last accessed 2025/03/31, on the experiences relating to the Gulf Cooperation Council.
[21] See also Ian Meredith, supra n 20.

Lastly, parties may choose to capture the benefits of both systems by involving both tribunal-appointed experts and party-appointed experts in the same arbitration. There are different permutations of this approach. One common scenario is when a tribunal, despite having party experts, decides to appoint its own neutral expert to help resolve conflicting testimony.

The benefit of such an approach is simple – it provides a more complete picture and preserves parties' autonomy in the ability to present their case fully. Parties are able to present their case, whereas the tribunal's own expert can offer a sanity check and highlight areas of agreement or disagreement between the party experts.

Additionally, as opposed to the other two approaches discussed, when both parties have had their own expert heard and the tribunal has had independent expert help, parties are more likely to accept that the process was fair and thorough. Even if a party disagrees with the tribunal's decision on technical matters, it cannot easily claim it lacked opportunity to present its evidence. This makes it extremely difficult for parties to justify any setting aside applications in the future.

However, this model is not all roses. The biggest and most obvious concern is that this model the most expensive of all. Appointing a tribunal-appointed expert in addition to party-appointed experts means there are now three sets of experts to pay. Furthermore, managing three experts instead of one or two means more expenditure and can elongate the timeline. There will also likely be multiple rounds of exchanging reports and hearings might be extended to accommodate examinations of all experts.

Overall, each model for appointing experts in arbitration offers distinct advantages and drawbacks. In this regard, there is no one-size-fits-all solution and the optimal strategy depends on the particular needs of the case, the willingness of parties to cooperate on expert issues, and the arbitrators' judgment in maintaining fairness. This shall be discussed in Section V below.

4. Other Practical Challenges

Beyond choosing whether to rely on a joint expert, a tribunal-appointed expert, or a hybrid of both party- and tribunal-appointed experts, a myriad of other practical considerations often arise in the context of expert evidence. In respect of the challenge to arbitrators in determining which expert's decision is more persuasive, a big factor comes down to how these experts are cross-examined.

In the traditional, counsel-controlled approach to expert examination, each party's expert provides his/her examination-in-chief followed by cross-examination. However, witness conferencing (also known as "hot-tubbing") is an alternative practice whereby two or more experts at a hearing give their evidence concurrently. This enables simultaneous questioning and discussion on key expert issues.

Hot-tubbing provides many advantages. For example, hot-tubbing minimises the aggressive nature associated with cross-examination, thereby providing experts with a more constructive platform to present their views. Hot-tubbing provides experts with greater opportunities to explain their opinions in-depth, compared to the narrow scope of traditional cross-examination. Hot-tubbing also creates an environment that encourages experts to find common ground. When sitting in the hot tub alongside industry peers, experts are compelled to respond reasonably, enhancing their credibility through reasoned argumentation.

However, hot-tubbing may not be particularly useful for controversial topics, such as delay disputes.
Delay experts are rarely able to agree on what methodology to use, the baseline programme or the relevant critical path and so there is little point in making the delay experts sit in the hot tub at the same time.

Hot-tubbing may encourage the dominance of one delay expert in the discussion. This dynamic could affect the equal contribution of all delay experts. In the interest of time, delay experts may face the risk of oversimplifying their explanations. Time constraints could contribute to discussions remaining at a superficial level. Therefore, with respect to delay experts, it is likely to be more appropriate for delay experts to be cross-examined in the conventional format rather than in the hot-tubbing process.

5. Conclusions and Recommendations

In conclusion, dealing with expert evidence remains a major bugbear in international arbitration for both parties and tribunals alike. Whilst it is often indispensable for resolving complex technical issues, the related costs and confusion can be worrisome if not properly managed. Ensuring that expert testimony genuinely aids the tribunal requires diligence and foresight from both the disputing parties and the arbitral tribunal. What follows are my recommendations, drawn from both my experience in Singapore and international best practices.

5.1. Recommendations for Parties

Prioritise the independence and impartiality of experts

First, parties should prioritise the independence and impartiality of their experts. If an expert comes across as an advocate rather than an impartial assessor, the tribunal is likely to discount their evidence significantly. In the aforementioned 2021 BCLP survey, out of the 51% of respondents who agreed that party-appointed experts tend to be "hired guns", 24% did not think that this was a problem.[22] This was because 93% of practitioners agreed that tribunals should place *"limited weight"* on a party-appointed expert's evidence if the expert fails to remain independent.[23]

[22] 2021 BCLP Survey, supra n 7, at p 9.
[23] 2021 BCLP Survey, supra n 7, at p 9.

In practice, no matter how credentialed or eloquent an expert is, a **"**hired gun**"** will have little persuasive value. An expert who remains impartial and objective not only enhances their own credibility but ultimately bolsters the party's case.

Clearly identify the nature of disagreement if disagreeing to a joint-appointed expert

Second, parties should clearly identify and explain the nature of any disagreement over the appointment of joint experts, rather than reflexively insisting on the traditional model of party-appointed experts. Take for example a construction delay claim, where parties dispute on the methodology to be adopted – one party insists on using a time-impact analysis while the other relies on the traditional as-planned vs as-built analysis. If parties are unable to come to an agreement on a joint-appointed expert because of the two fundamentally different scheduling methodologies, it would be more constructive for the parties to candidly acknowledge the methodological disagreement at the outset, rather than simply objecting to a joint expert without explanation.

By highlighting the nature of the agreement, the parties can help frame the issue for the tribunal. This allows the tribunal to consider tailored solutions. For instance, the tribunal may appoint a neutral tribunal-appointed delay expert not generally, but just to critique the applicability of the competing approaches and to assist in determining which methodology is better suited to the case.

5.2. Recommendations for Tribunals

Early assessment of whether expert evidence is necessary, and which arrangement is most appropriate

Similarly, tribunals should exercise proactive case management in respect of expert evidence and conduct an early assessment of whether expert evidence is truly necessary and, if so, determine at the outset the most appropriate model for appointing experts.[24] In practice, this means that the tribunal should canvass with the parties which technical issues will require expert input at the procedural conference or as soon as pleadings clarify the issues.

If expert evidence is needed, the tribunal should then deliberate on the optimal appointment model – whether to proceed with each side appointing its own expert, to use a single joint expert, to appoint an independent expert itself, or some other combination. Crucially, this decision should be tailored to the case and focused on party agreement. Tribunals should strongly encourage low-cost alternatives if they are appropriate, but they must also be careful not to overstep boundaries, lest parties allege that they were unable to present their case.

A tribunal that thoughtfully chooses an appointment model early and communicates this choice to the parties with reasons can greatly streamline the proceedings. Importantly, the appropriate expert model may vary by issue type. Take the example of construction arbitration:

[24] See, for example Charted Institute of Arbitrators, *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (2015), at Art 2.

- For quantum claims (such as valuation of work done, cost overruns, or damages for delays), the underlying methodologies are often relatively standardised. Quantity surveyors or accounting experts will typically draw on established industry techniques to measure loss or value. Here, a jointly appointed quantum expert or a tribunal-appointed expert can be highly effective. Because both parties ultimately need to rely on the same accounting or measurement principles (even if they dispute certain figures), having one neutral expert conduct the analysis can save time and avoid duplication.

- In contrast, delay claims often involve widely divergent analyses, where experts may legitimately adopt different methodologies to examine schedule impacts. Multiple methods may be accepted in principle, yet they can yield very different conclusions regarding the extent of delay. Faced with this situation, a tribunal should hear from both sides of party-appointed experts or consider appointing its own delay expert to evaluate the claims of the party-appointed experts, especially for higher-value disputes where the quantum of disputes justifies the additional cost of experts. This also applies to other technically complex issues, such as defects claims, tribunal, typically composed of legal experts, may not have deep expertise in, for example, structural engineering or soil mechanics.

Transparency in expert-appointment process

Finally, whenever a tribunal decides to adopt an approach involving a joint expert or tribunal-appointed expert, it should clearly explain its rationale and institute procedural safeguards to protect the parties' rights. Transparency at this stage is critical. The parties should be informed, via a reasoned procedural order, why the tribunal believes a joint or neutral expert is necessary or preferable – for example, because the quantum issues are largely technical and agreement on a single expert will save time and costs, or because the methodologies diverge and an independent analysis will assist the tribunal.

These safeguards ensure that parties' rights are preserved and minimise the risk that disgruntled parties may subsequently allege a breach of natural justice in seeking to set aside an unfavourable award.

HICAC 2025: ENHANCING EXPERT EVIDENCE IN MODERN ARBITRATION

HO CHIEN MIEN (Mr.)
Partner (Co-Head), Construction & Engineering

BOUQUETS

- Expert evidence helps the parties and counsel understand highly technical issues and understand the relative strengths and weaknesses of their claims.
- For example, in a delay-related claim, expert evidence can assist to:
  - determining the causes of the delay
  - the amount of critical delay
  - the party responsible for the critical delay
  - the quantification of the claim

BRICKBATS

- Opinions of delay expert witnesses usually support the interests of the parties who call them.

  ***Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [81]**

  "*… in many respects the incentives for experts to favour one party contrary to their actual belief are substantial. First, expert witnesses are paid for their evidence. Secondly, they may be retained on a regular basis by a particular client or group of clients in different cases. Thirdly the expert may hope to gain favour with a client generally, perhaps because he hopes that non-legal professional engagements may be forthcoming or continue.*"

- Poorly prepared delay expert evidence can:
  - undermine the case of the party which the expert is giving evidence for
  - unnecessarily complicate the issues before the Tribunal so that it is counter-productive
  - result in disproportionately high costs being incurred and the extravagant use of trial time

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BRICKBATS – MY EXPERIENCE

- Experts often come to diametrically-opposed opinions on the same issue:
  - Highly technical issues (like defects and delays) can have very different methodologies of assessment
  - Experts tend to prefer their clients, even if this may not be objectively correct
- Difficulties:
  - As an arbitrator, it is difficult to identify who is right.
  - As counsel, it is difficult to persuade the Tribunal.
  - As an expert, it is difficult to translate difficult technical issues into lay language
- Delay reports can be massive and expert reports can hinder more than help
- Expert reports on issues as diverse as geotechnical reports, underground vibrations and its impact on facades, properties of stones and structural steel, are frequently lost in translation.

BRICKBATS – MY EXPERIENCE *(MILLENIA V DRAGAGES)*

Millenia Pte Ltd v Dragages Singapore Pte Ltd and others [2019] 4 SLR 1075

Two granite stone panels fell from the façade of a 35-storey office building. Two passers-by were injured by the debris of the 2nd Panel, and significant property damage was caused. The issue was what caused the panels to fall?

- Claimant: Respondent's design and construction were defective
- Respondent: Vibration from adjacent tunnelling works caused defects

31 witnesses (liability tranche) – 15 fact witnesses, 16 expert witnesses:

6 Façade and Material Experts
2 Structural Dynamics Experts
2 Vibration Experts
2 Geotechnical Experts
4 Quantum Experts

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BRICKBATS – MY EXPERIENCE *(MILLENIA V DRAGAGES)*

Millenia Pte Ltd v Dragages Singapore Pte Ltd and others [2019] 4 SLR 1075

"218 I now come to my assessment of the credibility of the façade experts. The evidence on the defects was complex and complicated. ***Unfortunately, the façade experts could not reach a consensus on many issues. I therefore had to choose between competing opinions on many points****.*

219 Of all the experts, I found Mr Hartog the most objective and credible although I do not accept his evidence on every point. I also found the evidence of Mr Mann and Mr Hugh Keithly ("Mr Keithly"), ***the façade experts engaged by the Meinhardt Parties, generally credible, though I had to caution Mr Keithly on one occasion not to advocate his client's case****.*

…

660 The central issue addressed by the quantum experts was the question of whether the Rectification Option would be less costly than the Reclad Option. It is important to note at the outset that ***the evidence on this point was limited in utility****. Importantly,* ***there was no agreement on the remedial methods that the Rectification Option would involve****."*

NEW DEVELOPMENTS – CRITICISMS OF EXPERT EVIDENCE

- Two non-construction examples highlighted by the Judiciary:
  - In *Wong Meng Cheong v Lin Ai Wah* [2012] 1 SLR 549, which involved a family dispute over the transfer of property, the plaintiff called two experts to testify on the transferor's mental capacity at the time of the transfer. The High Court found that the plaintiff's experts failed to disclose their "fairly close relationship" with the plaintiff, and demonstrated "partiality to the plaintiff's case … by being selective in the presentation of the relevant medical evidence".
  - In *Mehra Radhika v Public Prosecutor* [2014] SGHC 214, a judgment of the Chief Justice, the appellant, who was charged with an offence of arranging a marriage of convenience, sought to adduce a medical report which opined that she had depression. The Chief Justice noted that the medical report was "patently lacking in objectivity with a great portion attempting to set out background facts that were exceedingly favourable to the appellant".

Justice Kannan Ramesh, Keynote Address (APIEx Symposium 2023)

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NEW DEVELOPMENTS – OLD RULES OF COURT 2014

- Under the old Rules of Court 2014, there were tools which were meant to combat this. For example, the court could direct experts to submit a joint report which listed their points of agreement or disagreement in a Scott Schedule.
- In theory, this would improve the efficiency.
- However, in practice, the joint report was often unhelpful as experts just asserted their own positions:

"However, the reality was at times different. Where the experts had fundamental differences in methodology or analysis, ***the expert conference served only to harden positions, and the joint report was nothing more than another piece of paper evidencing their intractable differences****. Where this was the case, the cost advantages associated with expert conferences and joint reports were more apparent than real."*

Justice Kannan Ramesh, Keynote Address (APIEx Symposium 2023)

NEW DEVELOPMENTS – NEW RULES OF COURT 2021

Singapore's new Rules of Court 2021 (ROC 2021) significantly modify the approach to expert evidence:

O 12 r 2(1): "No expert evidence may be used in Court unless the Court approves."
O 12 r 3(1): "Subject to paragraph (5), as far as possible, parties must agree on one common expert."

These reforms are intended to prevent the proliferation of unnecessary expert evidence:

"By requiring the parties to endeavour to agree on a common expert, two issues are addressed. First, the problem of bias or partisanship, and the parties treating their experts as "hired guns". Second, the parties are prevented from treating expert evidence as an "arms race", thereby minimising costs and delays in civil litigation. Importantly, the playing field for less financially capable parties is levelled or at least improved by ensuring that expert testimony is only resorted to if necessary, with the costs associated with it controlled by the court. This undoubtedly promotes access to justice."

Justice Kannan Ramesh, Keynote Address (APIEx Symposium 2023)

NEW DEVELOPMENTS – NEW RULES OF COURT 2021

- Civil Justice Review Committee Report:

"*The default position should be for a single court expert to be appointed in cases where expert evidence is necessary. …Generally, no party expert witnesses will be permitted.*"

https://www.judiciary.gov.sg/docs/default-source/news-docs/annex-b_cjrc-report.pdf

- Difficulties identified:
  - Expert witnesses have irreconcilable differences in opinion
  - Party-appointed experts are presented with the facts of the case framed according to the perspective of the parties engaging them and this influences interpretation of evidence.
  - Disproportionately high costs

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NEW DEVELOPMENTS – NEW RULES OF COURT 2021

- New development for common law jurisdiction like Singapore
- Questions:
  - How is the common expert to be briefed?
  - How is the evidence of the common expert to be presented?
  - Presumably the common expert is available for cross-examination? What if he is shown to be incompetent or to lack the necessary expert knowledge under cross-examination?

"*Anecdotally, [Order 12 r 3(1) of the ROC 2021] has not given rise to any significant issues and common experts are the exception.*"

Justice Chua Lee Ming, The Rules of Court 2021: Perspectives from the Bench

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BY PARTIES AND TRIBUNALS

LEARNING FROM ROC 2021 – APPLICATIONS IN ARBITRATION

- Arbitration operates under different principles
  - Party autonomy
  - Institutional rules are not as prescriptive as ROC 2021
- Tribunals should nevertheless consider encouraging consensus on expert use:
  - Joint-appointed experts
  - Tribunal-appointed experts
  - Both party-appointed and tribunal-appointed experts

CONSIDERATIONS – WHEN TO USE JOINT EXPERTS

- Joint experts / tribunal-appointed experts only may not be appropriate where it is a complex issue with multiple methodologies for assessment.
- Example:
  - **Quantum claims** (valuation of work done, cost overrun), if the underlying methodology is standardised; parties may be able to agree to a neutral expert for valuation.
  - **Delay claims** often involve widely divergent analyses, where experts use different methodologies to examine schedule impacts.
- Having both party-appointed and tribunal-appointed experts may not be appropriate in lower value disputes.

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OTHER CONSIDERATIONS

- Parties should clearly identify the nature of disagreement if disagreeing to a joint-appointed expert.
- Tribunals should conduct early assessment of whether expert evidence is necessary, and which arrangement is most appropriate.

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HICAC 2025

Thank you for your attention!

Notes
This presentation does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. This presentation is intended to provide general information only and does not contain or convey any legal or other advice. Although we endeavour to ensure that the information contained herein is accurate, we do not warrant its accuracy or completeness or accept any liability for any loss or damage arising from any reliance thereon.

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HO Chi Minh city International Construction Arbitration Conference 2025
Theme: "*Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects — Bridging International Expertise with Domestic Practice"*

Dispute Avoidance – is it realistic?

Gerard P. Monaghan

BEng, MSc, MBA, Dip Const Law, Dip Arb, CEng, FIEI, FCIArb

FIDIC Certified Adjudicator, Member of the FIDIC Presidents List of Adjudicators, Ireland Country Representative, the Dispute Resolution Board Foundation(DRBF)

Abstract.
Dispute avoidance on major construction projects minimizes costly and time-consuming disputes which are bad for the project and bad for relationships. The main vehicle for facilitating the dispute avoidance concept is via Dispute Boards appointed from commencement of the project. This paper explores the key ingredients for successful dispute avoidance and examines the effectiveness of the approach from international data.

Keywords: Dispute Boards, Dispute Avoidance, FIDIC, DRBF

1.0 Introduction

Dispute avoidance is very much in vogue these days for construction contracts worldwide and for good reason. Construction disputes can be costly, time consuming, bad for relationships and rarely are a positive development for a project. Better it is that resources are focused on project deliverables and milestones and thus a model whereby disputes that typically arise on construction projects (whether typical or of a more bespoke nature) can be taken out of the equation and dealt with offline - or in some other non-adjudicative forum.

The most common vehicle for delivery of dispute avoidance is through the involvement of a Dispute Board (DB) which is appointed at the start of the project – i.e. a Standing Dispute Board. The FIDIC forms of contract have really pioneered the way over the last 10 to 15 years in terms of dispute avoidance and indeed the most recent versions to their FIDIC Red, Yellow and Silver books [1, 2, 3] have seen the terminology evolve from the 1999 version of a Dispute Adjudication Board (DAB) to a Dispute Avoidance and Adjudication Board (DAAB) (See Clause 21.3 FIDIC Red, Yellow and Silver Books [1, 2, 3]). The General Conditions of Dispute Avoidance/Adjudication Agreement at Appendix 1 and the DAAB Procedural Rules at Annex 1 to the Contract govern the arrangement and the powers of the DAAB.

Both the ICC and the CIArb have dispute board rules all of which comprises an element of dispute avoidance procedures and guidelines.

The most common approach towards dispute avoidance is through the provision of informal assistance by the DB upon the request of both parties. Clause 21.3 FIDIC 2017/2022 indicates that "*Such informal assistance may*

take place during any meeting, Site Visit or otherwise" However importantly "*the parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process*".

In December 2023 the FIDIC Dispute Avoidance and Adjudication Forum published *Practice Note 1 Dispute Avoidance* which provides valuable guidance as to how a dispute board should address the matter of dispute avoidance as is well worth a read for anyone interested in the topic [4]

2.0 Key Ingredients for Success

As a member of the Engineers Ireland Conciliation Panel and the FIDIC Presidents List of Adjudicators and hence with considerable practical experience of Standing Conciliation under the Public Works Contracts in Ireland and the DAB/DAAB arrangements under FIDIC, I make some general observations as to what I consider the key ingredients for success as follows;

- The DB must be appointed from the start of the project to properly understand the project issues and personnel dynamics ie a Standing DAAB or Standing Conciliator

- The parties must have trust in the DAAB /Standing Conciliator – integrity and impartiality is a given but real "trust" comes with interaction over a period of time – need to know that your Standing Conciliator is a safe pair of hands that can be relied upon

- The parties must have confidence in the DAAB /Standing Conciliator's expertise – technical, legal, financial

- The DAAB/Standing Conciliator must be a good listener

- Once the first four bullet points are established the most important element of all is to ask the right question at the right time and in the right tone – done properly it can be remarkably successful in fostering discussions and moving things along - done poorly then it could be disastrous and all the rapport and confidence built up with the parties could evaporate.

3.0 Does it work?/ Is it realistic?

The Dispute Resolution Board Foundation (DRBF www.drb.org) provides assistance with the worldwide application of DB practices, provides training for DB practitioners and maintains a large data base of publications, articles and webinars on the topic. In particular, the DRBF maintains statistics based on returns from both DB members and contractor/employer representative bodies around the world relating to the use of and success of DB generally. The use of DB worldwide is increasing and for good reason. By way of headline statistics, the DRBF point to data from 2018 which indicates that where a DB was in situ and issued a decision, only 6% of said decisions were rejected and subsequently referred to arbitration for final resolution. Of the 6% referred to arbitration only in 22% was a different decision reached [ref]. So the DB process works and hence the increasing popularity.

Specifically in relation to dispute avoidance a detailed survey and analysis was carried out by the DRBF in 2018. The results are summarised in Figure 1.

The main takeaways from this survey generally are as follows:

- A Standing DB is considerably more effective generally than an Ad-Hoc Board which is only established once a dispute has arisen and is referred. Of the total number of issues that came before an Ad-Hoc board as shown over 14% were subsequently referred to arbitration against an average figure for a Standing DB of 1.75%

- Where a Standing DB engages proactively in dispute avoidance the outcome indicates that a significant number of disputes that may arise can be avoided from engagement around the issues and further that where a decision is ultimately required from the Standing DB that the subsequent referral to arbitration metrics are at 0.5% approximately presumably on the basis that many of the issues have been flushed out at the dispute avoidance phase and hence the decisions do not generally come as a surprise and are therefore broadly accepted.

The key takeaway is that dispute avoidance can only (and by definition) be achieved where a DAAB is appointed at project commencement (ie a Standing DAAB or Standing Conciliator in the Irish Public Works Context) and further where the DAAB or Standing Conciliator proactively engages with the parties on the matters and issues before they crystallise into disputes.

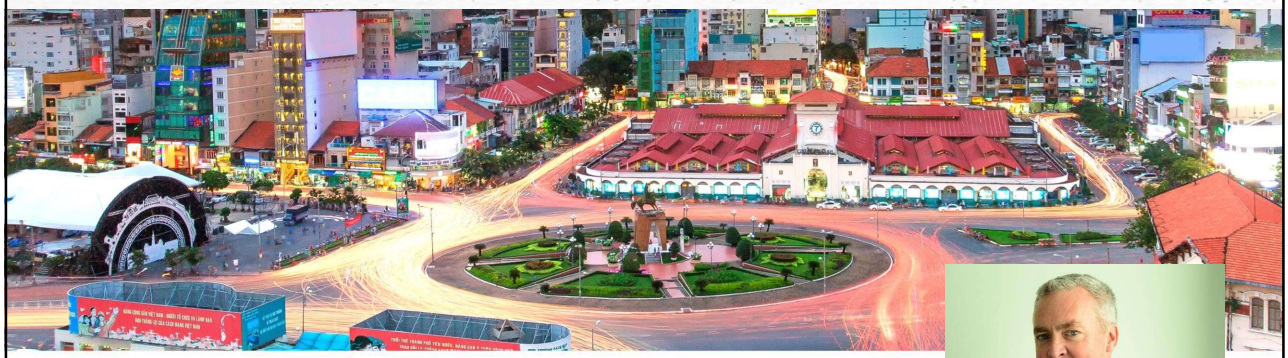
References

1. FIDIC® Conditions of Contract for CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER, Second Edition 2017, ISBN 978-2-88432-084-9, Reprinted 2022 with amendments, Published by FIDIC
2. FIDIC® Conditions of Contract for PLANT and DESIGN-BUILD FOR ELECTRICAL & MECHANICAL PLANT, AND FOR BUILDING AND ENGINEERING WORKS, DESIGNED BY THE CONTRACTOR, Second Edition 2017, ISBN 978-2-88432-082-5, Reprinted 2022 with amendments, Published by FIDIC
3. FIDIC® Conditions of Contract for EPC Turnkey Projects, Second Edition 2017, ISBN 978-2-88432-083-2, Reprinted 2022 with amendments, Published by FIDIC
4. FIDIC® Dispute Avoidance and Adjudication Forum, Practice Note 1; Dispute Avoidance (https://fidic.org/publications/practice-notes)

		Standing Boards								Ad-Hoc Boards			
		Dispute Avoidance Yes				Dispute Avoidance No							
	Tot Projects	Nr. Boards	Opinions	Decisions	⇒ Arbitration	Nr. Boards	Opinions	Decisions	⇒ Arbitration	Nr. Boards	Opinions	Decisions	⇒ Arbitration
MDB	107	59	95	184	3	26	8	75	3	22	5	66	16
Billateral Loan	37	17	76	48	0	3	0	1	0	17	0	20	7
Government	47	30	81	22	0	9	0	7	0	8	5	19	0
Private	11	5	15	15	0	0	0	0	0	6	16	30	1
Other	29	16	13	14	0	6	7	3	0	7	16	8	2
		Issues	280	283		Issues	15			Issues	42	143	
		∑ Issues	563		3	∑ Issues	101		3	∑ Issues	185		26
					0.53%				2.97%				14.05%

Source: Geoffrey Smith and Leo Grutters, DRBF Conference Tokyo 2018. www.drb.org

Fig. 1 The Positive Effect of Dispute Boards



Dispute Avoidance – Is it realistic?

Gerard P. Monaghan
Chartered Engineer, Chartered Arbitrator, Accredited Mediator,
FIDIC Certified Adjudicator, FIDIC President's List of Approved Dispute Adjudicators

FIDIC Dispute Avoidance (FIDIC 2017/22)

21.3 Avoidance of Disputes

If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.

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ICC DB Rules

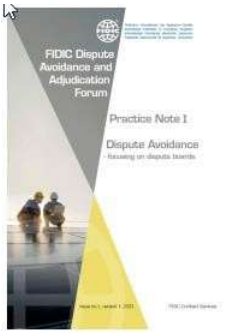
Article 16: Avoidance of Disagreements

If at any time, in particular during meetings or site visits, ***the DB considers that there may be a potential Disagreement between the parties, the DB may raise this with the Parties with a view to encouraging them to avoid the Disagreement*** *on their own without any further involvement of the DB. In so doing, the DB may assist the Parties in defining the potential Disagreement. The DB may suggest a specific process that the Parties could follow to avoid the Disagreement, while making it clear to the Parties that it stands ready to provide informal assistance or to issue a Conclusion in the event that the Parties are unable to avoid the Disagreement on their own.*

FIDIC Dispute Avoidance and Adjudication Forum Practice Note 1 Dispute Avoidance

https://fidic.org/publications/practice-notes

1. How/when does the dispute board make the parties aware of its dispute avoidance role?
2. When should dispute avoidance ideally take place?
3. Where should dispute avoidance take place?
4. What matters most lend themselves to dispute avoidance?
5. What are the most effective techniques for dispute avoidance?



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Dispute Avoidance – Key Ingredients for success

1. Appointed from commencement of the project – standing DAAB
2. Parties must have confidence in DAAB members, commercial, legal and technical skills and experience
3. Real trust
4. Good listening skills

AND assuming ingredients 1 to 4 are present

5. The ability to ask the right question and the right time and in the right tone.

The Positive Effect Of Dispute Boards

		Standing Boards								Ad-Hoc Boards			
		Dispute Avoidance Yes				Dispute Avoidance No							
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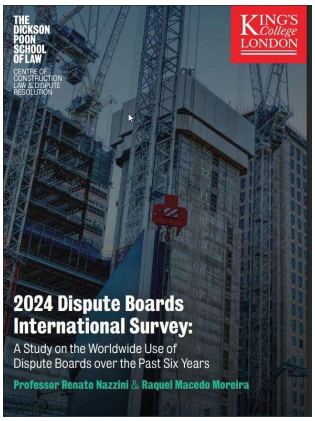
Source: G.Smith & L. Grutters, DRBF Conference, Tokyo 2018

The Positive Effect Of Dispute Boards



https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf

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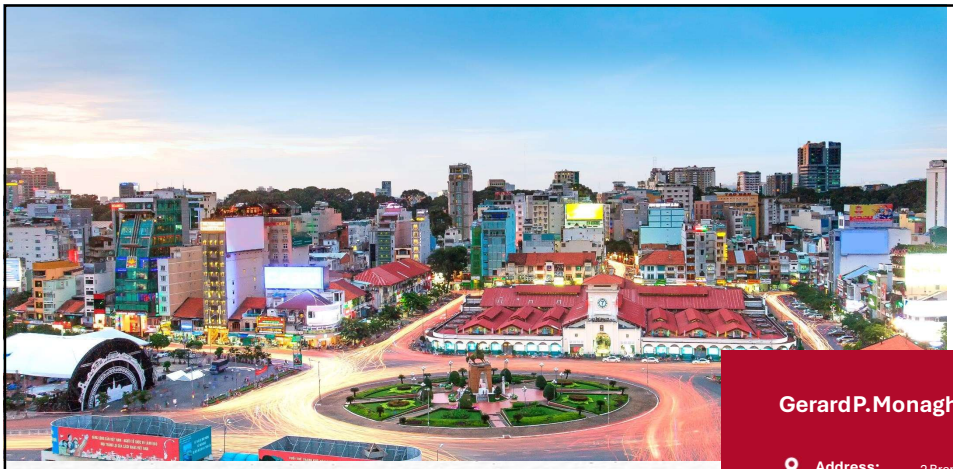

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Thank you for your attention!

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TENTATIVE AGENDA

SECTION A *(held concurrently with Section B)*

Current Trends in ADR for Construction Projects

1.30 – 5.00 PM, 10 April 2025 (Thu)
Lotus A Meeting Room, Rex Hotel Saigon

DURATION (PM)	CONTENT
	Session A1 – Current Trends in ADR for Construction Projects
1.30 – 3.00	**The applicability of third-party funding in cross-border construction dispute settlement** **Ms. Nguyen Thi Thanh Minh** – *Special Counsel and Head of Dispute Resolution Practice of ACSV Legal*
	The Use of Artificial Intelligence in Dispute Resolution **Ms. Lynette Chew** – *Partner at CMS (Singapore)*
	Case Management Practices from Institutional Perspective - Promoting Efficiency in Construction Arbitration **Ms. Hoang Tran Thuy Duong** – *Deputy Counsel, Singapore International Arbitration Centre (SIAC)*
	Panel Discussion **Moderator: Ms. Nguyen Thi Thanh Minh** – *Special Counsel and Head of Dispute Resolution Practice of ACSV Legal*
3.00 – 3.30	**Tea-break**
	Session A2 – Alternative Dispute Resolutions for Construction- International Experiences
3.30 – 5.00	**Options for Early Resolution of Disputes in Construction Arbitration Proceedings** **Ms. Sinyee Ong** – *Legal Director at HFW*
	The Enforcement of Expert Determination in Construction Disputes: What happens if an Expert goes wrong? Perspectives from Vietnam, the United Kingdom, & Austria **Mr. Pham Duong Hoang Phuc** – *Arbitral Assistant at ADR Vietnam Chambers LLC*
	Enhancing Project Integrity and Dispute Resolution Through Early Expert Engagement and Institutional Accountability **Mr. Maximilian D. Benz** – *Quantum Expert, SJA (Singapore)*
	Panel Discussion **Moderator: Ms. Duong Thi Thu Ha** – *Managing Partner, CDR Counsels*
5.00	**End of Section A**

THE APPLICABILITY OF THIRD-PARTY FUNDING IN CROSS-BORDER CONSTRUCTION DISPUTE SETTLEMENT

MINH NGUYEN
Special Counsel – Head of Dispute Resolution Practice at ACSV Legal

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1. Introduction of Third-Party Funding

What is Third-Party Funding?

TPF definition from the 2018 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration:

- the involvement of an external entity without prior interest in the dispute;
- that entity provides financing to one of the parties.
- working on "non-recourse" basis.

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International Adoption of Third-Party Funding

European Union - Vietnam Investment Protection Agreement

Art. 3.28(i): TPF means "*any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings* ***in return for a remuneration dependent on the outcome of the dispute****, or any funding provided by a natural or juridical person who is not a party to the dispute in the form of a donation or grant.*"

Singapore Civil Law (Third-Party Funding) Regulations 2017, revised in 2024

Art. 4.1(a): The definition of TPF is implied through the rights of third-party funders. A third-party funder is allowed to fund "*the costs of dispute resolution proceedings to which the third-party funder is not a party*".

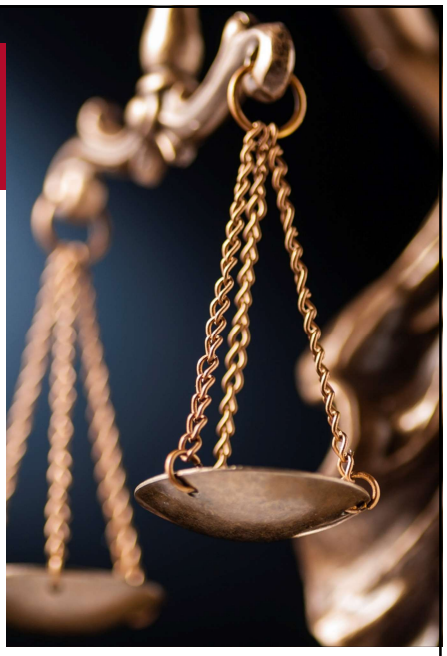
"*Dispute resolution proceedings*" therein is defined to cover **both domestic and international arbitrations and ancillary court proceedings** such as court intervention or assistance, mediation and foreign arbitral award enforcement.

Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017

Art. 98G: *Third party funding of arbitration is the provision of arbitration funding for an arbitration:*

a. *under a funding agreement;*
b. *to a funded party;*
c. *by a third-party funder; and*
d. *in return for the third-party funder receiving a financial benefit* ***only if the arbitration is successful*** *within the meaning of the funding agreement.*

2. Advantages of Third-Party Funding

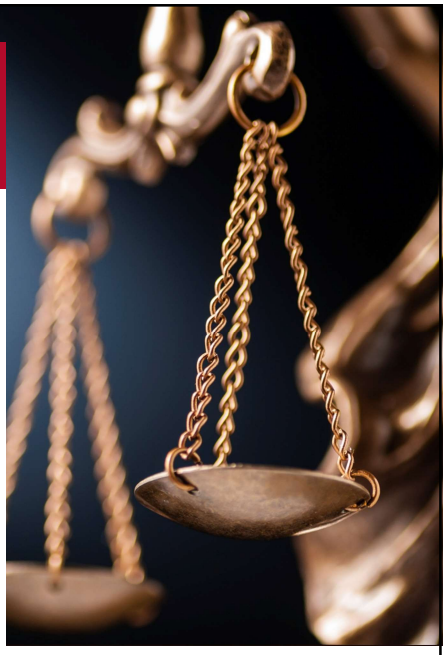


Financial and Justice Accessibility

✓ Provide funding to cover all arbitration-related costs.

✓ Offer a party with limited financial resources an opportunity to litigate meritorious claims.

2. Advantages of Third-Party Funding

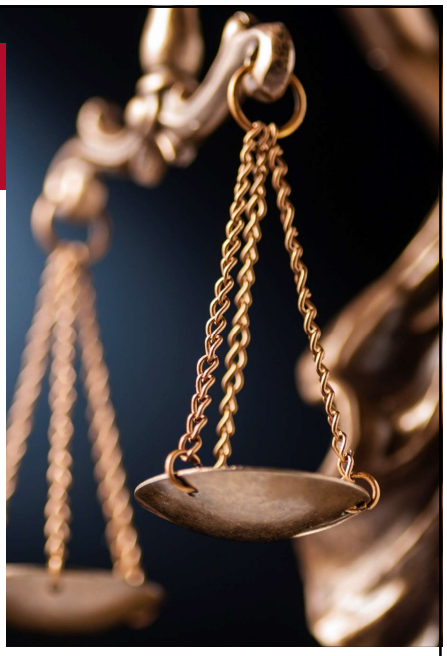


Risk Mitigation

✓ The risk of the arbitration will be transferred to Funder.

✓ Avoid excessive legal costs with an uncertain outcome.

2. Advantages of Third-Party Funding



Credibility & Strategic Leverage

✓ Boosts claim credibility through the Funder's due diligence.

✓ Sends a strong signal to the opposing party.

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3. Disadvantages of Third-Party Funding

Recovery by Funder

Funders typically request a share ranging from 30% to 50% of the recovered amount.

Influence over proceedings

A funder who wants to maximize its recovery may discourage the funded party from accepting a settlement offer from the other side.

Funding threshold

Claims must be at least USD 10 million. Only a handful of funders accept to fund claims of more than USD 1 million but less than USD 10 million.

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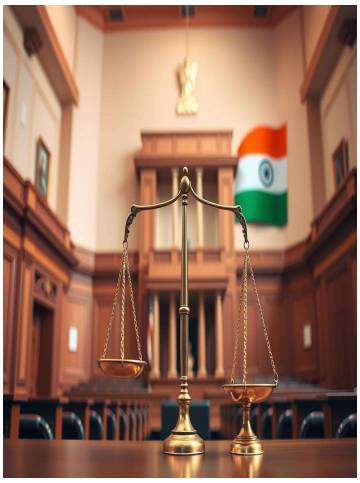
4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

SIAC Arbitration (2019):
- Claimant: C, funded by Tomorrow Sales Agency Private Limited ('**TSA**');
- Respondent: SBS Holdings Inc. ('**SBS**');
- Award: The Tribunal ordered the Claimant to pay ~USD 1 million to SBS;

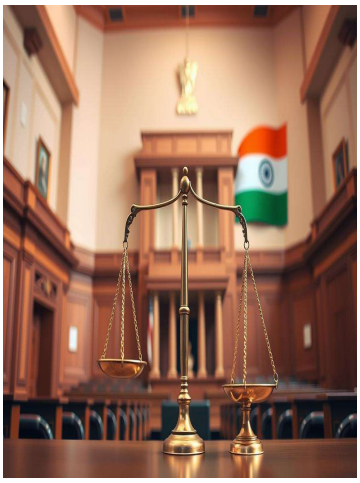
→ Due to the Claimant's failure to pay, SBS initiated a lawsuit against TSA to seek to recover the awarded amount from TSA.



4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

Indian First-Instance Court (March 2023):
- Claimant: SBS;
- Respondent: TSA;
- Cause of action:
  - SBS claimed TSA to pay the awarded amount;
- Court's ruling:
  - Awarded an interim measure order to compel TSA to (i) disclose their fixed assets and bank accounts, (ii) submit a security equivalent to the awarded amount, (iii) restrain from encumbering its assets;



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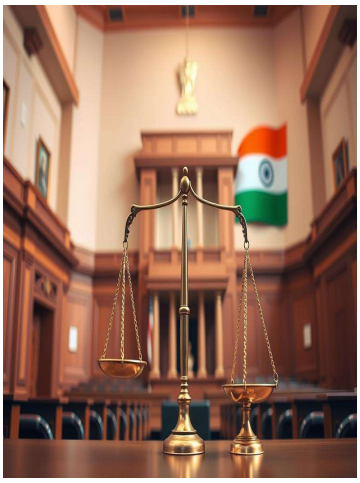
4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

Indian Court of Appeal (May 2023):

- Appellant: TSA;
- Respondent: SBS;
- Cause of action: TSA appealed the interim measure order of the first-instance court
- Court's ruling: Annulled the interim measure order of the first-instance court
- Court's reasoning: Third-party funders are not liable for the awarded amount against the funded parties because they are not a party of the arbitration agreement.

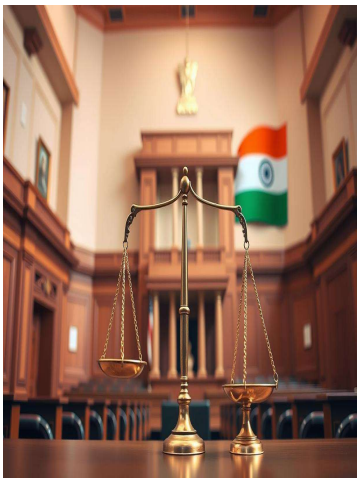


4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

- ACSV's observations:
  - In the judgment, the appellate court said that an arbitral award cannot be enforced against a non-signatory funder unless it is explicitly bound by an arbitration agreement.
  - The appellate court did not opine on the validity of the third-party funding agreement (because it is not a point of contest in this case), but it did look into the terms and dispute resolution clause of the third-party funding agreement to conclude that TSA is not a party of the arbitration agreement between C and SBS.

=> The India court did not declare that the third-party funding agreement is null and void even though Indian law is silent on TPF.



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4. Case studies - India

Case #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

Funded case at the Privy Council (1872):

- Claimants: McQueen and his wife, funded by Chunder Canto Mookerjee
- Respondents: Ram Coomar Coondoo and others
- Cause of action: McQueen and his wife claimed the ownership of land that they were inherited from Mrs. McQueen's father
- Court's ruling: Dismissed the Claimants' claim and awarded the Respondents the costs of the litigation.
- Court's reasoning : The McQueens could not substantiate their claims.

4. Case studies - India

Case #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

High Court of Juricature at Fort William in Bengal (1876)

- Claimants: Ram Coomar Coondoo and another;
- Respondent: Chunder Canto Mookerjee (TPF);
- Cause of action:
  - The Claimants alleged that the TPF "'*maliciously and without reasonable cause*'" contested the will for "'*his own benefit, and he was the real mover*.'"
  - The Claimants argued that the TPF's funding agreement constituted champerty and that he should therefore be held liable for the costs incurred.

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4. Case studies - India

Case #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

High Court of Juricature at Fort William in Bengal (1876) – ctn.

- Court's ruling: Dismissed the Claimants' claims.

- Court's reasoning:
  - The Claimants cannot demonstrate that the TPF acted maliciously or without reasonable cause in funding the litigation;
  - There was no legal relationship between the Claimants and the TPF that would impose liability on the TPF for costs;
  - The financial support for a claim is not inherently against public policy: *"A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being per se opposed to public policy".*

Conclusions

Financial Support	➢ Allowing parties to pursue meritorious claims despite financial constraints.
International Recognition	➢ India sets an example for a jurisdiction recognizing the validity of TPF albeit absence of the domestic legal framework regulating the same.
Opportunities	➢ TPF arrangements can be structured to support claims of Vietnam-based companies.

HICAC 2025
10 – 14 April 2025 Ho Chi Minh City, Vietnam
HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE
Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects
- Bridging International Expertise with Domestic Practice

HICAC 2025

ACSV LEGAL

Thank you for your attention!

ACSV LEGAL

Nguyen Thi Thanh Minh

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Phone number (+84) 28 3822 4538
(+84) 778653936

Email: Minh.Nguyen@acsvlegal.com


CMS
law·tax·future
The use of AI
in dispute resolution


Will AI replace large swathes of the litigation process by making them redundant or undertaking them entirely itself?
Or will it be a tool used by litigators, but not replacing them at any stage? Human + machine?
Are we culturally ready to embrace AI fully in our dispute resolution procedures?
2

The different types of AI tools

Machine learning software

Advanced computer application that employs massive datasets and complex algorithms to train itself, apply knowledge and develop its capability to predict e.g. Harvey, Kira, Relativity One.

GenAI

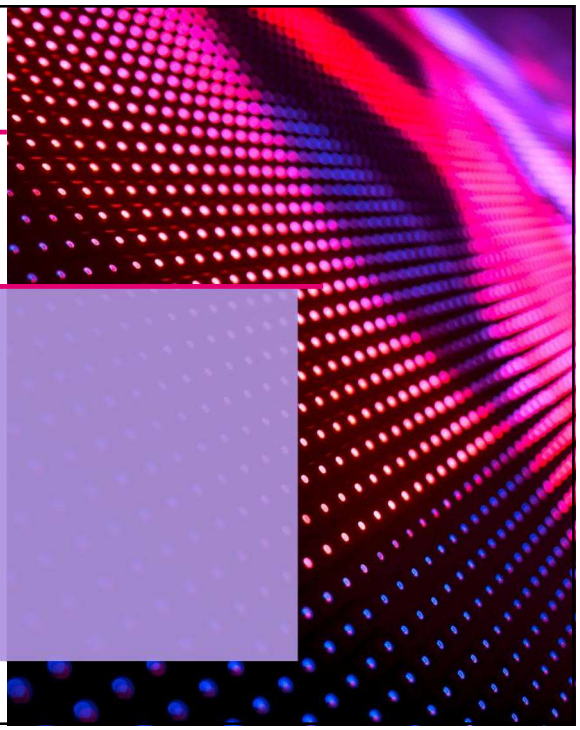
AI systems capable of generating new content, ideas, or data that mimic human-like creativity e.g. ChatGPT, Copilot.

3

Harvey

Built for the legal industry, Harvey aids document review, due diligence, legal drafting and regulatory compliance

- Summarises case law and legal developments
- Document comparison
- Drafting first drafts of any legal document
- Identifies trends in large volumes of documents.



4

RelativityOne

Supercharges eDiscovery and investigation reviews

Investigations

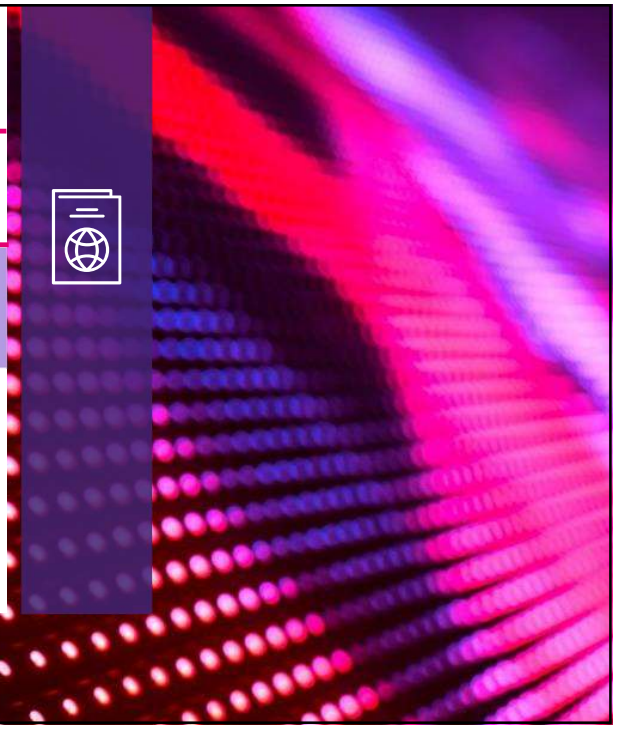
- Identify communications and information to explain how and why an event occurred.
- Identify participants material to case.

4

DeepL

Translation tool to translate text and documents from one language to another

- Translates documents of all types including pdf and excel
- Translate contracts, briefs and court filings

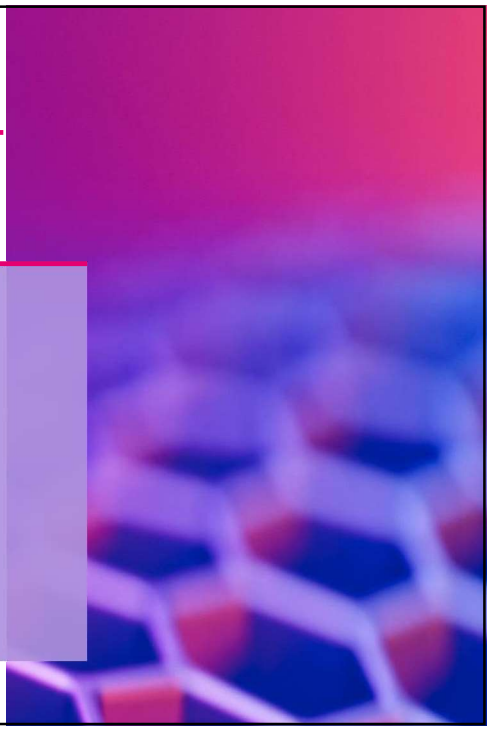


6

Copilot

genAI embedded into Microsoft 365 to include private and public data

- Review and analyse documents, case law and reports to extract relevant information and propose arguments.
- Analyse past settlements in similar cases
- Compare hearing transcripts with written evidence for cross examination and submissions
- Summarising calls
- Automate repetitive tasks
- Highlight risky language in legal briefs
- Turn long documents into PowerPoint presentations.



7

What can AI really help with in dispute resolution?

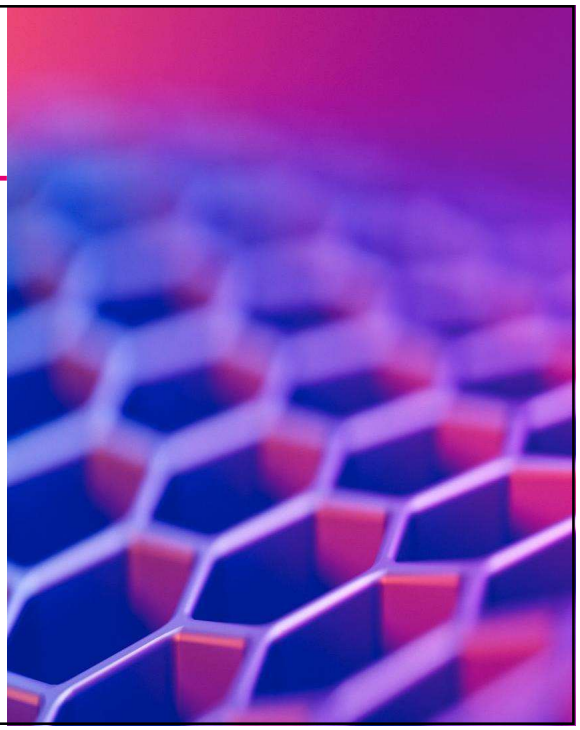
Document review

- Summary of documents
- Create workflows for review
- Document comparison
- Disclosure of documents.

Legal research e.g.

- Case law
- Relevant experience of experts

- Summarise case law and legal developments
- Taking meeting notes
- Drafting emails
- Suggest edits and improvements
- Translate from one language to another
- Help generate ideas



8

AI Applications in ADR Phases

AI enhances various stages of ADR, improving efficiency and effectiveness.

- Mediation
- Adjudication
- Arbitration

Benefits of the use of AI in ADR for Construction and Energy Disputes:

- Efficiency Gains:
- Cost Reduction:
- Improved Accuracy and Consistency

9

Harvey in action at CMS

Real estate and construction

- Research on cases for a planning breach
- Support in a lease review exercise to extract provisions on forfeiture or service charge cap
- Monitor evolving regulations to ensure a particular business remains compliant with relevant laws and industry standards.
- Uploaded a FIDIC and JCT contract that is no longer under licence and summarise it, answering questions about specific clauses.

10

Harvey in action at CMS

Energy

Saving 50 hours of lawyer time

- Supply contract dispute involving complex equipment installations worldwide.
- Harvey reviewed 20 documents, summarised the multiple complaints from different jurisdictions and provided a detailed analysis.
- Lawyer time was freed up to focus on legal analysis of the entire matter and enabling the detailed analysis to be incorporated into advice.
- 50 hours of lawyer time saved.
- Average user saving 5.25 hours per month.
- This is a significant return on investment.

11

RelativityOne in action at CMS

CMS is the only firm in the UK to have the early release of Relativity's new GenAI powered system.

RelativityOne gives CMS an average 50% reduction in the number of documents a team must review during disclosures, investigations, or audits.

RelativityaiR live use on client work.

Example for a first-pass review (real case but * numbers estimated):

	Manual Review	aiR for Review
Number of documents	78,000	78,000
Working days	104	3
SME lawyer time (hrs)*	125	24
Review lawyer/paralegal time	624	0

12

Limitations and Ethical Considerations

- Hallucinations

- The phenomenon of AI-generated errors are commonly referred to as "hallucinations."

- Transparency and Explainability

- 'Black box' decisions by adjudicators or arbitrators
- Bias in Data and Decision-Making

- Data Privacy and Security

- Handling sensitive information

13

Your CMS contact

Lynette Chew
Partner – Singapore
Infrastructure, Construction
and Energy Disputes

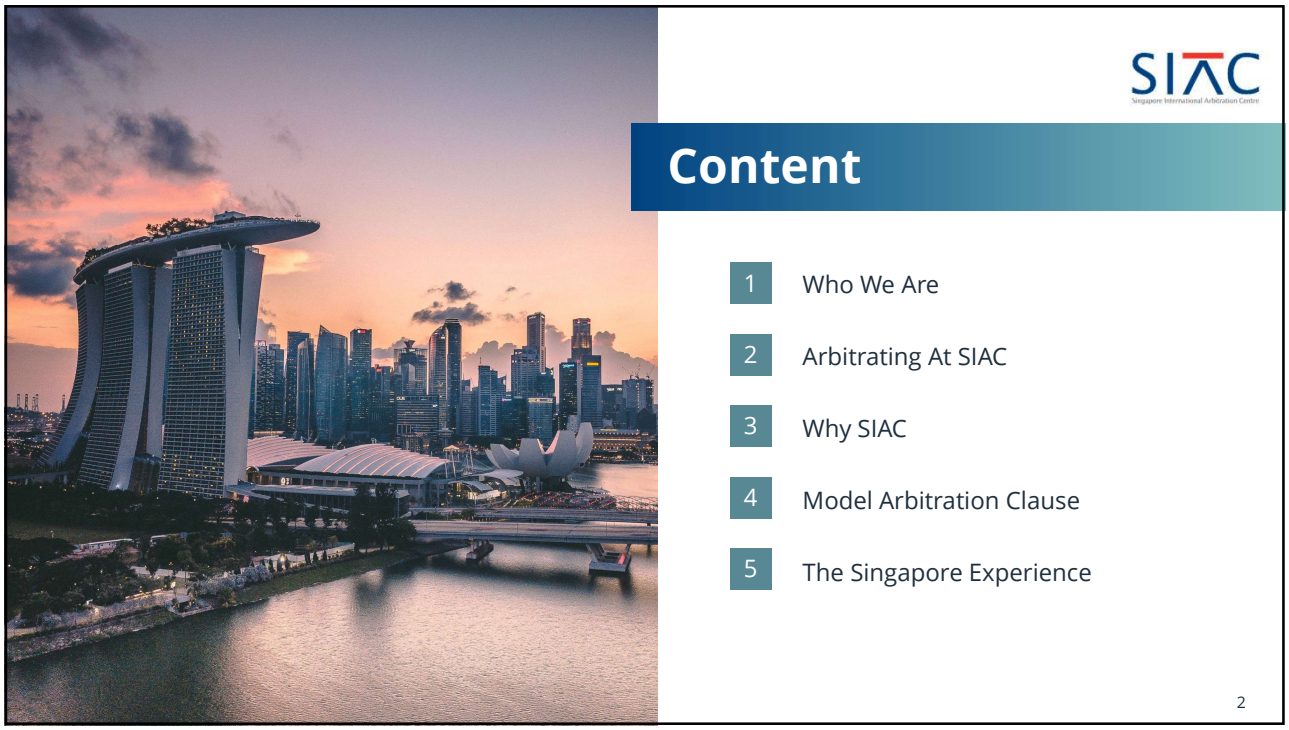
T +65 9889 8694
E lynette.chew@cms-cmno.com

Lynette Chew is a Partner in CMS Singapore. She is Co-Head of the Infrastructure, Construction and Energy Disputes practice in Singapore.

Lynette's area of practice encompasses a wide range of contentious and non-contentious work in the infrastructure, construction and energy sectors in Asia. She specialises in high-value and complex projects in Singapore and Asia.

Lynette is the only woman lawyer to be accredited by the Singapore Academy of Law as Senior Accredited Specialist for Building and Construction Law and has been recognised by legal directories for her expertise in construction, projects and energy. These include Chambers Asia Pacific, Legal 500, AsiaLaw, Asian Legal Business, and Benchmark Litigation.


VIAC
HICAC 2025
CASE MANAGEMENT PRACTICES FROM INSTITUTIONAL PERSPECTIVE
- PROMOTING EFFICIENCY IN CONSTRUCTION ARBITRATION
TRAN HOANG THUY DUONG
Deputy Counsel, Singapore International Arbitration Centre


SIAC
Content
1 Who We Are
2 Arbitrating At SIAC
3 Why SIAC
4 Model Arbitration Clause
5 The Singapore Experience
2

Who We Are

Overview of SIAC

History

- Over 3 decades. Commenced operations in July 1991
- Independent and not-for-profit organisation

Proven Record for Enforcement

- SIAC Awards have been enforced, among others, in Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA, and Vietnam

Caseload Statistics

- Average new caseload of 400-600 cases annually and an active caseload of 800-1,000 cases
- Over 90% of SIAC's cases are international
- Parties are from more than 100 jurisdictions over the last 5 years

Our Rules

- Rules ensure efficiency, cost effectiveness and flexibility
- Rules are easily acceptable to both Civil and Common Law practitioners/ arbitrators

3

Who We Are

Global

SIAC's Global Offices

4

Who We Are
Global

SIAC

Users from Over 100 Jurisdictions Over the Last Five Years

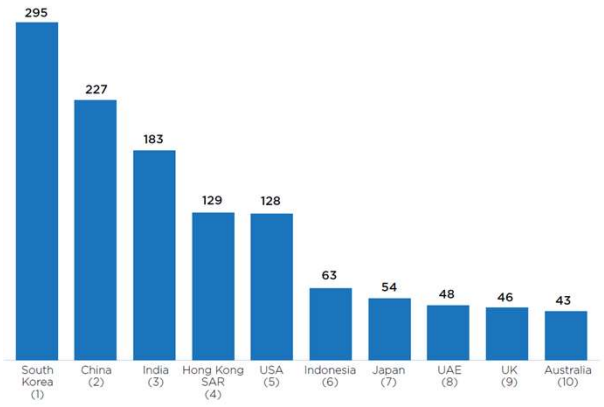
1. Afghanistan
2. Albania
3. Antigua and Barbuda
4. Argentina
5. Armenia
6. Australia
7. Austria
8. Azerbaijan
9. Bahamas
10. Bangladesh
11. Belarus
12. Belgium
13. Belize
14. Bermuda
15. Brazil
16. British Virgin Islands
17. Brunei
18. Cambodia
19. Cameroon
20. Canada
21. Cayman Islands
22. Chile
23. Colombia
24. Cook Islands
25. Curacao
26. Cyprus
27. Denmark
28. Egypt
29. Estonia
30. Fiji
31. Finland
32. France
33. Georgia
34. Germany
35. Republic of Ghana
36. Gibraltar
37. Greece
38. Hong Kong SAR
39. India
40. Indonesia
41. Iran
42. Ireland
43. Isle of Man
44. Israel
45. Italy
46. Ivory Coast
47. Japan
48. Jersey
49. Kazakhstan
50. Kenya
51. Kingdom of Tonga
52. Kuwait
53. Kyrgyzstan
54. Laos
55. Lebanon
56. Liberia
57. Lithuania
58. Luxembourg
59. Macao SAR
60. Madagascar
61. Mainland China
62. Malaysia
63. Maldives
64. Malta
65. Marshall Islands
66. Mauritius
67. Mexico
68. Monaco
69. Mongolia
70. Morocco
71. Mozambique
72. Myanmar
73. Namibia
74. Nepal
75. Netherlands
76. New Zealand
77. Nigeria
78. Norway
79. Oman
80. Pakistan
81. Panama
82. Papua New Guinea
83. Philippines
84. Portugal
85. Qatar
86. Romania
87. Russia
88. Saint Kitts and Nevis
89. Saint Lucia
90. Saudi Arabia
91. Seychelles
92. Singapore
93. Slovenia
94. Solomon Islands
95. South Africa
96. South Korea
97. Spain
98. Sri Lanka
99. Sweden
100. Switzerland
101. Taiwan
102. Thailand
103. Timor Leste
104. Tunisia
105. Türkiye
106. Uganda
107. Ukraine
108. United Arab Emirates
109. United Kingdom
110. USA
111. Uzbekistan
112. Vanuatu
113. Vietnam

5

Who We Are
Global

SIAC

Top 10 Foreign Users (2024)



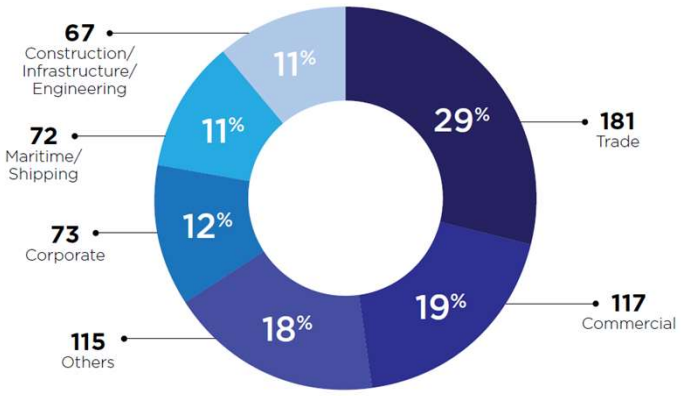
**Parties from South Korea topped the foreign user rankings for the first time due to a pack of related cases.*

6

Vietnamese Parties Arbitrating at SIAC (2022–2024)

Year	Total Number of Vietnamese Parties
2022	25
2023	23
2024	28

Categories of Disputes (2024)



Who We Are
Expertise

SIAC

Board of Directors

Mr Davinder Singh, SC
Chairman

Mr Chong Yee Leong
Deputy Chairman

Mr Siraj Omar, SC

Mr Gerald Singham

Dr Michael Moser

Ms Lucy Reed

Mr Cyril Shroff

Mr Luke Sobota

Mr Tham Sai Choy

Mr Cao Lijun

Who We Are
Expertise

SIAC

Court of Arbitration (as of 31 Dec 2024)

Ms Lucy Reed, President

Mr Cavinder Bull, SC Vice President

Mr Toby Landau KC Vice President

Ms Olufunke Adekoya

Ms Catherine Amirfar

Dr Claudia Annacker

Mr John P. Bang

Ms Yas Banifatemi

Mr Pierre Bienvenu

Mr Nigel Blackaby KC

Prof Lawrence Boo

Mr Cao Lijun

Mr Chan Hock Keng

Mr Minh Dang

Mr Dmitry Dyakin

Ms Jessica Fei

Ms Karina Goldberg

Prof Bernard Hanotiau

Mr Eri Hertiawan

Mr Benjamin Hughes

Mr Tejas Karia

Mr Darius Khambata, SC

Ms K. Shanti Mogan

Dr Eun Young Park

Mr Philippe Pinsolle

Mr Harish Salve KC

Mr Michael E. Schneider

Mr Vijayendra Pratap Singh

Ms Abby Cohen Smutny

Mr Thomas Snider

Mr Guido Tawil

Mr Hiroyuki Tezuka

Mr Alan Thambiayah

Mr Gaetan Verhoosel KC

Who We Are
Expertise

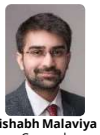
SIAC Secretariat

Team of international arbitration lawyers qualified in 13 jurisdictions (Singapore, China, Ecuador, Georgia, India, Indonesia, Malaysia, Nepal, Nigeria, Russia, Sri Lanka, USA, and Vietnam)


Vivekananda Neelakantan
Registrar


Samuel Leong
Supervising Counsel


Lynnette Lee
Counsel


Rishabh Malaviya
Counsel


Sherly Gunawan
Counsel


Duong Hoang
Deputy Counsel


Vakhtangi Giorgadze
Deputy Counsel


Wang Xuanzhong
Deputy Counsel


Snigdha Bhatta
Deputy Counsel


Andres Larrea Savinovich
Deputy Counsel


Nusry Hussain
Deputy Counsel


Zhao Yue
Deputy Counsel


Shivam Patanjali
Deputy Counsel


Nguyen Thi Mai Anh
Deputy Counsel


Margarita Drobyshevskaia
Deputy Counsel


Jo-Ann Heng
Deputy Counsel


Olusola Odunsi
Deputy Counsel

11

Why SIAC
Expertise

Panel of Arbitrators

Rigorous Admission Process

600+
Expert arbitrators from over **40** jurisdictions

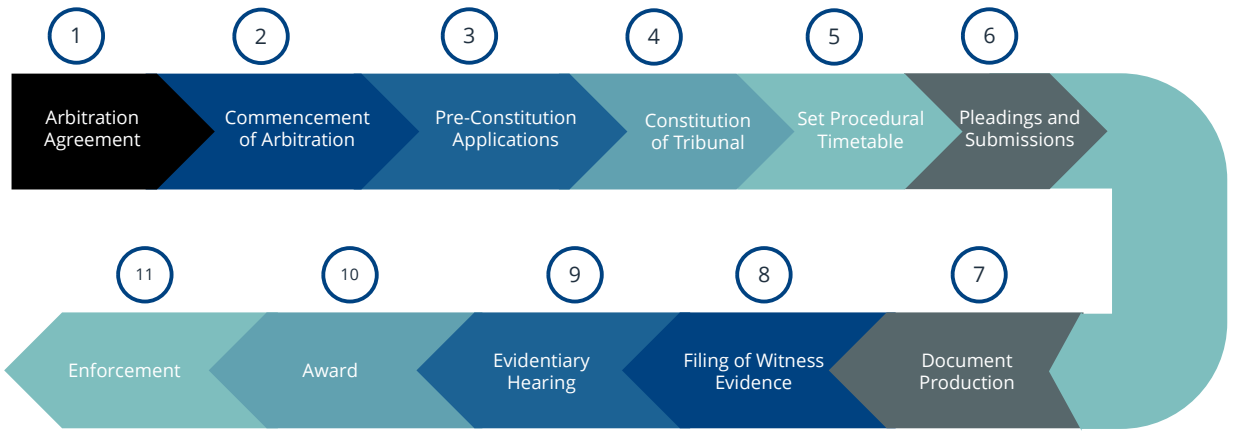
100+ arbitrators experienced in **Energy, Engineering, Procurement** and **Construction**

Specialist IP Panel

12

Arbitrating at SIAC

International Arbitration Lifecycle



13

Arbitrating at SIAC

Functions of the Secretariat

Appointment of Arbitrators

Supervising Case Progress

Financial Management

Scrutiny of Draft Awards

14

Why SIAC

Cost Efficient

	Median duration of arbitration for all tribunals (months)	Median total costs of arbitration for all tribunals (USD)
SIAC	**11.7**	**USD 29,567**
HKIAC	13	USD 64,606
LCIA	16	USD 97,000
SCC	13.5	Undisclosed

**Total costs of arbitration comprise the combined sum of tribunal fees and administration fees disclosed only.*

Sources:
LCIA - http://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx
SCC - http://www.sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf
HKIAC - http://www.hkiac.org/content/costs-duration
CMS - https://www.cms-holbornasia.law/en/sgh/publication/costs-and-duration-a-comparison-of-the-hkiac-lcia-scc-and-siac-studies

> SIAC remains the most cost-competitive option for both sole-arbitrator and three-arbitrator cases. For three-arbitrator cases in particular, SIAC remains significantly cheaper than LCIA and SCC where the costs extend to six-digit figures.
>
> CMS Holborn Asia

15

Why SIAC

Innovation through the SIAC Rules

- Emergency Arbitrator
  - Protective Preliminary Order
- Preliminary Determination
- Early Dismissal
- Consolidation
- Coordinated Proceedings
- Joinder
- Arb-Med-Arb

Innovative Procedural Tools to Reduce Time & Costs

- Streamlined Procedure
- Expedited Procedure

16

Why SIAC

Streamlined Procedure (SP) – Rule 13, Schedule 2

When does SP apply?

- SP applies automatically when the parties agree, unless expressly excluded
- SP applies automatically when the sum in dispute does not exceed SGD 1,000,000 unless the President determines on the basis of an application by a party that the SP shall not apply
- Useful for lower-value, less complex disputes

What happens when SP applies?

- Matter is referred to a sole arbitrator; faster timelines for nomination, appointment and challenge
- Tribunal may limit interlocutory applications
- Documents-only, no document production, no fact / expert evidence; any hearing is typically virtual (unless the Tribunal determines otherwise)
- Rule 46 (preliminary determination) or Rule 47 (early dismissal) not applicable
- Award to be made within 3 months
- Tribunal and SIAC fees capped at 50% of Schedule of Fees

"The headline innovation in the 2025 Rules in the introduction of the Streamlined Procedure. This recognises that a one size fits all approach is not appropriate and will help make arbitration a viable option for smaller claims".

Harry Elias Partnership

17

Why SIAC

Expedited Procedure (EP) – Rule 14, Schedule 3

When may a Party apply for EP?

- When sum in dispute does not exceed SGD 10,000,000 (up from SGD 6,000,000) but exceeds SGD 1,000,000; or
- When the sum in dispute does not exceed SGD1,000,000 but President of Court of Arbitration determines that Streamlined Procedure does not apply; or
- When parties agree; or
- The circumstances of the case warrant it (amended from 2016 version which referred to cases of exceptional urgency)
- President of Court of Arbitration determines application on whether case proceeds via EP where there is no prior agreement.

What happens when EP applies?

- Matter is referred to a sole arbitrator; normal timelines for nomination, appointment and challenge
- Tribunal may disallow document production and limit written evidence
- Any hearing is typically virtual
- Award to be made within 6 months

18

Why SIAC

Comparison – Streamlined v Expedited Procedure

	Streamlined Procedure	Expedited Procedure
Criteria	▪ SP applies automatically when the parties agree, unless expressly excluded ▪ Appplies automatically when the sum in dispute does not exceed SGD 1,000,000 unless the President determines on the basis of an application by a party that the SP shall not apply	▪ When sum in dispute does not exceed SGD 10,000,000 but exceeds SGD 1,000,000; or ▪ When the sum in dispute does not exceed SGD1,000,000 but President of Court of Arbitration determines that Streamlined Procedure does not apply; or ▪ When parties agree; or ▪ The circumstances of the case warrant it
Procedure	▪ Matter is referred to a sole arbitrator; faster timelines for nomination, appointment and challenge ▪ Tribunal may limit interlocutory applications ▪ Documents-only, no document production, no fact / expert evidence; any hearing is typically virtual ▪ Rule 46 (preliminary determination) or Rule 47 (early dismissal) not applicable ▪ Tribunal can order that the case be taken off the SP in consultation with parties and with the approval of the Registrar	▪ Matter is referred to a sole arbitrator; normal timelines for nomination, appointment and challenge ▪ Tribunal may disallow document production and limit written evidence ▪ Any hearing is typically virtual ▪ Tribunal can order that the case be taken off the EP in consultation with the parties and the Registrar
Timeline	Award to be made within 3 months	Award to be made within 6 months
Costs	Tribunal and SIAC fees capped at 50% of Schedule of Fees	Normal Schedule of Fees

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Why SIAC

Joinder, Consolidation and Coordination

Joinder
(Rule 18)

- Allows both parties and non-parties to be joined in pending arbitration proceedings under these Rules
- Where all parties – including party to be joined – have agreed or the additional party is *prima facie* bound by the arbitration agreement

Consolidation
(Rule 16)

- After arbitration proceedings have been commenced, any party may make an application for consolidation of multiple arbitrations
- (a) Where all parties have agreed; (b) all claims in two or more arbitrations pending under SIAC administration are under the same arbitration agreement; or (c) arbitration agreements are compatible and (i) disputes arise from same legal relationship, (ii) from principal and ancillary contracts, (iii) same or series of transactions.

Coordination
(Rule 17)

- Newly introduced provision: a party may apply for two or more arbitrations to be conducted concurrently or sequentially; heard together with any procedural aspects aligned; or have any of the arbitrations suspended pending determination of any of the other arbitrations
- Where the same tribunal is constituted in two or more arbitrations; and a common question of law or fact arises out of or in connection with all the arbitrations

- An application for joinder or consolidation may be made to the Registrar for determination by the SIAC Court of Arbitration (before Tribunal has been constituted) or to the Tribunal directly (after constitution of Tribunal).
- The 2025 Rules now also provide for the President to make an order for joinder or consolidation 'by consent' where all the parties are in agreement on the same

- An application for coordination made directly to the Tribunal (after constitution of Tribunal)

20

Why SIAC

Early Dismissal (ED) and Preliminary Determination (PD)

Early Dismissal (Rule 47)	Preliminary Determination (Rule 46)

▪ First of its kind amongst major institutional rules for commercial arbitration
▪ Parties may apply to Tribunal for Early Dismissal if claim/defence is:
  ▪ Manifestly without legal merit; or
  ▪ Manifestly outside jurisdiction of the Tribunal
	▪ Codification and added clarity on scope of Tribunal's powers to make a final and binding preliminary determination of any issue
	▪ Parties may apply to Tribunal if:
	  ▪ The parties agree; or
	  ▪ Applicant can demonstrate it would contribute to time and costs savings and efficient, expeditious resolution of dispute
	  ▪ Circumstances of the case warrant it

- Procedures have potential to provide significant savings of time and cost
- As a safeguard against unmeritorious applications, Tribunal retains discretion to decide whether an application for early dismissal or preliminary determination should be allowed to proceed

21

Why SIAC

Emergency Arbitration (EA) – Rule 12, Schedule 1

The ex parte PPO application represents a significant step by SIAC to broaden and strengthen the scope of an EA's powers. It showcases SIAC's willingness to pioneer procedural mechanisms to address the needs of arbitration users.

Watson, Farley & Williams

1. Application in Writing to Registrar
2. Acceptance of EA application by President of SIAC Court of Arbitration
3. Appointment of EA
4. Consideration of Application

1
- Application typically made concurrently with a Notice of Arbitration
- As of 2025, a party may apply for a protective preliminary prior to a Notice of Arbitration without notifying counterparties *(PPO)*.
- President of the SIAC Court of Arbitration will determine if an EA application will be accepted
- EA applications must be accompanied by payment of EA filing fee and requisite deposits

2
- Appointment is made **within 24 hours** of receipt by Registrar of application or payment of filing fee and deposits, whichever is later
- Appointment will be made without notice to other parties in the case of an application for a PPO if accepted by the President

3
- Any challenge to appointment must be made **within 24 hours** (previously 2 days) of communication by Registrar of EA appointment; *or from the date that circumstances for challenge (specified in Rule 26.1) became known or should reasonably have been known to the party.*

4
- In the case of a PPO, an order is made within **24 hours** of appointment after which it is transmitted by SIAC to all other parties
- Applicant must deliver all case papers within 12 hours to all parties or provide a statement explaining the steps taken to do so if unable to deliver, failing which the PPO will lapse 3 days from the date on which it was issued
- In all other EA cases: Schedule for consideration of application by EA is made **within 24 hours** (previously 2 days) from appointment; and order or award made within **14 days** from appointment

22

Why SIAC

Innovation through the SIAC Rules – Other New Rules

Third Party Funding (Rule 38)

Introduction of disclosure requirements to mitigate risk of conflicts

Prima Facie Jurisdictional Objections (Rule 8)

Registrar may refer issue of jurisdiction for prima facie determination to SIAC Court of Arbitration prior to constitution of Tribunal

Administrative Conferences (Rule 11)

Convened prior to constitution of Tribunal at Registrar's discretion to discuss procedural or administrative directions

Mediation Provisions (Rules 32.4; 50.2)

Multiple prompts to parties to consider including via SIAC-SIMC AMA Protocol

Innovative Procedural Tools to Reduce Time & Costs

23

Why SIAC

Arbitration-Mediation-Arbitration Protocol

SIAC-SIMC Arb-Med-Arb Service is a one-stop process where a dispute is first referred to arbitration before mediation is attempted

Arbitration → Mediation → Arbitration

- If mediation is successful, parties may request their mediated settlement be made a consent arbitral award with advantages of enforceability under New York Convention
- If mediation is unsuccessful, parties may proceed with arbitration
- The average settlement rate for mediation at SIMC is more than 70%

24

Why SIAC

Applications under the SIAC Rules

Expedited Procedure (EP) applications

- 143 in 2024 (66 accepted)
- 1,039 since 2010 (598 accepted)

Joinder applications

- 13 in 2024 (4 granted)
- 78 since 2010 (37 granted)

Consolidation applications

- 101 in 2024 (64 granted)
- 533 since 2016 (355 granted)

Early Dismissal (ED) applications

- 13 in 2024 (7 allowed to proceed under Rule 29.3 of SIAC Rules 2016)
- 78 applications since 2016 (40 allowed to proceed under Rule 29.3 of SIAC Rules 2016; 16 granted (8 in whole, 8 in part))

Emergency Arbitrator (EA) applications

- 21 in 2024 (all accepted)
- 173 since 2010 (all accepted)

25

SIAC Model Clause

(Revised as of 9 Dec 2024)

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].*

The Tribunal shall consist of _____ arbitrator(s).^

The language of the arbitration shall be _____.

The law governing this arbitration agreement shall be ____. #

[In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation to the arbitration, the parties agree (a) to commence such proceedings before the Singapore International Commercial Court ("the SICC"); and (b) in any event, that such proceedings shall be heard and adjudicated by the SICC.] **
Parties should also include an applicable law clause. The following language is recommended:

APPLICABLE LAW

This contract is governed by the laws of ____. ^^

* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").
^ State an odd number. Either state one, or state three.
# State the country or jurisdiction. We recommend that parties agree on the law governing the arbitration agreement. This law potentially governs matters including the formation, existence, enforceability, legality, scope, and validity of the arbitration agreement, and the arbitrability of disputes arising from it.
** Parties may wish to agree to the supervisory jurisdiction of the Singapore International Commercial Court (SICC) for international commercial arbitrations where Singapore is chosen as the seat of arbitration.
^^ State the country or jurisdiction.

Reference: SIAC Model Clause - Singapore International Arbitration Centre

26

The Singapore Experience

Leading Arbitral Seat

- Progressive Pro-Arbitration Legislation
- Experienced and Supportive Judiciary
- Neutral, Politically Stable, and Independent
- Robust Dispute Resolution Ecosystem

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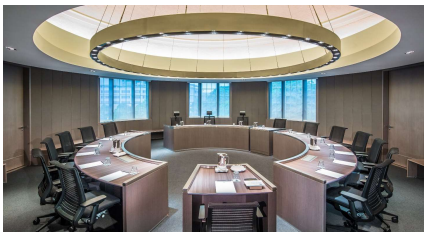
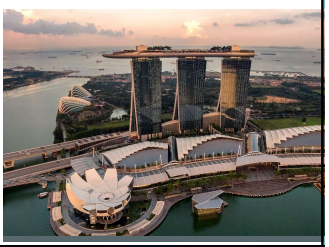
The Singapore Experience

World-Class Venue

- State-of-the-Art Facilities
- Excellent Connectivity and Infrastructure
- Vibrant and International City





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HICAC 2025

Thank you for your attention!

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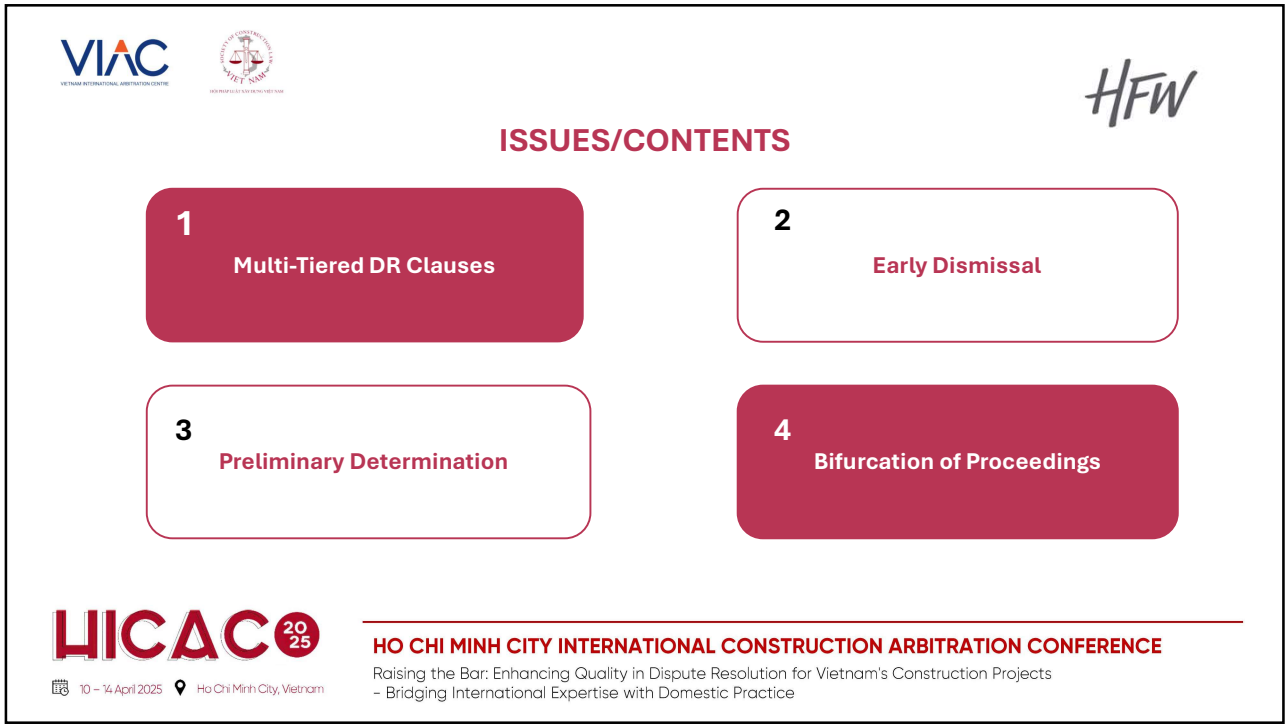
VIAC
HICAC 2025
Speaker's image
Options for Early Resolution of Construction Arbitration Disputes
Sinyee Ong
Legal Director, HFW

1


VIAC
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2

Multi-Tiered DR Clauses
Overview

- Requirement to undertake certain steps (i.e., dispute board / settlement) in an attempt to resolve the dispute amicably before arbitration may be commenced

- Pros & Cons

  ✓ Preserves the long-term relationships between employers, contractors, engineers & other professionals

  ✓ Reduces the aggregate number of issues to be resolved by arbitration

  ✗ Deadlock → Going through the motion → Waste of resources

Multi-Tiered DR Clauses
FIDIC

- Clause 21, FIDIC Red Book (2017)

  - Cl 21.3 Avoidance of Disputes

    If the Parties so agree, they may jointly request … the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract.

  - Cl 21.4 Obtaining DAAB's Decision

    If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 …

Multi-Tiered DR Clauses
FIDIC

- Cl 21.4.4 Obtaining DAAB's Decision ['Pay now, argue later']

  The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision ...

- Cl 21.5 Amicable Settlement

  Where a NOD has been given under Sub-Clause 21.4 ... both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempts at amicable settlement has been made.

- Cl 21.6 Arbitration

  Unless settled amicably, and subject to Sub-Clause 3.7.5 ... Sub-Clause 21.4.4 ... Sub-Clause 21.7 ... and Sub-Clause 21.8 ... any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.

Multi-Tiered DR Clauses
Legal Precedents

- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30
  - FIDIC Red Book (1999) contract
  - DAB ordered Employer to pay Contractor
  - Employer issued Notice of Dissatisfaction; refused to comply
  - Contractor commenced 1st arbitration → Tribunal issued award requiring Employer to comply and pay → SGHC set aside award (upheld by SGCA)
  - Contractor commenced 2nd arbitration → Tribunal issued interim award requiring Employer to comply and pay → SGHC upheld interim award (confirmed by SGCA)

**Pay now and cost more later?

Multi-Tiered DR Clauses
Legal Precedents

- *International Research Corporation Plc v Lufthansa Systems Asia Pacific Ltd & Anor* [2013] SGCA 55
  - Non-construction/FIDIC dispute
  - Contract provided for a multi-tiered dispute resolution clause requiring a specified mediation process to be attempted before disputes may be referred to arbitration
  - Parties attempted some commercial negotiations (but not in line with specified mediation process)
  - SGCA: Preconditions to arbitration had to be precisely complied with before arbitration may be commenced

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Multi-Tiered DR Clauses
Legal Precedents

- *CZQ and CZR v CZS* [2023] SGHC(I) 16
  - FIDIC Yellow Book (1999)
  - Amicable settlement provision (Cl 20.5) was not followed
  - Claimants commenced arbitration; Tribunal determined it had jurisdiction
  - Respondents applied to SG Courts for determination
  - SICC: Cl 20.5 was not a condition precedent to the commencement of arbitration
  - SICC: Cl 20.5 did not restrict parties to settling disputes only through the amicable settlement procedure & did not require parties to *first* go through the amicable settlement procedure before going to arbitration

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8

Early Dismissal Overview

- Dismiss a claim (or part of a claim) early in the proceedings without a full hearing on the merits
- Pros & Cons:
  - ✓ Efficient disposal of unmeritorious claims
  - ✕ Strategic abuse → Increase costs + time

9

Early Dismissal Institution Rules

- SIAC Rules

A party may apply to the Tribunal for the early dismissal of a claim or defence where:
(a) a claim or defence is manifestly without legal merit; or
(b) a claim or defence is manifestly outside the jurisdiction of the Tribunal

[Rule 47.1]

10

Early Dismissal
Institution Rules

- ICC Rules

Any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction ("application"). The application must be
made as promptly as possible after the filing of the relevant claims or defences.

[ICC Practice Note to Parties & Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, Para 110]

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Early Dismissal
Legal Precedent

- *DBO and others v DBP and others* [2024] SGCA(I) 4
  - Claimant commenced arbitration claiming that loan agreement was discharged by frustration
  - Respondent applied for early dismissal under SIAC Rules (frustration claim was manifestly without merits)
  - Tribunal issued partial award dismissing the Claimant's claim
  - Claimant applied to SG Courts to set aside partial award
  - SICC: Rejected set aside; partial award valid

12

Preliminary Determination Overview

- Tribunal decides on a specific issue before the final award is issued
  - I.e., jurisdiction challenges
  - I.e., governing law / applicable rules
- Pros & Cons:
  - ✓ Early resolution of critical issues
  - ⨯ Potential for delays and increased costs

13

Preliminary Determination Institution Rules

- SIAC

A party may apply to the Tribunal for a final and binding preliminary determination of any issue that arises for determination in the arbitration where:

(a) the parties agree that the Tribunal may determine such an issue on a preliminary basis;

(b) the applicant is able to demonstrate that the determination of the issue on a preliminary basis is likely to contribute to savings of time and costs and a more efficient and expeditious resolution of the dispute; or

(c) the circumstances of the case otherwise warrant the determination of the issue on a preliminary basis.

[Rule 46.1]

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Preliminary Determination
Institution Rules

- ICC Rules

  In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

  [Article 22(2)]

15

Bifurcation
Overview

- Dividing the arbitration proceedings into separate phases or stages
  - Liability & Quantum
- Pros & Cons
  - ✓ Efficiency + Cost Savings
  - ✕ Delays + Additional Costs

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Bifurcation
Institution Rules

- SIAC Rules:

The Tribunal shall have the power to direct and schedule the order of proceedings, bifurcate proceedings, order page limits on submissions, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the determination of which could dispose of all or part of the case.

[Rule 32.6]

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Bifurcation
Institution Rules

- ICC Rules:

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.

[Appendix IV]

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Bifurcation
Legal Precedents

- *CFJ and another v CFL and another and other matters* [2023] 3 SLR 1; [2023] SGHC(I) 1

  - Tribunal bifurcated the arbitration into liability phase and quantum phase
  - Tribunal issued three partial awards (on liability; with quantum to be determined subsequently)
  - 3rd Partial Award, CFJ alleged that Tribunal had exceeded its jurisdiction by purporting to pre-determine how damages were to be assessed (notwithstanding the agreement to bifurcate proceedings)
  - SICC → Not really exceeded jurisdiction
    → Not really provided definitive view on appropriate quantum

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Bifurcation
Legal Precedents

- *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251

  - Disputes regarding questions of interpretation or application of the contract → Courts
  - All other disputes (including differences in quantum) → Arbitration

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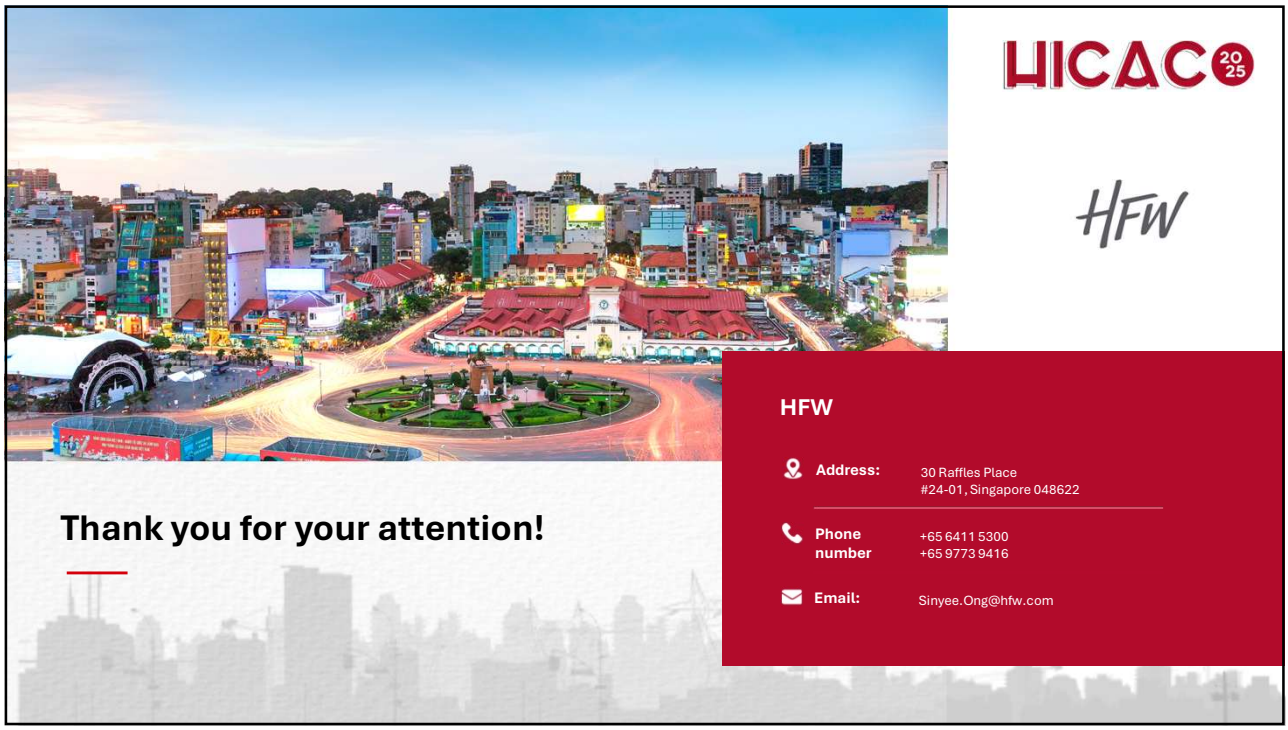
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The Enforcement of Expert Determination in Construction Disputes: What happens if an Expert goes wrong? Perspectives from Vietnam, the United Kingdom, and Australia

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Abstract.
Expert determination is an alternative dispute resolution mechanism in construction, where an independent and impartial expert is appointed to resolve technical or specialized issues. Due to the inherently complex and technical nature of construction disputes, expert determination is widely used to address matters such as engineering specifications, project delays, cost overruns, and the quality of materials. This is distinguished from non-binding forms as expert appraisals, expert assessments used along with the arbitral process. In practice, expert determination clauses have been mentioned since the Property Council of Australia Standard Form Contract, FIDIC form 1999, or ICC Rules for the Administration of Expertise Proceedings 2015.
Nevertheless, as a creature of contract, expert determination does not carry the same "res judicata" effect as an arbitral award. Expert determination is generally binding under the terms agreed upon by the parties under an expert determination clause. Therefore, the judge or arbitrator will not serve the jurisdiction to reassess the facts or decisions determined by the expert. Currently, the ability to set aside or enforce expert determinations is largely dependent on the jurisdiction and the applicable national laws, as there is no international framework akin to the New York Convention 1958 to provide uniform enforcement.
In Vietnam, there are no explicit regulations on setting aside or enforcing an expert determination. This then begs for the question of what happens if an expert determination is found to be incorrect. In some jurisdictions, such as Austria and Germany, expert determinations may be not binding and set aside in case of coercion, deceit or error, if the principle of equal treatment or the right to be heard was violated or if the result is grossly incorrect (at least 50%). Meanwhile, in England, there is no specific numerical margin standard. Instead, English law uses the concept of "manifest error or fraud", which is narrow in its application. In Flowgroup Plc v. Co-operative Energy Ltd [2021], the High Court considered whether an expert's determination in respect of a completion accounts dispute arising in the context of a share purchase agreement should be set aside on the grounds of manifest error.
According to statistics from the Vietnam International Arbitration Centre (VIAC) for the period 2020-2023, construction disputes consistently ranked among the top three most disputed areas, often involving complex technical issues. Therefore, there would be disputes with the role of expert determination over arbitration. As a result, this paper focuses on two central questions: What happens if an expert determination goes wrong; and the suggests for Vietnam when drafting the Expert Determination Clause? Accordingly, the author will introduce the ICC's Rules for the Administration of Expert Proceedings 2015
This study aims to provide a comparative analysis of expert determination practices in Vietnam, the United Kingdom, and Austria, offering recommendations for the Vietnamese legal framework on expert determination, especially regarding its enforcement and potential grounds for setting aside determinations.

Keywords: Expert determination, Alternative dispute resolution, Enforcement.

1 The concept of Expert Determination – Perspectives from England and Wales, Australia and Vietnam

1.1 Defining Expert Determination

Expert determination is a dispute resolution mechanism particularly suitable for matters involving technical expertise, such as the valuation of company shares, price adjustment calculations in M&A transactions, or quality assessments in construction and infrastructure projects.[1] This is distinguished from non-binding forms as expert appraisals, expert assessments used along with the arbitral process.[2] The core of the expert determination mechanism focuses on the role of experts who shall be engaged by the parties to act as a valuer, assessor, or certifier, depending on the nature of the dispute. Lord Esher MR in Re Dawdy (1885) explained the difference between an arbitrator and an expert is that while the arbitrator follows the judicial laws to hear parties and evidence, the expert is appointed to make valuation solely by his knowledge and skill.[3] He then concluded "*The expert is using the skill of a valuer, not of a judge*".

There are differences between the Expert determination and Dispute boards. In Expert determination, a single neutral expert is appointed to hear and assess evidence from both parties and to render a decision on a defined issue, typically technical, financial, or quantitative in nature. Despite sharing many similarities, the Dispute Board is a group of experts who are selected by the contract parties from the execution to the conclusion of the contract. The Dispute Board gets familiar with the terms, context, and subject matter of the project. Dispute boards are commonly used in long-term and complex contracts, particularly in sectors such as construction and infrastructure.[4] In summary, while Expert determination is used for specific technical or specialized matters, the Dispute Board consists of a panel of experts that could be appointed at the beginning of the contract and become familiar with the contract and the project.[5]

Expert determination is distinct from Adjudication. According to the UNCITRAL Model Clause on Adjudication 2024, adjudication is a form of alternative dispute resolution where an adjudicator makes a determination through a simplified procedure and within a short timeframe.[6] If a party disagrees with the adjudicator's determination, they may refer some or all of the dispute to arbitration. However, they must abide by the adjudicator's determination unless the arbitration reaches a different resolution. Adjudication is commonly used in substantial construction contracts. In England and Wales, adjudication is a statutory process for construction disputes, meaning it can be used as a dispute resolution method in construction contracts.[7] As a result, the adjudicator's decision is final and binding, like a court judgment.

In 2024, UNCITRAL also introduced its Model Clause on Technical Advisers. Similarly to Expert determination, Technical Advisers are used in specialized, technical types of disputes.[8] However, unlike independent Alternative Dispute Resolution (ADR) methods, Technical Advisers provide opinions that are advisory in nature and not final or binding. Their primary role is to assist the arbitral tribunal in understanding the technical aspects of

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[1] Doug Jones, 'Is Expert Determination a "Final and Binding" Alternative?' (1997) 63 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 213, 215.

[2] Douglas Jones, 'Expert Determination and Arbitration' (2001) 67 The Journal of the Chartered Institute of Arbitrators 17

[3] Re Dawdy [1885] 15 QBD; 54 LJQB 574; 53 LT 800 cited in Doug Jones (n 1) 214.

[4] 'What Is Dispute Resolution' (*The Chartered Institute of Arbitrators*) <https://www.ciarb.org/dispute-services/what-is-dispute-resolution/> accessed 26 March 2025.

[5] The 2017 2nd Edition of FIDIC Red Book, Yellow Book, and Silver Book.

[6] 'UNCITRAL Model Clause on Adjudication' (*United Nations*, 2024) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf> accessed 27 March 2025.

[7] 'What Is Dispute Resolution' (*The Chartered Institute of Arbitrators*) <https://www.ciarb.org/dispute-services/what-is-dispute-resolution/> accessed 26 March 2025.

[8] 'UNCITRAL Model Clause on Technical Advisers' (*United Nations*, 2024) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc_techadvisers_2419437e-ebook.pdf> accessed 27 March 2025.

the dispute, primarily through explanations. Notably, Technical Advisers differ from Experts appointed by the arbitral tribunal (already governed by Article 29 of UNCITRAL Arbitration Rules). While experts appointed under Article 29 prepare written reports and offer opinions on the issues the tribunal must resolve, the role of a Technical Adviser is more limited. The Technical Adviser's function is confined to helping the tribunal better understand the technical issues raised by the parties, including those presented by the expert appointed by the tribunal.[9]

In 2001, Professor Doug Jones, an International Judge of the Singapore International Commercial Court (SICC), referenced various expert determination clause models in Australia, which includes: Head Contract for the Construction of Facilities standard contract (1993),[10] The Property Council of Australia Standard Form Contract,[11] New South Wales Government's C21 Construction Contract Condition (1996).[12] Currently, the Queensland Law Society also introduces the ADR Practitioners with the Model Clause for Expert Determination.[13] Under these frameworks, expert determination is described as a contractual process whereby parties agree to appoint a qualified expert to resolve a specific dispute. The expert's determination may be either final and binding or non-binding, depending on the parties' agreement.

1.2 The differences between Expert Determination and Arbitration – The enforcement of Expert Determination

1.2.1 The Courts' refusal to accept cases in which there is an expert determination clause?

In arbitration, courts have the authority to stay proceedings to allow arbitration to proceed, thereby ensuring the enforceability of arbitration agreements. However, the court lacks statutory framework for staying court proceedings to allow the expert determination to proceed without interference.[14] In *Barclays Bank v Nylon Capital (2011)*, Thosmas LJ contends that "*expert determination is a very different form of dispute resolution to which neither the Arbitration Act 1996 nor any other statutory codes apply*".[15]

For example, in the Law on Commercial Arbitration 2010 ("**LCA 2010**") of Vietnam, in case the disputing parties have reached an arbitration agreement, but one party initiates a lawsuit at a court, the court shall refuse to accept the case, unless the arbitration agreement is invalid or unenforceable.[16] However, there is no provision in Vietnamese law providing that the court shall stay proceedings where the parties have agreed an expert determination clause in their contract.

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[9] Explanatory notes, paragraph 1.1, ibid.

[10] Currently, Head Contract Template of the Department of Defence of Australia Government has been updated with Clause 15.2 (Expert Determination): "*Unless otherwise agreed between the parties, to the extent the dispute or difference is in relation to a direction of the Contract Administrator under one of the clauses specified in the Contract Particulars and is not resolved within 14 days after a notice is given under clause 15.1, the dispute or difference must be submitted to expert determination*.", 'Head Contract Templates' (Department of Defence (Australia Government), 2024) <https://www.defence.gov.au/business-industry/procurement/contracting-templates/suite-facilities-contracts/head-contract-templates> accessed 26 March 2025.

[11] Sergio Capelli, The Property Council Of Australia Standard Form Contract - A User's Guide, <https://classic.austlii.edu.au/au/journals/AUConstrLawNlr/1999/31.pdf>, assess 26 March 2025. Article 15 (Disputes): "*PC-I's dispute resolution provisions include expert determination, executive negotiation, and commercial arbitration…15.3. In the event that a dispute or difference arises in relation to one of those specified directions, the dispute is submitted to expert determination by a pre-agreed industry expert or by such independent industry expert appointed by a pre-agreed person. The expert determination is expressly stated not to be an arbitration and the expert is not to perform the functions of an arbitrator*."

[12] C21 Conditions of Contract, https://www.austlii.edu.au/au/journals/AUConstrLawNlr/1996/95.pdf, assess 26 March 2025.

[13] 'ADR Practitioners - Model Clause for Expert Determination' (*Queensland Law Society*) <https://www.qls.com.au/Practising-law-in-Qld/ADR/Alternative-Dispute-Resolution/ADR-Practitioners> accessed 26 March 2025.

[14] Margaret J. Hughe, 'Expert Determination: A Suitable Dispute Resolution Technique for Offshore Construction Project Disputes? Part II' (2004) 3 Journal of International Trade Law and Policy 3, 7.

[15] Barclays Bank v Nylon Capital [2011] EWCA Civ 826.

[16] Article 6 of LCA 2010.

In England and Wales, in *Thames Valley Power Ltd. V Total Gas & Power Ltd (2005)*, the judge declined to grant a stay so that the dispute could referred to expert determination because (i) the issue was related to the interpretation of an agreement, which had already been examined and concluded by the court; (ii) using an expert could lead to duplication of effort and unnecessary costs; and (iii) it could cause unnecessary delays. The court concluded that the appointment of a nominated expert should depend on suitability.[17]

In Australia, the court have the tendency to enhance the autonomy of parties in the contract. Accordingly, the court would not interfere in the expert determination agreements unless the expert acted beyond his jurisdiction set out in the contract.[18] In *Bauldersrone Hornibrook Engineering Lrd v Kuyah Holding Pry Lrd (1997)*, the Supreme Court of Australia declared an expert determination was void because the case involved complicated questions of law, which is not suitable for an expert determination as a dispute resolution.[19]

1.2.2 The interaction of court in appointing experts

The expert determination clause becomes ineffective if the parties are unable to mutually agree on the appointment of an expert. In arbitration, however, the court or the arbitration center may intervene and assist when such a situation arises. Under the UNCITRAL Model Law on Commercial Arbitration (Model Law), any party can request the court to take necessary measures if the parties cannot agree on the appointment procedure (including the appointment of arbitrators or an arbitration institution).[20]

For example, in Vietnam, for ad-hoc arbitration, unless otherwise agreed by the parties, the claimant may request a competent court to designate an arbitrator for the respondent if he fails to select an arbitrator.[21] Regarding institutional arbitration, unless otherwise agreed by the parties, the president of arbitration center shall appoint an arbitrator for the Respondent if he fails to select on his own within the time limit.[22] Such provisions is to enhance the efficiency of the arbitration process when there is a party delay or do not attend the arbitral process on purpose.

However, similar provisions do not exist for expert determination. This raises the question of whether the court has the authority to "fill the gap" in such situations. The answer to this depends on the statutory legislation of each country, presenting a challenge to the practice of expert determination. For example, in Queensland Law Society in Australia, under its Model Clause for Expert Determination, the parties may agree to appoint a particular expert. Failing agreement between the parties, either party may request the President for the time being of the Queensland Law Society to appoint the expert. [23]

1.2.3 The independence and impartiality of an expert

In Vietnam there are no requirements regarding the qualifications of an expert. Under the Commercial Arbitration Law 2010 (LCA 2010), an arbitrator shall be independent, objective, and impartial[24] as well as satisfy all criteria of an arbitrator required under Article 20 of LCA 2010. However, there is no similar provision applied to an expert. This thus begs the question about the independence and impartiality of an expert if he acts as an audit expert to value shares in a company which he has a close connection with the shareholders, or if he acts as a certifier in a construction dispute which he has a close connection with the building owner. The independence and impartiality of experts are essential as they serve as grounds for challenging the experts or invalidating their determination.

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[17] Thames Valley Power Ltd. v Total Gas & Power Ltd. [2005] EWHC 2208 (Comm)

[18] Douglas Jones, 'Expert Determination and Arbitration' (2001) 67 The Journal of the Chartered Institute of Arbitrators 17, 22.

[19] The Supreme Court of Australia Bauldersrone Hornibrook Engineering Lrd v Kuyah Holding Pry Lrd (1997)

[20] Article 11.4 of UNCITRAL Model Law

[21] Article 41.1 of LCA 2010.

[22] Article 40.1 of LCA 2010.

[23] Clause 1.4 (Appointment of expert), 'ADR Practitioners - Model Clause for Expert Determination' (n 13).

[24] Article 4 of LCA 2010.

In England and Wales, if an expert is found to have actual bias, the court may set aside the expert determination.[25] In *Marco v Thomson (1997)*, Rober Walker J stated that when assessing a decision made by an expert, as opposed to an arbitrator (who has quasi-judicial powers), the court will focus on "actual partiality" rather than just the "appearance of partiality".[26] f the court only considers the appearance of partiality, an auditor with a long-standing relationship with one of the parties to the contract could be unfairly disadvantaged in continuing their professional duties to their clients.

1.2.4 The enforcement of an expert determination – What happens if an expert determination goes wrong?

There is no universal convention for the international enforcement of expert determinations, in contrast to arbitration, which is governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958). Under the New York Convention, arbitral awards can be recognized and enforced in contracting states.

In practice, as noted by Douglas Jones, international organizations often use expert determination as a binding interim dispute resolution method, allowing parties to move to arbitration if they wish to challenge or enforce an expert determination.[27] The Dispute Board clause in FIDIC Red Book shares same approach at Clause 20.7 providing that failure to comply with Dispute Board's decision, then the other party may refer the dispute to arbitration under its Clause 20.6.

Domestically, expert determination can be viewed as a contractual matter. If a party fails to comply with the expert's decision, the prevailing party may bring the case before a competent court or arbitration due to a breach of contract, seeking to enforce the value of the expert determination as an outstanding debt. Therefore, while the contractual text may state that the expert determination is final and binding, the court will not enforce it if there is fraud, a serious mistake of law, or if it contravenes public policy.[28]

An expert has no authority to make a binding decision on a dispute unless such authority is explicitly conferred by the parties. In England and Wales, there is no specific legislation governing expert determination. The jurisdiction of an expert is defined by the express terms of the contract between the parties. As such, the court will not enforce an expert determination if (i) the decision was made by someone else other than the expert selected by the parties, (ii) the expert exceeded its jurisdiction, (iii) the expert materially departed from instructions from the parties.[29]

For instance, in Austria and Germany, expert determinations may be set aside if they are clearly incorrect. For an error to be deemed "obvious," it must be easily detectable. Additionally, the error must deviate by at least 10%, with a 25% margin typically required to justify legal intervention in practice.[30] These standards are indicative and offer considerable flexibility in their application. Similarly, in Switzerland, courts apply a comparable standard, requiring a deviation of at least 25%.[31]

In England & Wales, the court could grant summary judgement to enforce expert determination.[32] An expert determination could be challenged on limited grounds:

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[25] Adham Kotb, 'Alternative Dispute Resolution: Arbitration Remains a Better "Final and Binding" Alternative than Expert Determination' (2017) 8 Queen Mary Law Journal 125, 131.
[26] Marco v Thomson [1997] 2 BCLC 354.
[27] Douglas Jones (n 18) 24.
[28] Margaret J. Hughe (n 14) 10.
[29] Filip De Ly and Paul-A. Gélinas, 'Chapter 2 Expert Determination', *The common law perspective, Dispute Prevention and Settlement through Expert Determination and Dispute Boards* (ICC Institute Dossier XV 2017).
[30] C Klausegge, 'Chapter III: Ad Hoc Expert Determination – Useful Tool or "Too Much of a Headache"', *Austrian Yearbook on International Arbitration* (2013). Cited in Wolfgan Peter and Daniel Greineder, 'Conflicts between Expert Determination Clauses and Arbitration Clauses', *The Guide to M&A Arbitration* (5th edn, Global Arbitration Review 2024) 42.
[31] Swiss Supreme Court decision ATV N29 III 535, c. 2.N• R Tsch:ni, U Vrey and J Möller, op. cit. note 6, NNN
[32] Filip De Ly and Paul-A. Gélinas (n 29).

(i) **Excess of jurisdiction:**
An expert generally does not have the authority to decide questions of law, such as interpreting the contract. The court will assess whether the expert could rule on legal questions by considering: (i) whether the contract specifies which matters can be adjudicated by the expert; (ii) whether the expert's interpretation aligns with the parties' intention; and (iii) the legal qualifications of the expert.

(ii) **Material departure from the terms of the contract:**
For example, if the appointment or nomination of the expert goes against the parties' agreements or if the expert misinterprets the terms of the contract. Filip Dely and Paul A Gelinas stated that "*When the contract says very little about what the expert must do, it will be harder to allege that the expert has failed to act in accordance with the requirements of the contract*".[33]

(iii) **Error of law:**
If an expert answers the wrong question due to negligence, the determination will not be binding. Accordingly, the decision is not binding. In Nikko Hotel (UK) Ltd v. NEPC plc (1991), the English court stated that if an expert answers a question incorrectly, their decision is binding. However, if the expert answers the wrong question altogether, the decision will be null and void.[34] This means that the expert's role is limited to answering the questions agreed upon by the parties. If the expert answers a question outside of their jurisdiction, they may be deemed to have made an error of fact or law.[35] Courts will not intervene unless the expert materially departs from their instructions, such as when they incorrectly value an asset.[36]

(iv) **The expert is not independent:**
Experts must not act fraudulently or collude with one of the parties. While there is no uniform rule requiring experts to be independent and impartial, if an expert's conduct gives rise to justifiable doubts about their independence or impartiality, and appears biased, their decision can be challenged.

(v) **Unfair process:**
As Adham Kotb notes, the principle of due process in arbitration is connected to the principles of natural justice in common law jurisdictions, including: (i) the right to be heard (audi alteram partem) and (ii) no person may be a judge in their own cause (nemo judex in causa sua). Kotb argues that the "right to be heard" is not applicable in expert determination.[37]. In *AMEC Civil Engineering Ltd v Secretary of State for Transport (2005)*,[38] the Highways Agency submitted its opinion to the expert, but the expert did not allow AMEC the opportunity to make submissions before issuing the determination. The Court of Appeal concluded that the expert was not required to provide AMEC an opportunity to respond, as the principles of natural justice do not apply to expert determination. Consequently, there is no uniform standard for assessing the fairness of an expert determination process, which depends on the interpretation of the national court.

2 Why Expert Determination? The combination of Expert Determination and Arbitration in Multi-tiered Dispute Resolution Clause

Despite the disadvantages of expert determination mentioned above, expert determination when combined with arbitration throughout a multi-tiered dispute resolution clause could maximize its advantage.[39] Accordingly, the

[33] ibid.
[34] Nikko Hotel (UK) Ltd v. NEPC plc (1991) 28 EG 86.
[35] Adham Kotb (n 25) 128.
[36] Jones v Sherwood [1992] 1 WLR 277
[37] Adham Kotb (n 25) 128.
[38] AMEC Civil Engineering Ltd v Secretary of State for Transport [2005] 1 WLR 2339.
[39] Douglas Jones (n 18) 27.

expert determination would be the first filter before arbitration, in which complex and technical dispute has been resolved before arbitration. This would reduce the pressure on the arbitrator to solve the problems and save extra expenses and time. Furthermore, parties may have motivations to negotiate after receiving expert determination. That is to say, regarding expert determination, parties seem more likely to achieve a commercial rather than legal settlement. If practice, in M&A disputes, an expert is appointed by the parties to value companies or shares, or to set the final purchase price. Most M&A transactions are complicated so that the contract may not be clear as to the price adjustment mechanism.[40]

The expert determination is cost-effective and speedy to solve technical problems in complex contracts that an arbitrator may ask for an expert witness' assistance besides hearing and examining the evidence submitted by disputed parties. However, arbitration is praised for its certainty, efficiency, and fairness with the support from harmonized instruments such as the New York Convention 1958.

Furthermore, in arbitration, parties or arbitrators shall appoint a requisite expert when deciding complex technical issues which may require specific knowledge or experience. The process of appointing an expert witness is not simple, which requires mutual agreements among parties and the jurisdiction of an arbitrator to hear and examine the evidence provided by the expert.[41] It is not to mention that the arbitrator may need hot-tubbing, expert cross examination, witness statements or even evidence hearing. Douglas Jones opined that in Asia, confrontational dispute resolution is traditionally avoided, so that the expert determination has a potential to develop as an alternative.[42]

A dispute in the construction or M&A sector involves many aspects that need to be addressed, ranging from contract interpretation, examining whether the parties have fulfilled their contractual rights and obligations, to specific issues such as payment terms, construction milestone completion for construction contracts, and precedent conditions for M&A agreements. Additionally, there are matters related to damage and their quantum. Requiring an expert who may not be trained in law to resolve these issues could be an unreasonable expectation. However, if expert determination is considered as a filtering mechanism for technical and specialized issues, this is a reasonable expectation.

For example, when an expert decides on a construction dispute related to an unforeseen incident, where both parties claim the other is at fault. After the expert determines who is at fault, or how the fault is to be allocated between the parties, both sides will respect the expert's determination and engage in good-faith negotiations. Even if one of the parties disagrees and initiates arbitration, the tribunal would be relieved from acting as an expert or having to appoint another expert, thus avoiding unnecessary delays in the dispute resolution process.

3 The suggestions for Vietnam when drafting Expert Determination Clause – Insights from ICC's Rules for the Administration of Expertise Proceedings 2015

In Vietnam, expert determination is not popular. Normally, experts will appear as expert witnesses in arbitration proceedings. Furthermore, there are no explicit regulations on how to conduct and enforce the expert determination in Vietnam. However, according to statistics from the Vietnam International Arbitration Centre (VIAC) for the period 2020-2023,[43] construction disputes and M&A consistently ranked among the top four most disputed areas, often involving complex technical issues. Therefore, expert determination will soon appear in contracts, especially cross-border transactions, as an alternative dispute resolution besides arbitration.

[40] Wolfgan Peter and Daniel Greineder (n 30).
[41] 'International Arbitration Practice Guideline on Party-Appointed and Tribunal-Appointed Experts' (*The Chartered Institute of Arbitrators*) <https://www.ciarb.org/media/zvijl3kx/7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf>.
[42] Douglas Jones (n 18) 27.
[43] VIAC Annual Report 2023, https://www.viac.vn/images/Resources/Annual-Reports/2023/Bao-cao-thuong-nien-2023---EN_240829.pdf

Currently, the Dispute Boards is regulated by the Decree No. 37/2015/ND-CP on construction contract and Law on Construction 2015 as a dispute resolution method,[44] if a party does not agree with the determination from the Dispute Board, it could bring its dispute to arbitration or court. Otherwise, the result shall be deemed as agreed by the parties.[45] However, unlike the Dispute Boards, Expert determination is legally unclear of how to enforce in Vietnam. Notably, expert determination is a contract in nature. Therefore, an expert determination could be deemed as a contract under Article 385 in Civil Code 2015 of Vietnam. If a party breaches the expert determination, the other could bring their case to the court or arbitration due to breach of contract. If parties carefully draft expert determination cause and consider combining it as the first tier before arbitration in multi-tiered dispute resolution clause, the disadvantages of expert determination could be reduced.

According to the instruction of GAR (Global Arbitration Review), a well-drafted expert determination clause should identify the expert's functions. That is to say, the clause should define the mandate or authority of an expert "precisely and narrowly" such as to identify the liability issues or damage quantum in construction disputes.[46] That is to say, the expert determination clause should not push an expert into making complex legal reasoning such as interpreting the legal norms, torts and so on. Additionally, the clause should briefly describe the procedural rules of (i) the number of experts, (ii) whether members of a panel of experts may reach the majority decisions, possible timeline or cost allocation.

In 2015, ICC published its Rules for the Administration of Expertise Proceedings ("The Rules").[47] When disputes happen, parties may refer to an expert providing their findings on specified issues through expert proceedings administered by the ICC. The Rules cover the selection of experts, the impartiality and independence of experts, the replacement, procedural timetable, duties and responsibilities of the parties and experts and so on.

Accordingly, ICC has suggested four model clauses referring to the Rules when Parties want to draft expert determination,[48] in which Clause C is appropriate when the parties want to be contractually bound by the expert's findings:

- **Clause A (Optional administered expert proceedings)**: "*The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with [clause X of the present contract] to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce*."
- **Clause B (Obligation to submit dispute to non-binding administered expert proceedings)**: "In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce."
- **Clause C (Obligation to submit dispute to contractually binding administered expert proceedings):** "In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. The parties agree that the findings of the expert shall be contractually binding upon them."
- **Clause D (Obligation to submit dispute to non-binding administered expert proceedings, followed by arbitration if required)**: "In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute, in the first instance, to administered expert

[44] Article 146.8.b of Law on Construction 2014.
[45] Article 45.2.b of Decree No. 37/2015/ND-CP.
[46] Wolfgan Peter and Daniel Greineder (n 30).
[47] The ICC Rules for the Administration of Expert Proceedings 2025, https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/experts/administration-of-experts-proceedings/rules-for-the-administration-of-expert-proceedings/
[48] 'Suggested Clauses Referring to the ICC Rules for the Administration of Expert Proceedings' (*ICC - International Chamber of Commerce*) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/experts/administration-of-experts-proceedings/suggested-clauses-referring-to-the-icc-rules-for-the-administration-of-expert-proceedings/> accessed 28 March 2025.

proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. After the International Centre for ADR's notification of the termination of the administered expert proceedings, the dispute, if it has not been resolved, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."

4 Conclusion

In conclusion, expert determination offers a specialised and efficient dispute resolution mechanism, particularly suitable for complex, technical issues in fields such as construction and M&A transactions. While it provides distinct advantages in terms of cost-effectiveness and speed, its application is not without challenges, particularly regarding its enforceability and the limitations posed by the lack of a uniform framework across jurisdictions. The comparative analysis of expert determination in various legal systems, including those of England and Wales, Australia, and Vietnam, highlights the varying levels of acceptance and the complexity of its integration into contractual agreements.

Combining expert determination with arbitration can serve as an effective filter, resolving technical issues before they escalate to full arbitration, thereby saving both time and resources. Furthermore, the need for precise drafting of expert determination clauses cannot be overstated. Clear definitions of the expert's role, authority, and procedural rules are essential to ensure the smooth functioning of this mechanism and to prevent potential disputes regarding its scope and enforceability.

In Vietnam, although expert determination is not yet widely used, its potential as an alternative dispute resolution method in cross-border transactions is evident, especially in the face of increasing construction and M&A disputes. By carefully drafting expert determination clauses and incorporating them into multi-tiered dispute resolution frameworks, parties can mitigate the disadvantages and maximize the benefits of expert determination. Adopting international standards, such as those outlined in the ICC's Rules for the Administration of Expertise Proceedings 2015, will further strengthen the legal infrastructure and facilitate the wider acceptance of expert determination as a legitimate and effective dispute resolution method in Vietnam.

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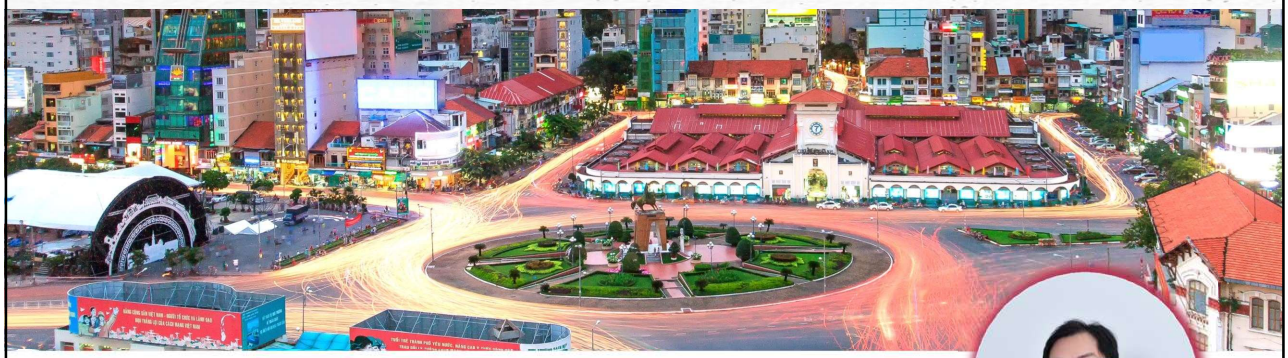

The Enforcement of Expert Determination in Construction Disputes: What happens if an Expert goes wrong? Perspectives from Vietnam, the United Kingdom, and Australia

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Construction and M&A disputes consistently ranked among the top five most disputed areas, often involving complex technical issues in VIAC

18,6%

Construction

3,3%

Shares Transfer

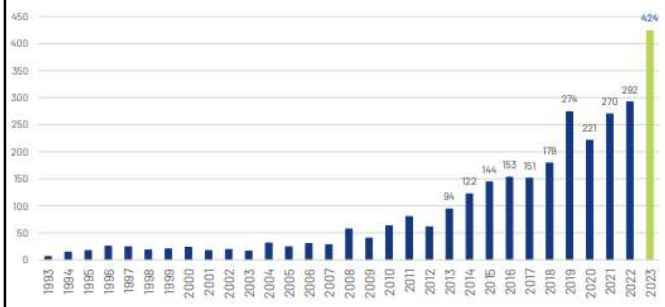

Figure 1.1 - The number of cases handled at VIAC (1993 - 2023)

Figure 1.7 - Types of disputes at VIAC in 2023

Types of disputes		
1	Real Estate	26.2%
2	Sale of Goods	21.2%
3	Construction	18.6%
4	Leasing and Loan	5.9%
5	Shares Transfer	3.3%
6	Security	0.9%
7	Insurance	0.9%
8	Investment	0.9%
9	NDA, NCA	0.9%
10	Finance	0.5%
11	Logistics	0.5%
12	Other services	20%

HICAC 2025

VIAC

"The Expert is using the skill of valuer, not of a judge" (Lord Esher MR in Re Dawdy)

1. The concept of Expert Determination

1. What is Expert Determination?

- Expert determination is a dispute resolution mechanism particularly suitable for matters involving technical expertise, such as the valuation of company shares, price adjustment calculations in MCA transactions, or quality assessments in construction and infrastructure projects (Prof. Doug Jone, International Judge of the Singapore International Commercial Court).
- Expert determination is distinguished from non-binding forms as expert appraisals, expert assessments used along with the arbitral process.
- Example of expert determination clause in Australia:
  - Head Contract for the Construction of Facilities standard contract (1993)
  - The Property Council of Australia Standard Form Contract
  - New South Wales Government's C21 Construction Contract Condition (1996)
  - The Queensland Law Society's ADR Practitioners with the Model Clause for Expert Determination

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Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice

"The Expert is using the skill of valuer, not of a judge"
(Lord Esher MR in Re Dawdy)

1. What is Expert Determination?

- Expert determination
- Dispute Adjudication Board (DAB)
- Technical Advisers
- Adjudication

Source:

- 'UNCITRAL Model Clause on Adjudication' (United Nations, 2024) https://uncitral.un.org/sites/uncitral.un.org/files/media- documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf
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1.2. The difference between Expert Determination and Arbitration

a. The Courts' refusal to accept cases in which there is an expert determination clause?

- In arbitration, Courts have the authority to stay proceedings to allow arbitration to proceed, thereby ensuring the enforceability of arbitration agreements (E.g.: Article 6 of Law on Commercial Arbitration 2010 of Vietnam, Article 5 of UNICITRAL Model Law)
- Whether the court shall stay proceedings where the parties have agreed an expert determination clause in their contract? **UNCLEAR!**
  - In England and Wales, The judge considers (i) the issue was related to the interpretation of an agreement, which had already been examined and concluded by the court; (ii) using an expert could lead to duplication of effort and unnecessary costs; and (iii) it could cause unnecessary delays. *(Thames Valley Power Ltd. V Total Gas & Power Ltd (2005)*
  - In Australia, the court have the tendency to enhance the autonomy of parties in the contract. Accordingly, the court would not interfere in the expert determination agreements unless the expert acted beyond his jurisdiction set out in the contract *(Bauldersrone Hornibrook Engineering Lrd v Kuyah Holding Pry Lrd (1SS7)*

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1.2. The difference between Expert Determination and Arbitration

b. The interaction of court in appointing experts

- Under Article 11.4 of UNCITRAL Model Law, any party can request the court to take necessary measures if the parties cannot agree on the appointment pro-cedure (including the appointment of arbitrators or an arbitration institution)
- Whether the court has the authority to "fill the gap" in situations when the parties are unable to mutually agree on the appointment of an expert?
  - ➢ Cannot appoint an expert => Expert Determination Clause is meaningless.
  - ➢ Queensland Law Society's Model Clause for Expert Determination (Clause 1.4): *the parties may agree to appoint a particular expert. Failing agreement between the parties, either party may request the President for the time being of the Queensland Law Society to appoint the expert.*

1.2. The difference between Expert Determination and Arbitration

c. The independence and impartiality of an expert

- Article 4 of Law on Commercial Arbitration 2010 (LCA 2010) of Vietnam, an arbitrator shall be independent, objective, and impartial and satisfies all criteria of an arbitrator required under Article 20 of LCA 2010.
- No similar provision applied to an expert.
- For example: The question about the independence and impartiality of an expert if he acts as an audit expert to value shares in a company which he has a close connection with the shareholders, or if he acts as a certifier in a construction dispute which he has a close connection with the building owner?
  - ➢ Rober Walker J stated that when assessing a decision made by an expert, as opposed to an arbitrator (who has quasi-judicial powers), the court will focus on "actual partiality" rather than just the "appearance of partiality" *(Marco v Thomson [1SS7] 2 BCLC 354)*

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1.2. The difference between Expert Determination and Arbitration

d. The enforcement of an expert determination – What happens if an expert determination goes wrong?

- There is no universal convention for the international enforcement of expert determinations like New York Convention 1958 (as to arbitration).
- How to challenge or unrecognize C unenforce an expert determinations.
- Expert Determination = Contractual matter (in nature)
- If a party fails to comply with the expert's decision, the prevailing party may bring the case before a competent court or arbitration due to a breach of contract, seeking to enforce the value of the expert determination as an outstanding debt.

1.2. The difference between Expert Determination and Arbitration

d. The enforcement of an expert determination – What happens if an expert determination goes wrong?

- In England and Wales, Expert Determination would not be enforced due to some limited grounds:
  - Excess of jurisdiction
  - Material departure from the terms of the contract
  - Error of law: the English court stated that if an expert answers a question incorrectly, their decision is binding. However, if the expert answers the wrong question altogether, the decision will be null and void - *Nikko Hotel (UK) Ltd v. NEPC plc (1SS1) 28 EG 8c*
  - The expert is not independent and impartial
  - Unfair process: the principles of natural justice - (i) the right to be heard and (ii) no person may be a judge in their own cause => Whether to apply for expert determination

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1.2. The difference between Expert Determination and Arbitration

Expert Determination	Arbitration
There is no statutory basis for stay court proceedings	The court has a statutory power of stay proceedings in favour of arbitration
The grounds for challenging/not recognizing C enforcing expert determination are not of worldwide acceptance.	Article V of New York Convention 1958 UNCITRAL Model Law (Article 34 – set aside, Article 36 – refuse recognition or enforcement)
The expert determination can be enforced contractually on the basis of a breach of contract	New York Convention 1958 and National arbitration legislation
The expert has limited power to prevent a party from manipulating the process and causing delay	The arbitrator has statutory power to combat a party's dilatory tactics

2. Why Expert Determination?

- An increasing focus on ADR
- The technical nature of disputes
- Difficulty of avoiding enforcement of a contractual expert agreement
- Difficulty of challenging an expert's decision

- International enforcement issues
- Absence of due process
- A key factor – the importance of contract – drafting matters

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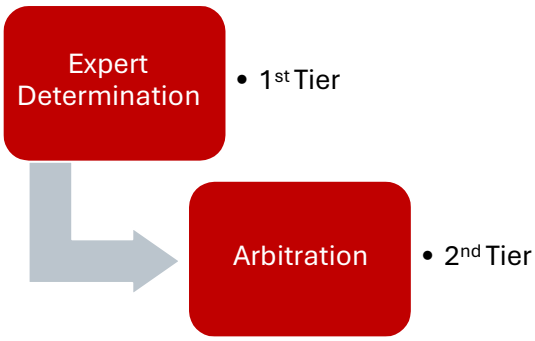
3. The suggestions for Vietnam when drafting Expert Determination Clause

1. The combination of Expert Determination and Arbitration in Multi-tiered Dispute Resolution Clause



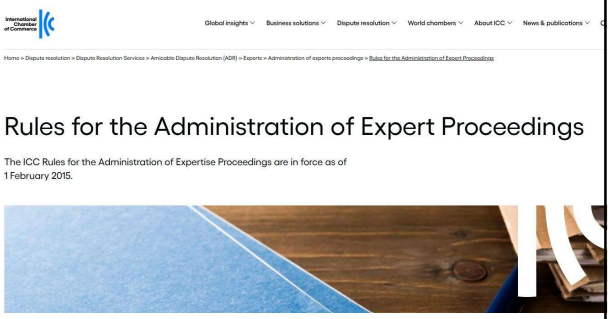
- The expert determination would be the first filter before arbitration, in which complex and technical dispute has been resolved before arbitration
- Solve technical problems + times
- Motivation to negotiate after receiving expert determination
- Expert Determination is to achieve a commercial rather than a legal settlement.

3. The suggestions for Vietnam when drafting Expert Determination Clause

3.2. Insights from ICC's Rules for the Administration of Expertise Proceedings 2015

- **Clause A (Optional administered expert proceedings)**: "*The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with [clause X of the present contract] to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce.*"

- **Clause B (Obligation to submit dispute to non-binding administered expert proceedings)**: "*In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce.*"


Rules for the Administration of Expert Proceedings

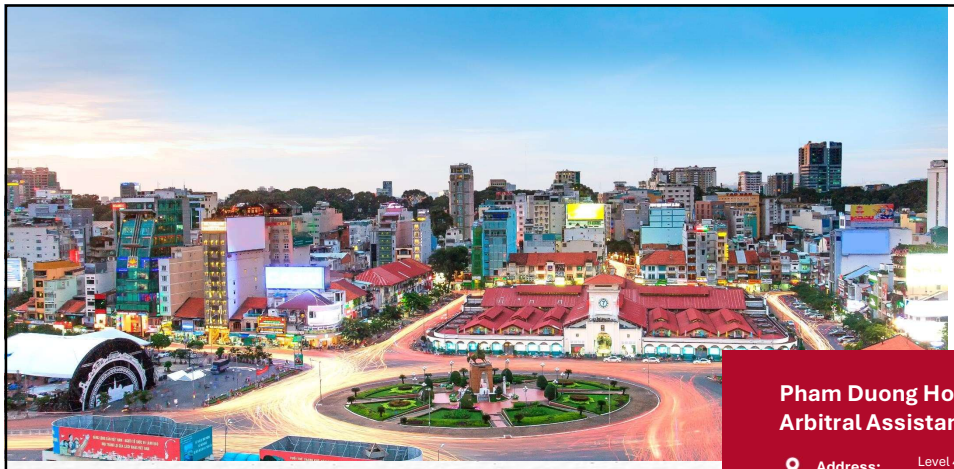
The ICC Rules for the Administration of Expertise Proceedings are in force as of 1 February 2015.

3. The suggestions for Vietnam when drafting Expert Determination Clause

3.2. Insights from ICC's Rules for the Administration of Expertise Proceedings 2015 and

- **Clause C (Obligation to submit dispute to contractually binding administered expert proceedings)**: "*In the event of any dispute arising out of or in connection with [clause X of the present con-tract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. The parties agree that the findings of the expert shall be contractually binding upon them.*"

- **Clause D (Obligation to submit dispute to non-binding administered expert proceedings, followed by arbitration if required)**: "*In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute, in the first instance, to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. After the International Centre for ADR's notification of the termination of the administered expert proceedings, the dispute, if it has not been resolved, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.*"



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Thank you for your attention!

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1 Abstract – Maximilian Benz

1.1 Early Expert Engagement

Early engagement of expert witnesses in disputes or contentious matters provides significant strategic and procedural advantages. Engaging an expert at the outset allows parties to gain an early and independent understanding of the strengths and weaknesses of their case. This early insight can prevent the entrenchment of positions and help determine whether a claim is viable—sometimes revealing that a matter may be a "no go."

One of the most valuable benefits of early expert involvement is the ability to identify areas outside the expert's scope of expertise. This gives parties time to procure the necessary specialist input, address documentary gaps, and refine the scope of expert evidence. Moreover, it facilitates the development of a clear roadmap that outlines timelines, evidentiary requirements, and roles.

Despite these benefits, early engagement comes with responsibilities. The expert must maintain independence and avoid becoming an advocate for the client's position. Experts should not draft or develop claims on behalf of the parties; their role is to assess, not create, the substance of claims. Timeframes also need to be carefully managed to ensure that the expert has adequate time to conduct their work thoroughly and meet procedural deadlines. Commercial consistency throughout the process—between legal teams, consultants, and experts—is also essential to avoid misalignment.

Ultimately, early engagement reduces exposure to risk, enhances procedural clarity, and fosters a more efficient resolution process.

1.2 Institutional Accountability

Institutional accountability ensures that expert witnesses adhere to high standards of independence, ethics, and competence. Professional bodies such as the Royal Institution of Chartered Surveyors (RICS), The Academy of Experts (TAE), the Expert Witness Institute (EWI), and the Society of Construction Law (SCL) provide training, certification, and ethical guidelines that govern expert conduct.

RICS, for example, has introduced the "RICS Registered Expert" designation, which imposes a structured standard on expert practitioners. This designation serves as a benchmark for quality, requiring adherence to codes of conduct and procedural guidance. Non-compliance may result in disciplinary action, thereby reinforcing accountability and trustworthiness. For clients and instructing parties, this provides assurance that appointed experts are not only technically capable but also ethically and procedurally reliable.

The benefits of institutional oversight include global recognition of expertise, heightened credibility in legal proceedings, and a consistent framework for expert behaviour. Moreover, institutions such as CIArb provide codes of ethical practice and guidance on procedural conduct, reinforcing the impartial role experts play in dispute resolution.

Institutional accountability gives clients peace of mind, knowing their experts have been subject to rigorous scrutiny and are committed to the highest professional standards and promotes fairness and impartiality in the expert process providing integrity to the dispute processes.

Enhancing Project Integrity Through Early Engagement of Experts and Institutional Accountability

Maximilian Benz
Quantum Expert, SJA

ISSUES/CONTENTS

1. Early Engagement
2. Institutional Accountability

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Presenter

Maximilian Benz

Quantum Expert

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Maximilian Benz is a Who's Who Legal-recognized Quantum Expert with considerable experience in construction disputes and international arbitration.
Maximilian specializes in quantum analysis and claims across global projects, advising to clients on major infrastructure developments in the rail, road, oil & gas, aerospace and leisure industries. Maximilian also mentors' industry professionals through workshops and training. His expertise spans the Middle East and APAC.

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Different Expert Types

BUILDINGS AND STRUCTURES

- Acoustics, noise and vibration Building fabric consultancy
- Building surveying
- Change control and management
- Claims assessment, advice and preparation Claims management
- Contracts management
- Cost consultancy and quantity surveying Defects assessment and management
- Delay and disruption analysis Delay cost assessment
- Design management
- Extension of time (EOT) claim management Planning and programming
- Principal designer and CDM adviser Procurement management
- Programme management Project delivery issues
- Project management
- Project monitoring and reporting Quantum assessment
- Remediation costings
- Superintendency

DESIGN AND ENGINEERING

- Acoustics, noise and vibration
- Architectural design and planning Briefing and design management Civil engineering
- Earthworks design
- Electrical engineering
- Fire services engineering Hydraulic engineering
- Lead property consultancy Mechanical engineering
- Pile testing
- Rigging and fabric structure construction Strategic land
- Structural engineering
- Structural inspection and investigation Structural maintenance and repair
- Timber frame structural engineering Value and risk management

CLIMATE CHANGE AND RENEWABLE ENERGY

- Carbon and sustainability accounting Climate change risk and reporting
- Ecology and biodiversity Flood risk assessment
- Ground source heating Nature-based solutions
- Social and stakeholder engagement Solar power engineering

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RSK Global Experts

Different Expert Types

ENVIRONMENT AND SOCIAL

- Acoustics, noise and vibration Aerial surveys
- Air quality
- Arboriculture and vegetation management
- Archaeology and heritage
- Carbon and sustainability
- Ecology and biodiversity
- Environmental and social impact assessments
- Environmental permitting and site condition assessment
- Food risk management
- Habitat management
- Hydrology
- Land contamination risk assessment
- Landscape architecture
- Natured-based solutions
- Marine services
- Social and stakeholder engagement
- Utility installation consents support

GROUND INVESTIGATION AND REMEDIATION

- Contaminated land remediation
- Drilling services and geotechnics
- Earthworks design
- Environmental permitting and site condition assessment
- Geoenvironmental consultancy
- Geophysical and utility surveys
- Geotechnical consultancy
- Ground investigation
- Hydrogeology
- Pile testing
- Spill and pollution response
- Topographical surveys

PLANNING

- Development consent order (DCO)
- Landscape and visual impact assessment (LVIA)
- Transport planning
- Urban and rural planning support

HEALTH, SAFETY AND RISK

- Acoustics, noise and vibration
- Asbestos consultancy and contracting
- Chemical - human health and environmental risk assessment /Chemical Regulatory support
- Clerk of Works Fire safety
- Legionella
- Principal design and CDM adviser
- Radiological services
- Spill and pollution response

LABORATORY TESTING

- Geotechnical laboratory testing
- Materials laboratory testing
- Molecular diagnostics

RURAL AND AGRICULTURE

- Farm business advice
- Food and farm productivity
- Land management
- Soil, drainage and land classification
- Sustainable agricultural supply

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Early Engagement – Project Perspective

- Benefits
  - Independent Expert Engagement has been seen in a number of contracts such as FIDIC.
  - This provides opportunity for an impartial, independent position.
  - Can alleviate disputes early on.
  - Either as a dispute board function or as external consultants.
  - Provides a clear road map, that allows a project to go on, Rather than get stuck in a dispute.

- Issues
  - Independence needs to be maintained – Cannot develop claims.
  - Clients / Contractors should bring well substantiated and fair claims to the table.
  - Payment of such services.
  - Contractual engagement.
  - Depending on the above then independence needs to be considered.
  - Conflicts.

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Early Engagement – Disputes Perspective

- Benefits
  - Provides clear understanding of the expert witness process.
  - Allows understanding of time frames
  - Irons out issues that may be raised in relation to areas outside of their expertise.
  - Provides clear positions. The case / matter may be a no go…
  - Provides an independent opinion out of any engrained positions.
  - Allows a clear road map and irons out issues such as records etc.
  - If there are issues, then there is time to discuss these and resolve these i.e. other expertise required.
- Issues
  - Independence needs to be maintained – Cannot develop the clients claims for them.
  - Proper timeframes need to be allocated and maintained.
  - Commercial management of the matter needs to be consistent.
  - Could affect legal strategy depending on preliminary findings.
  - Conflicts

Institutional Accountability

- RICS
  - RICS Registered Experts.
  - This course provides guidance and knowledge to experts providing a minimum standard.
  - Standards must be maintained not adhering to standards can lead to disciplinary action.
  - This creates a understanding by clients on independence, impartiality.
  - Key Benefits include:
    - Global Recognition.
    - High Professional Standards.
    - Mandates on Independence.
    - RICS Structured Approach.
    - Confidence.
- CIArb
  - Code of ethical practice.
  - Procedural awareness.
  - Trusted by legal parties.
  - Impartial mindset.
- Others
  - TAE
  - EWI
  - SCL

Summary

- Early Engagement
  - Allows for a continuation of a Project.
  - Provides who independent position to those who may be entrenched.
  - Provides clarity early in the matter.
  - Can give a good insight of a position early on that may not be known.
  - Reduces exposure to risk.

- Institutional Accountability
  - Allows for high professional standards to be adhered to.
  - Provides a peace of mind.
  - Gives clients an understanding that their experts have been through rigorous training.

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TENTATIVE AGENDA

SESSION B *(held concurrently with Session A)*

Disputes arising from Construction Projects in Vietnam – Identifying Key challenges and Proposing solutions to Enhance the Quality of Dispute Resolution

1.30 – 5.00 PM, 10 April 2025 (Thu)
Lotus B Meeting Room, Rex Hotel Saigon

DURATION (PM)	CONTENT
1.30 – 1.45	**Opening remark**
	Session B1 – Dispute Resolutions in Construction & Infrastructure Projects
1.45 – 2.15	**Specific legal issues regarding Construction and Infrastructure Investment Projects & the selection of dispute resolution method** **Mr. Nguyen Bac Thuy** – *Head of Economics and Construction Contracts – Department of Construction Economics – Ministry of Construction*
2.15 – 3.15	**Legal Risk Management & Dispute Prevention in Construction & Infrastructure Projects** **Mr. Vu Van Vinh** – *Director of the Project Management Board for Metro Line 2 – Management Authority for Urban Railways Ho Chi Minh City (MAUR)*
	Challenges in Resolving Disputes Arising from Construction and Infrastructure Projects **Mr. Nguyen Thanh Long** – *Chairman cum Managing Director at VinaQS, FIDIC Certified Trainer / Contract Manager*
	Key Considerations in Resolving Disputes in Construction and Infrastructure Projects **Ms. Thang Nguyen** – *Managing Partner at VN Counsel*
	Moderator: Mr. Nguyen Ngoc Minh – *Partner at Dzungsrt & Associates*
3.15 – 3.30	**Tea-break**
	Session B2 – Resolving dispute arising from Commercial Real Estates Projects
3.30 – 5.00	**Disputes arising from Commercial Real Estate Projects: Emerging Trends and Key Legal Considerations** **Mr. Nguyen Cong Phu** – *Former Judge – Deputy Chief Justice of Economic Court, Ho Chi Minh City People's Court, Partner at LNT & Partners*
	Real Estate market and the Possible Disputes arising from Real Estate in Vietnam **Ms. Vu Thi Hang** – *Senior Counsel cum Deputy Director of the Secretariat, Member of Science Council, Vietnam International Arbitration Centre (VIAC)*
	Key Considerations in Resolving Disputes Arising from Commercial Real Estate Projects – A Lawyer's Perspective **Ms. Vu Thuy Diem** – *Senior Legal Counsel (Regional), Shift Energy Japan & Shire Oak International (Singapore) Pte Ltd*
	Mr. Truong Thai Son – *Deputy General Secretary of Vietnam Real Estate Association*
	Moderator: Mr. Duong Quoc Thanh – *Managing Partner at ALV Lawyers*
5.00	**End of Section B**

DISPUTE RESOLUTION IN CONSTRUCTION AND INFRASTRUCTURE PROJECTS – SPECIFIC LEGAL FEATURES AND CONSIDERATIONS IN SELECTING DISPUTE RESOLUTION METHODS

NGUYEN BAC THUY
Head of Economics and Construction Contracts – Department of Construction Economics – investment management – Ministry of Construction, VIAC Listed Arbitrator, Member of Executive Committee of Society of Construction Law – Viet Nam (SCLVN)

CONTENTS

1. CURRENT CONTEXT OF INFRASTRUCTURE CONSTRUCTION

> Vietnam is witnessing the era of national aspiration. Strategic breakthroughs are therefore crucial, as the Resolution of the 13th National Congress of the Communist Party of Vietnam has pointed out:

i.

Comprehensively and synchronously improve institutional framework for development. Innovate national governance towards modernity and effective competitiveness. Prioritize the synchronous and high-quality completion and effective implementation of the legal system, mechanisms, and policies to create a favorable and fair investment and business environment for all economic sectors, promoting innovation and creativity; mobilize, manage, and effectively utilize all resources for development, especially land, finance, and public-private partnerships; promote reasonable and effective decentralization and delegation of authority, while strengthening inspection, supervision, and power control through the legal system.

ii.

Develop human resources, especially high-quality human resources; prioritize the development of human resources for leadership, management, and key sectors based on enhancing and achieving a strong, comprehensive, and fundamental transformation in the quality of education and training, linked with mechanisms for recruitment, utilization, and talent incentives, promoting research, transfer, application, and robust development of science and technology, as well as innovation and creativity; encourage the aspiration for a prosperous and happy nation, promote cultural values, the strength of Vietnamese people, the spirit of solidarity, and national pride in the cause of building and defending the Fatherland.

iii.

Build a synchronous and modern infrastructure system for socio-economic purposes; prioritize key national projects in transportation and climate change adaptation; focus on developing information and telecommunications infrastructure to establish a foundation for national digital transformation, gradually advancing the digital economy and digital society.

1. CURRENT CONTEXT OF INFRASTRUCTURE CONSTRUCTION

> Infrastructure construction is one of the three strategic breakthroughs with the following characteristics:

- Consists of large-scale projects, including some being implemented in Vietnam for the first time
- Requires significant resources in terms of finance, human capital, science and technology, etc., which must be mobilized from various domestic and international sources via different methods
- The reduction of implementation time, technology transfer and mastery are of particular concern
- High demands for the integration of infrastructure system investment and development of other projects
- Is prone to corruption, wastefulness, and negative phenomena

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1. CURRENT CONTEXT OF INFRASTRUCTURE CONSTRUCTION

> This, therefore, demands new approaches, primarily through specific and special mechanisms approved by the National Assembly, such as:

- i. Resolution No. 106/2023/QH15;
- ii. Resolution No. 172/2024/QH15;
- iii. Resolution No. 187/2025/QH15;
- iv. Resolution No. 188/2025/QH15.

2. LEGAL FEATURES OF INFRASTRUCTURE CONSTRUCTION

- Specific and special mechanism for private investment capital
- Characteristics regarding planning management
- Characteristics regarding the mining of minerals in type IV, VL for common construction materials, waste disposal and certain mechanisms regarding land
- Characteristics regarding the development of science, technology, and training of human resources
- Industrial development and technology transfer
- Specific and special mechanism for project management and implementation
- Specific and special mechanism for preventing corruption, wastefulness and negative phenomena

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3. SPECIFIC AND SPECIAL MECHANISMS FOR THE MANAGEMENT AND IMPLEMENTATION OF INFRASTRUCTURE INVESTMENT PROJECTS

- Specific mechanisms regarding project management procedures
- Contractor selection
- Mechanisms for the mining of Type IV and VL minerals for common construction materials
- Specific and special mechanisms related to FEED design
- Management of investment costs
- Mechanisms for development, training, and technology transfer
- Detailed design management after Front-End Engineering Design
- Mechanisms related to planning, architecture, and land
- Mechanisms for managing TOD (Transit-Oriented Development) projects

4. CHALLENGES OF INFRASTRUCTURE CONSTRUCTION INVESTMENT PROJECTS

- New and unfamiliar approach, causing confusion during implementation
- Lack of knowledge & experience, especially with first projects
- Large-scale projects with specific and special policies, requiring thorough attention
- Diverse range of participants involved in the process
- Wide range of data, sample documents, etc., may lead to different interpretations
- Obstacles caused by poor decentralization, delegation & coordination

Potential disputes between parties

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5. DISPUTE RESOLUTION METHODS IN CASE OF DISPUTES

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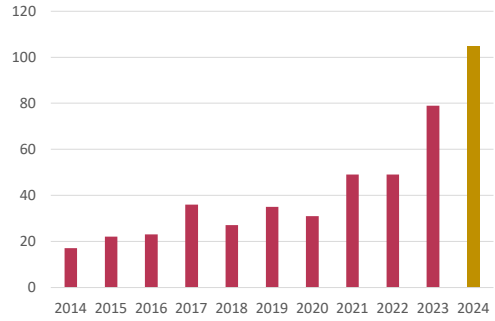
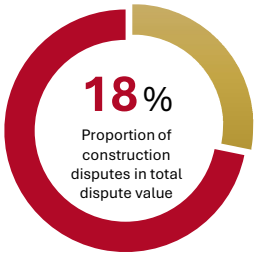
CONSTRUCTION DISPUTES AT VIAC (from 2014 to 2024)





Total value of construction disputes

~28.708 Billion VND

Average value of construction disputes

~65.54 Billion VND

Number of construction disputes at VIAC (2014 – 2024)

Value of construction dispute at VIAC (2014 – 2024)

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Thank you for your attention!

NGUYEN BAC THUY

Head of Economics and Construction Contracts – Department of Construction Economics – Ministry of Construction;
VIAC Listed Arbitrator;
Member of Executive Committee of Society of Construction Law – Viet Nam (SCLVN).

DISPUTES ARISING FROM COMMERCIAL REAL ESTATE PROJECTS: EMERGING TRENDS AND KEY LEGAL CONSIDERATIONS

NGUYEN CONG PHU
Partner at LNT & PARTNERS, Listed Arbitrator at VIAC

CONTENTS

DISPUTES ARISING FROM COMMERICAL REAL ESTATE PROJECTS

- Disputes arising from project transfer contracts;
- Disputes arising from share transfer contracts, capital contribution;
- Disputes arising from capital mobilization contracts;
- Disputes arising from construction contracts;
- Disputes arising from consulting and project management contracts;
- Disputes arising from real estate product distribution contracts
- Disputes arising from real estate sale contracts from the investor
- Disputes arising from real estate lease contracts from the investor
- Disputes arising from real estate consulting and brokerage contracts
- Disputes arising from real estate business cooperation contracts

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DISPUTES ARISING FROM COMMERICAL REAL ESTATE PROJECTS

Increasing number of disputes related to real estate projects	Increasing diversity in types of dispute and disputing parties	Increasing popularity of arbitration as a method of dispute resolution
More diverse and complex matters in dispute	More frequent requests for invalidation of contract and arbitration agreement	Issues of arbitrability and jurisdiction of Arbitral Tribunals being raised more often

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KEY LEGAL CONSIDERATIONS

Validity of the arbitration agreement	Arbitrability and jurisdiction of the Arbitral Tribunal	Validity of the contract	Requests for Relief
Burden of proof and Provision of evidence by disputing parties	Amendment and supplement to the Request for Arbitration, the Counterclaim	Principle of "waiver of right to object" in arbitration	

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1
Separability of the arbitration agreement (Article 19 of LCA)

2
The form of the arbitration agreement must comply with Article 16 of LCA

3
Inapplicability of the principle of "estoppel by silence" to the arbitration agreement

4
Notes on arbitration agreements in legal relationships involving foreign elements

ARBITRABILITY AND THE ARBITRAL TRIBUNAL

1

Difference between arbitrability and the Arbitral Tribunal's jurisdiction

2

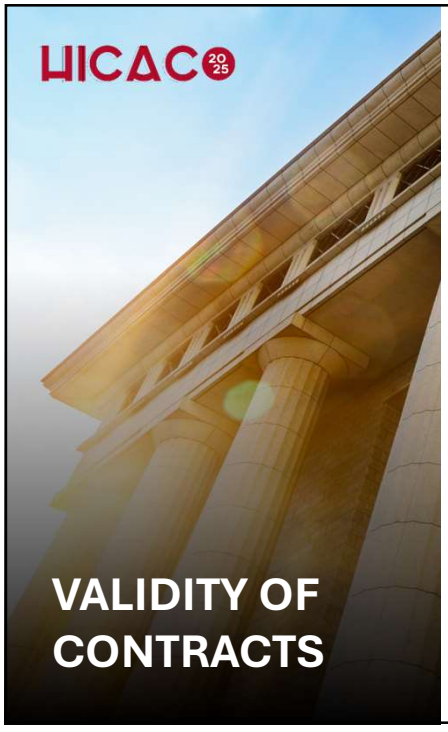
Order of determination: Validity of the arbitration agreement → Arbitrability → Arbitral Tribunal's jurisdiction

3

Objection to the validity of the arbitration agreement → Objection of Arbitral Tribunal's jurisdiction

4

Differentiate between challenges of the jurisdiction of and the arbitrability

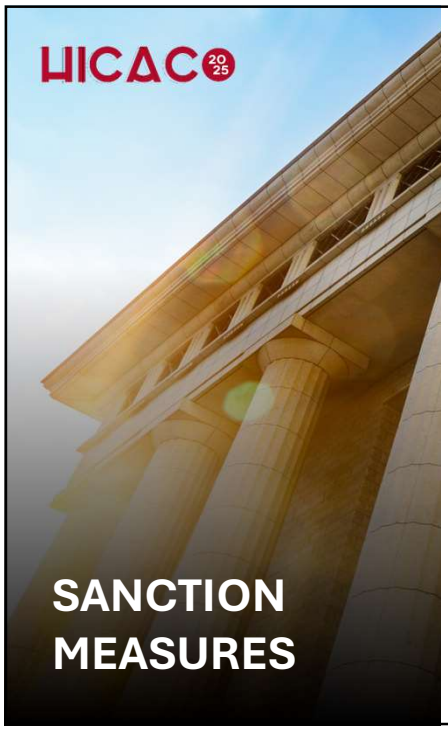


VALIDITY OF CONTRACTS

The burden of proof of the **party referring to the contract**

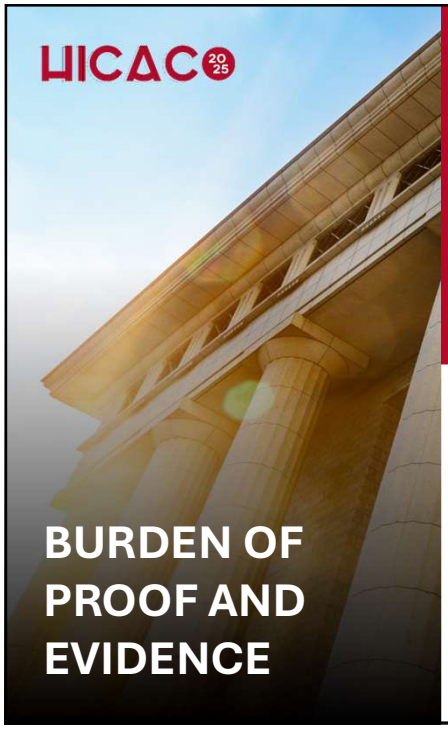
Invalid **commercial real estate contracts**

The burden of proof of **the party challenging the validity of the contract**



SANCTION MEASURES

- Applicable laws in dispute relations: Civil Code, Commercial Law, Law on Real Estate Business, etc.
- Notes on filing complaints regarding contractual breaches before making requests for reliefs
- Special attention to requets in Construction contract and Real estate sale contract disputes:
  - *Termination/cancellation of construction contracts*
  - *Penalty for breaches in construction contracts and its relation to compensation request*
  - *Liquidated damages clauses in construction contracts (LD Clause)*
  - *Interest rates for late payments due to breach of payment obligations in construction contracts*
  - *Penalty levels for breaches in Real estate sale contracts*
  - *The relationship between penalties and compensation for losses in Real estate sale contract disputes*



BURDEN OF PROOF AND EVIDENCE

Right and obligation of the parties to collect and provide evidence (Clause 1, Article 46(1) of LCA

Right to request for Court's judicial support to collect evidence (Article 46(5) of LCA)

Right to invite witnesses to attend hearings (Article 55(2) of LCA)

Right to request the Arbitral Tribunal to summon witnesses to attend hearings (Article 46 of LCA)

Time limit for amending and supplementing the Statement of Claim and Counterclaim

Scope of amendments and supplements to the Statement of Claim and Counterclaim

Practices of assessment of signs of abuse of the right to amend or supplement the Statement of Claim and Counterclaim

- Waiver of right to object under Article 13 of the Law on Commercial Arbitration 2010
- Waiver of right to object under Article 38(4) of the VIAC Rules of Arbitration
- Comparison of the "waiver of right to object" provisions in the Law on Commercial Arbitration and VIAC Rules:
  - *VIAC Rules add cases involving violations of VIAC Rules*
  - *VIAC Rules remove the condition of "the party continues to participate in arbitral proceedings"*
  - *VIAC Rules add provisions on objection time limit when no specific timeline is provided*

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Thank you for your attention!

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REAL ESTATE SECTOR & DISPUTES: SOME OBSERVATIONS

VU THI HANG (Ms.)
Senior Counsel and Deputy Director of the Secretariat, Member of the Scientific Council,
Vietnam International Arbitration Centre (VIAC)

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1. OBSERVATIONS OF THE VIETNAM REAL ESTATE MARKET FROM 2023 TO 2025

Market overview

- Vietnam entered the "**new normal**" post-pandemic;
- Real estate market began recovering but faced numerous challenges;
- Major downturn **in 2023**: widespread investor losses and price cuts up to 40%. *(according to data from the Vietnam Association of Realtors – VARS)*

Ho Chi Minh City

- **Supply**: Reached 7,600 units, stable quarter-on-quarter but down 5% year-on-year;
- **Prices**: Return to 2020 levels, down 36% quarter-on-quarter and 45% year-on-year.

Hanoi

- **Supply**: Reached 11,911 units, reducing 40% quarter-on-quarter and 41% year-on-year;
- **Prices**: Reached 58 million VND/m2, increasing 7% quarter-on-quarter and 12% year-on-year.

Average primary price: increased **for 20 consecutive quarters** *(Savill's Report)*

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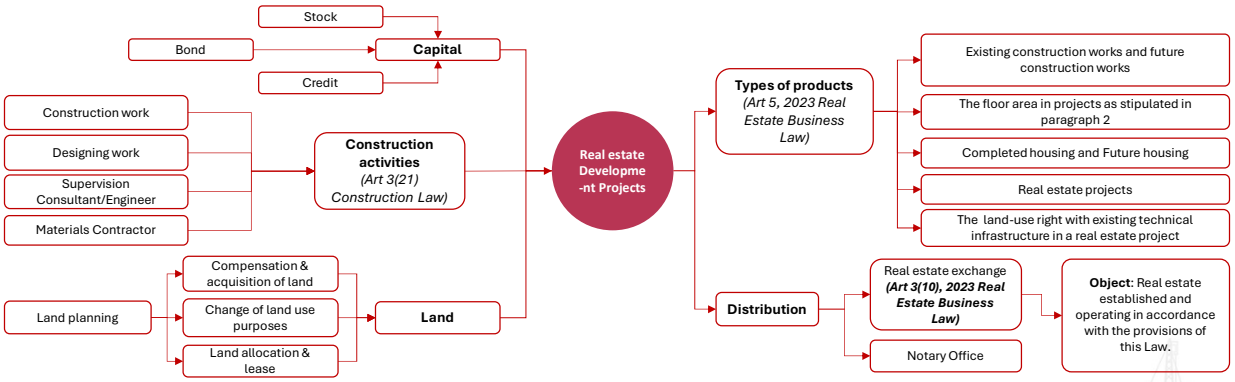
1. OBSERVATIONS OF THE VIETNAM REAL ESTATE MARKET FROM 2023 TO 2025

Graph illustrating the input and output sources of the real estate market



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1. OBSERVATIONS OF THE VIETNAM REAL ESTATE MARKET FROM 2023 TO 2025

Legal & Policy Response

Article 1 – Decree No. 08/2023/ND-CP: *"For bonds offered in the domestic market, in case the issuing enterprise cannot fully and timely pay the principal and interest of the bonds in Vietnamese Dong according to the issuance plan announced to investors as prescribed in Article 17 of this Decree, the enterprise may negotiate with the bond owner to pay the principal and interest of the due bonds with other assets according to the following principles".*

- allowing that:
  - **Corporate bond debt** to be paid with other assets, including real estate.
  - **Debt deferral for up to 2 years** upon mutual agreement between issuers and bondholders.

Raises legal questions whether **future-formed real estate** (off-plan properties) can be used for debt settlement?

- **Article 24 of the 2023 Law on Real Estate Business** and further clarified in Government guidance

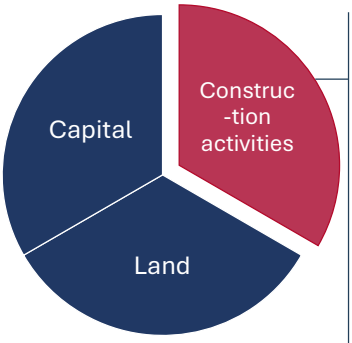
1. OBSERVATIONS OF THE VIETNAM REAL ESTATE MARKET FROM 2023 TO 2025

Legal challenges & Emerging Legal Disputes

RESOLVING UNPAID DEBTS

- The context of the construction industry faces increasing difficulties.
- Contractors will lose the source to pay contractors or construction enterprises.
- There are investment projects that are not synchronised.
- The businesses have to spend its own money to protect and guarantee.
- Disputes arising related to construction contract settlement, contract cancellation or force majeure cases have become more and more common.

2. CONSTRUCTION DISPUTES IN THE FIELD OF REAL ESTATE



- Except for large-scale state projects with the participation of foreign contractors, most real estate projects in Vietnam only have the **participation of Vietnamese and FDI contractors**.
- The applicable law will mostly be **Vietnamese law**.
- Arbitration mostly initiated by Contractors *(payment & handover, cancellation, force majeur)*

- Most disputes involved **individuals** *(investors/buyers)*
- Mass-arbitration.
- Cancellation, void

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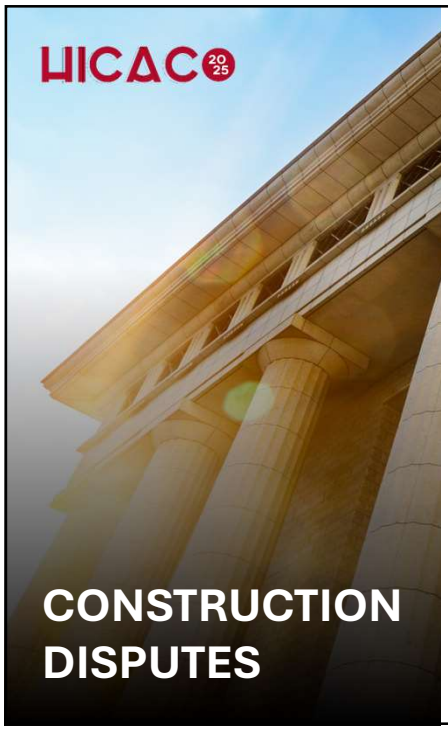
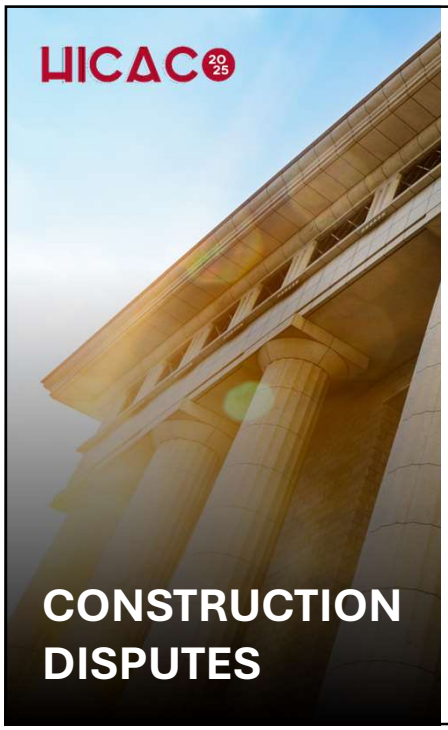


Disputes often arise from conflicts during the execution of work, including construction, supervision and handover of works. These disputes may stem from disagreements about quality, progress, or cost of work.

Common types of dispute:

Unsatisfactory construction quality	The completed construction does not meet the agreed technical or aesthetic standards.
Slow progress	The contractor does not complete the work on time, causing financial and time losses for the investor.
Unapproved additional costs	The contractor requests additional payment for additional work that has not been approved by the investor.



Disputes between owner and contractors are one of the most complex types of disputes in the construction industry. This is the result of disagreements on many aspects during the project implementation process, from the contract signing to the construction and acceptance stages.

Common types of dispute:

Unclarity in the contract	The contract lacks details or does not clearly define the responsibilities and rights of both parties, leading to misunderstandings and disputes during the implementation process.
Construction quality does not meet requirements	The investor is not satisfied with the quality of the project performed by the contractor, requests corrections but the contractor does not accept.
Late handover and payment	The contractor completes the project but is not paid in full or on time by the investor, or vice versa, the investor refuses to hand over the project due to errors discovered during construction.

*Often arise from ambiguity in contract terms or from failure of parties to comply with commitments

Common types of dispute:
- Adjustments
- Extension of time for completion
- Differences between contract and statutory provisions
- Provisions on nominated contractors/subcontractors
- Acceptance and handover
- Role of engineers/consultants
- Provisions on form of subcontract

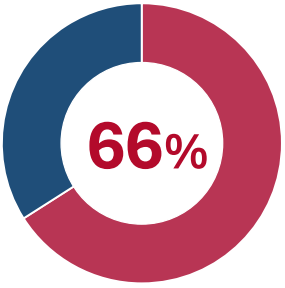
Characteristics:
- Unpredictable complexity, depending on the investor's intentions and actual developments;
- Although diverse, it mainly focuses on progress, quality, price, and warranty;
- Lack of understanding of the settlement process to ensure rights.

Dispute Resolution Procedures:

Decree No. 37 on Construction Contracts, however, it's quite complicated for the parties to apply.

2. CONSTRUCTION DISPUTES IN THE FIELD OF REAL ESTATE

Dispute related to the settlement of construction contracts:



At VIAC, violations related to settlement work currently account for 66% of disputes in the field of construction contracts.

Source: VIAC Statistics

The reasons for this kind of dispute include:

- Agreements and payment terms are unclear, not anticipating difficulties and arising problems during contract implementation (market value fluctuates)
- Subcontractors are dependent on payment progress according to the contract between the Main Contractor and the Investor
- Payment documents are not complete and complete (Minutes of acceptance of volume, minutes of acceptance of payment, value-added invoices, etc.)
- The Investor causes difficulties, delays payment or is no longer able to pay

2. CONSTRUCTION DISPUTES IN THE FIELD OF REAL ESTATE

Output-side disputes arising in real estate projects

Real estate products

Real estate distribution channels

- Disputes in this area commonly involve **an individual party**, often in the form of a chain (mass arbitration).
- Regarding these disputes, the law applicable to resolve the disputes will be **Vietnamese law** because disputes related to real estate will fall under the exclusive jurisdiction of the Vietnamese Court and the Vietnamese Arbitration Bodies, which means Vietnamese law and Vietnamese agencies resolve the dispute *(Article 470, Clause 1(a) of the 2015 Civil Procedure Code; Article 236.5 of the 2024 Land Law)*.

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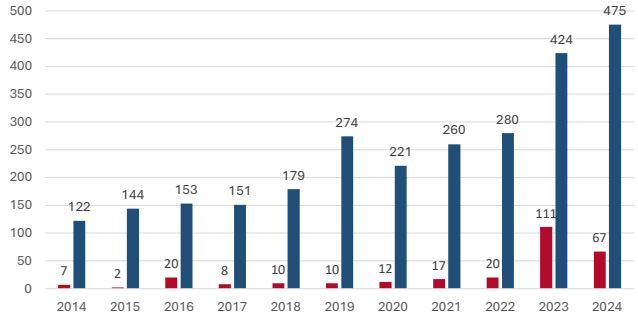
3. STATISTICS REGARDING THE REAL ESTATE DISPUTES

Statistics related to the Number of Real estate disputes & Construction disputes in the field of real estate



Number of Real estate disputes & Construction disputes in the field of real estate at VIAC (2014 – 2024)

Real Estate Disputes in 2023

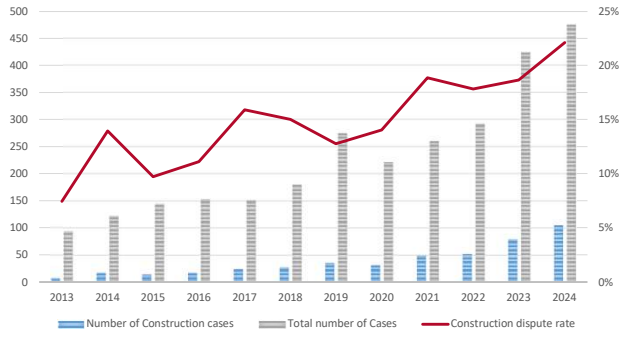
- In 2023, the number of disputes reached 424 cases, an increase of 46.2% compared to 2022, making a record increase compared to the number of disputes resolved at VIAC in previous years.
- Of the 424 disputes, "111 were related to real estate, accounting for 26%." (VIAC)

Disputes by Sector in 2023

- Disputes arising from real estate business activities accounted for 26.2%, having the highest number of disputes received at VIAC.
- "Trading in Goods" (21.2%) and "Construction" (18.6%) had significant dispute rates.

3. STATISTICS REGARDING THE REAL ESTATE DISPUTES

Statistics Construction-related disputes at VIAC



~20% Total New Cases by year

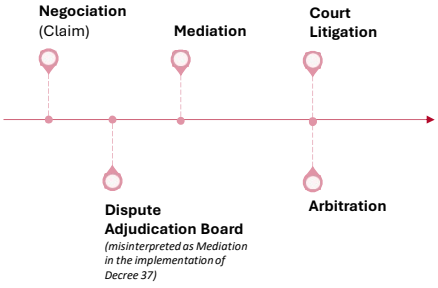
~90% Total Disputed Amount by year

At VIAC, approximately **20% of new cases each year** are cases arising from construction activities (including disputes related to infrastructure and investment) and account for more than 90% of the total annual dispute value.

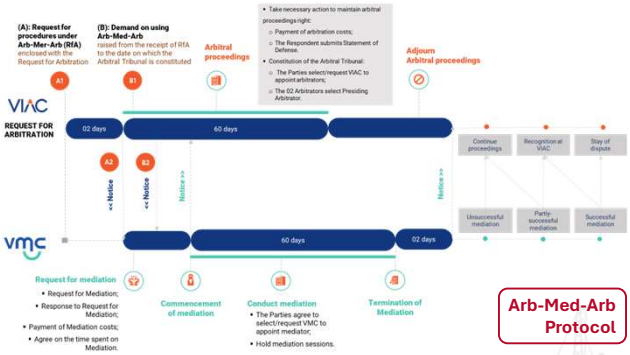
Source: VIAC Statistics

4. DISPUTE RESOLUTION METHOD AVAILABLE IN VIETNAM

Multi-tiered Dispute Resolution Clause



Combination of Arbitration & Mediation
(Med-Arb, Arb-Med-Arb)



Arb-Med-Arb Protocol

5. INTRODUCTION OF VIAC'S ECASE PLATFORM

VIAC ONLINE CASE MANAGEMENT PLATFORM

- **VIAC eCase** aims to be the all-in-one platform for e-filing and online case management for better experience of arbitration users by streamlining processes and improving time & cost-efficiency.
- **VIAC eCase** is developed and operated by Vietnam International Arbitration Centre (VIAC), embodying VIAC's great efforts to adapt to the Vietnam's transition to digital economy by vitalizing the enforcement of e-contracts – one among the cores of a digital economy.
- **VIAC eCase** is a VIAC's step toward reducing its carbon footprint and adopting practices of paperless arbitration.

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5. INTRODUCTION OF VIAC'S ECASE PLATFORM

Key features

- **E-filing and Secure Document Management**: Upload and schedule your submissions; securely store, organize and download all arbitral documents with ease.
- **Case Monitoring**: Monitor your arbitration cases in real-time by tracking key events (meetings, hearings or deadlines), being notified instantly of new procedural steps throughout the arbitration process, which are all integrated into your working calendar.
- **Notifications and Alerts**: Receive notifications within the platform and via email to stay informed of important updates and developments in your arbitration cases. These include reminders for upcoming deadlines, meetings or hearings, and new document uploaded or changes to meeting/hearing dates.
- **Bilingual Support**: Platform interface can be switched between English and Vietnamese to accommodate parties and arbitrators in both domestic and international arbitration proceedings.

Why VIAC eCase?

- **Accessibility**: Easily access the Platform across different time zones with basic internet services and smart devices.
- **Security and Data Protection**: Securely log in to your account using two-factor authentication; provide standardized security for documents and information, adhering to domestic and international standards, including EU General Data Protection Regulation.
- **Transparency**: Uphold transparency by maintaining clear and comprehensive records of all activities.
- **Cost and Time efficiency**: Optimize administrative process and overheads through e-filing and online case management; and minimize expenses for travel, accommodation, other expenses associated with in-person meetings and hearings.

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Thank you for your attention!

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TENTATIVE AGENDA

SESSION C *(held concurrently with Session D)*

Dispute Avoidance for Construction Projects

8.30 am – 12.00 pm, 11 April 2025 (Fri)
Lotus A Meeting Room, Rex Hotel Saigon

Duration (AM)	Content
	Session C1 – FIDIC contract & Dispute Resolutions
8.30 – 10.00	**ADR under FIDIC forms of contract in the context of Vietnamese Law** **Dr. Nguyen Thi Hoa** – *Lecturer at Ho Chi Minh City University of Law*
	Localizing FIDIC Dispute Resolution Mechanism in China's Construction Contracts: Experiences and Challenges **Ms. Liu Siyu** – *Partner at DeHeng Law Offices*
	Multi-tier Dispute Resolution under FIDIC Contracts **Ms. Asel El Housan** – *Founder and the Managing Director of AEH UK Limited*
	Bridging the Gap in Construction Dispute Procedures Between FIDIC Standard Contracts and Vietnamese Law **Mr. Vu Le Bang** – *Partner & HCMC Office Co-Representative at Branch of Nishimura & Asahi (Vietnam) Law Firm in Ho Chi Minh City*
	Panel Discussion **Moderator: Dr. Nguyen Thi Hoa** – *Lecturer at Ho Chi Minh City University of Law*
10.00 – 10.30	**Tea-break**
	Session C2 – Lesson Learned from Dispute Board (DB) Applications
10.30 – 12.00 PM	**Evaluating the Efficacy of DAB and DAAB as Dispute Resolution in infrastructure projects in India: Practical Implementation or Mere Stepping Step before Arbitration?** **Mr. Ajit Kumar Mishra** – *Executive Director, Dedicated Freight Corridor Corporation of India Limited*
	Avoiding construction disputes in Thailand **Mr. Chamnan Pichedpan** – *Advisor at Construction Lawyers Society and member of Thai Dispute Board institute as well as Construction Arbitration Centre (Asia-Pacific)*
	Bridging Conflicts: The Role of Dispute Boards in Indonesia's Legal System **Mr. Kurniadhi Widjojo** – *Civil Engineer, Lecturer, Mediator and Fellow of the Institute of Dispute Board for Construction*
	Panel Discussion **Moderator: Ms. Tong Thi Thu Thao** – *FIDIC Certified Contract Manager*
12.00 PM	**End of Section C**

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES UNDER FIDIC FORMS OF CONTRACT IN CONTEXT OF VIETNAMESE LAW

Dr. Nguyen Thi Hoa[1]

Introduction. FIDIC is the abbreviation of the French term (Fédération Internationale des Ingénieurs Conseils - International Federation of Consulting Engineers). FIDIC originated from the meeting that decided to establish it took place in Ghent, Belgium in 1913 with the support and participation of three initial members, the associations of consulting engineers from Belgium, France and Switzerland.[2] In 1914, FIDIC issued its first charter. In the following years, FIDIC did not really develop because it was affected by the First and Second World Wars. Since 1950, FIDIC has received additional members from Australia, Canada, South America and the United States, marking the development of this organization.[3] To date, FIDIC has had the participation of consulting engineer associations from about 93 countries and territories including Vietnam.[4] Therefore, the FIDIC forms of contract have an excellent opportunity to be applied in countries around the world. Furthemore, apart from the support of professional organizations that are members of FIDIC, FIDIC also receives support from other international organizations such as the World Bank and multinational development banks through promoting the application of FIDIC forms of contract at international level.[5]

In Vietnam, the support for the application of the FIDIC forms of contract is also reflected in the provisions of law. Specifically, paraphraphe 3 of Article 54 of Decree No. 37/2015/ND-CP dated April 22, 2015 of the Vietnamese Government providing in detail construction contracts states that "*organizations and individuals are encouraged to apply the set of contract conditions of the International Federation of Consulting*

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[1] Lecturer at International Law Faculty- Ho Chi Minh City University of Law and member of the Executive Committee of Society of Construction Law of Viet Nam.

[2] Nguyen Thi Hoa, "Procédures de règlement des litiges en matière de construction appliquant les contrats-types FIDIC", PhD thesis defended at Panthéon-Assas University Paris 2, in December 2018, p. 39.

[3] FIDIC official website:https://fidic.org/history, accessed February 25, 2025.

[4] Information published by FIDIC on the page: https://fidic.org/membership/membership_associations, accessed February 25, 2025.

[5] https://fidic.org/history, accessed February 25, 2025.

Engineers (FIDIC), standard forms of construction contracts in establishing and implementing construction contracts. When applying standard forms of construction contracts, the parties must adjust the contract content to comply with the provisions of Vietnamese law." In fact, recently, in December 2024, the author of the present writing conducted a survey on the application of the FIDIC contract model in Vietnam for 20 experts in which there is a question "Have you ever worked with the FIDIC forms of contract?" and received 100% of the answers saying that they had worked with the FIDIC contract forms. The above practice shows that research on the FIDIC forms of contract in general and the dispute resolution mechanism in particular according to the FIDIC forms of contract in the context of Vietnamese law become useful.

1. ADR mechanisms under FIDIC forms of contract

Since its establishment, FIDIC has issued many contract forms. However, the most famous and first form is the Red Book with the full name *of Conditions of Contract for Works of Civil Engineering Construction* which was issued in 1957 and then amended many times such as in 1987, 1999 and 2017.[6] In Vietnam, when conducting a research project on the application of FIDIC forms of contract in Vietnam, the author of the present writing also conducted a survey of 20 experts with the question "Which FIDIC forms of contract have you worked with?" and 18 answers mentioned Red Book - accounted for 90% of the respondents. This shows the popularity of the Red Book application in Vietnam. Thus, in the present writing, the author will use Red Book as an example for analysis.

Regarding Alternative Dispute Resolution (ADR) mechanism, there can be various interpretations, but in the present writing, the term of ADR is to refer to procedures to resolve disputes outside of court.[7] For those ADRs, from the FIDIC first model issued in 1957 and then revised in 1987, both version of Red Book were built by giving the authority to resolve disputes to engineers. Specifically, Article 67.1 of the 1987 Red Book stipulates that "*If a dispute of any kind arises between the Employer and the Contractor in connection with, or arising out of, the Contractor or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certification or valuation of the*

[6] Ellis Backer, Anthony Lavers, and Rebecca Major, "Introduction to FIDIC suite of contracts",https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition/article/introduction-the-fidic-suite-of-contracts#footnote-141, accessed March 1, 2025.

[7] Nguyen Thi Hoa and Tran Hoang Tu Linh, "Alternative Dispute Resolution and the Application of the Multitiered Dipsute Resolution Clause in the International Construction Secteur", Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, DOI: 10.1061/(ASCE)LA.1943-4170.0000589.

Engineer, the matter in dispute shall, in the first place, be referred to in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made regarding this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor shall state that it is made regarding this Clause." In the case that the engineer makes a decision but the parties are not satisfied and the dispute cannot be resolved amicably, the parties may submit the dispute to arbitration according to Article 67.2 as follows:

"*Any dispute in respect of which*:

a. the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

b. amicable settlement has not been reached within the period stated in Sub-Clause 67.2

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute".

However, after a long time of application, the role of the engineer in resolving disputes in the 1987 Red Book has been criticized a lot. This is because according to the FIDIC forms of contract, the engineer is an entity appointed and paid by only one party - the employer - to supervise the contractor's completion of the work. Therefore, the engineer is considered to have an interest related to the dispute between the contractor and the employer of the contract applying the Red Book.[8] Therefore, in 1999, FIDIC amended the Red Book by no longer assigning the engineer the authority to resolve disputes and this role was replaced by a new entity - Dispute Adjudication Board (DAB). Specifically, Clause 20.4 of the 1999 Red Book stipulates that "*If dispute (of any kind whatsoever) arises between the parties in connection with or arising out of the contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the engineer, either party may refer the dispute in writing to the DAB for its decision, with copies to the other party and the*

[8] MICHAEL R LUDLOW, "Engineer's role under FIDIC standard conditions of contract", Int'l. Bus. Law., vol. 20, no. 10, November 1992, p. 525-533.

Engineer." Although the Red Book was later amended in 2017, the authority of the DAB to resolve disputes remains.

2. Application of FIDIC dispute resolution procedures in Vietnam

2.1. DAB mechanism

Regarding the procedure for resolving construction contract disputes by the Dispute Resolution Board mechanism, Vietnamese law has provisions in paragraph 2, Article 45 of Decree No. 37/2015/ND-CP as follows:

"In case the parties to a contract have an agreement to resolve a contract dispute through mediation conducted by an agency, organization or one or several expert individuals (generally referred to as the dispute resolution board), then the settlement of the dispute through the dispute resolution board is regulated as follows:

a) The dispute resolution board may be stated in the contract at the time of signing or established after a dispute occurred. The number of members of the dispute resolution board shall be agreed by the parties. Members of the dispute resolution board must be people with professional qualifications appropriate to the content of the dispute, experience in resolving contract disputes and understanding legal regulations related to construction contracts.

b) Within twenty-eight (28) days from the date of receipt of the mediation conclusion of the dispute settlement board, if a party does not agree with the conclusion, it has the right to object and these disputes will be resolved by Arbitration or Court in accordance with the provisions of law; if after the above time limit, no party objects to the mediation conclusion, it is considered that the parties have agreed with the conclusion. Thus, the parties have to comply with the mediation conclusion.

c) The cost for the dispute resolution board is included in the construction contract price and is equally divided for each party to the contract, unless otherwise agreed by the parties."

Comparing the above provisions with Article 20 of the Red Book 2017, there are the following positive points:

Firstly, Vietnamese law allows the parties to choose a DAB mechanism. However, the Decree does not have specific regulations on how to establish a DAB. Therefore, when agreeing to choose a DAB to resolve their dispute, the parties must establish by themselves a clearer DAB's member selection process to have a basis for implementation, such as the number of DAB and when the DAB will be established.

Thus, when applying the FIDIC forms of contract, these shortcomings can be overcome because, for exemple, according to the provisions of Article 20.1 of the Red Book 1999, there are clear regulations on how to select DAB members. Precisely, FIDIC recommends that the parties should establish a list of entities that can be selected as members of the DAB in the contract documents right from the time of signing the contract. Then, if a dispute arises, the parties only need to select members from this list. In addition, Article 21.2 of the Red Book 2017 also foresees the situation where a party is unwilling to select a DAB member to delay dispute resolution by recommending that the parties to the contract anticipate at the time of signing the contract an entity with the authority in the place of that of unwilling party to appoint a DAB members.

Second, regarding the conditions for becoming a member of the DAB, Vietnamese law requires that the DAB's members need to be "a person with professional qualifications appropriate to the content of the dispute, experience in resolving contract disputes and understanding legal regulations related to construction contracts". This is different from the requirements of FIDIC. Specifically, for exemple, in Article 3.3. The General Conditions of Dispute Board set out the knowledge criteria for DAB members as follows: *"a) have experience and/or understanding of the type of works to be carried out under the contract; b) have experience in interpreting construction contract documents and engineering contract documents; c) be proficient in the language for communication specified in the contract documents (or the language agreed upon by the parties and the DAAB)*". In terms of this stipulation, the Red Book does not require that DAB members need to have knowledge of law relevant to the construction contract. This raises the question of whether, if the contract is governed by Vietnamese law, a foreign expert can be selected as a member of the DAB and, if so, what criteria are used to confirm that this entity has "knowledge of the provisions of Vietnamese law" chosen by the parties for the contract? For the author of the present writing, if the DAB has only one member and the law applicable to the contract is Vietnamese law, the requirement that the sole member "need to have knowledge of Vietnamese law" is unavoidable because Article 45 of Decree 37/2015/ND-CP uses the terms "need to…". In other words, at least one member of the DAB must have knowledge of Vietnamese law. Nevertheless, there is a wide margin for the parties to choose members of the DAB under Vietnamese law, this is because the law does not require experts to be law university graduates. As a result, the parties can rely on many other factors to prove the "knowledge of law" of the DAB's members, such as training certificates in law… With this understanding, the Vietnam Construction Law

Association has also published a list of experts in many different aspects of construction contracts which can be an effective channel for the parties to the contract to choose DAB's members. In addition to the above factors, there is also a view that, because Decree 37/2015/ND-CP uses the term "mediation" - (In case the parties to a contract have an agreement to resolve a contractual dispute through mediation conducted by an agency, organization or one or several expert individuals (generally referred to as the dispute settlement board)) - DAB can be considered a mediation procedure so that the parties can choose members from the list of mediators of the mediation centers.[9] For the author of the present writing, the parties have many ways to choose DAB members from the list of professional associations or mediation centers if they wish. However, the parties should note that the selection of members from a mediation center should not amount to the fact that the DAB procedure has to be conducted according to the mediation rules of that center. This is because the DAB, for example, according to the FIDIC Red Book, has its own rules and the parties can modify and supplement it to make this entity operate in accordance with the reality of each project. Therefore, the parties still have the right to choose the operating mechanism of DAB according to the provisions of the FIDIC forms of contract. This is also because even if the parties consider DAB as a "mediation" in the sense of Vietnamese law, Decree No. 22/2017/ND-CP of the Government dated February 24, 2017 on commercial mediation at Article 14, paragraph 1 stipulates that "the parties have the right to choose the mediation rules of a commercial mediation organization to conduct mediation or agree by themselves on the order and procedures for mediation".

Finally, regarding the enforcement of the DAB's dispute resolution decision, Decree 37/2015/ND-CP clearly stipulates that if no party objects the DAB's final conclusion after 28 days from the date of its receipt, the parties lose the right to object and are obliged to execute that conclusion. Furthermore, recently, when being asked by the Ho Chi Minh City Urban Railway Management Board, the Ministry of Construction issued a written response in the text No. 2234/BXD-KTXD dated May 22, 2024 that "the contract signed between the parties applies the FIDIC forms of contract, with provisions on the dispute resolution through DAB, however, there is no specific information on the time of signing the contract. In case the contract is within the scope of regulation of Decree No. 37/2015/ND-CP*: - DAB procedure is stipulated in Article*

[9] Nguyen Minh Hang and Tran Thi Viet Trinh, "Plan to establish a Dispute Resolution Board in construction contracts by conciliation method",file:///Users/macbook/Downloads/FWPS-Vol-2-No-2-Paper-7.pdf, accessed March 30, 2025.

45 of Decree No.37/2015/ND-CP is a model of resolving contract disputes on a voluntary basis agreed and committed by the parties to the contract. Therefore, when agreeing on the decision of DAB, the parties must be obliged to comply with the contents of the signed contract…". According to this understanding of the Vietnamese Ministry of Construction, it can be comprehensible that if the parties do not object to the decision of the Dispute Resolution Board within the time limit specified in the contract, the opportunity for the recalcitrant party to refuse enforcement of DAB's decision is very difficult. This provision of Vietnam also exists in Article 21.4.4 of the Red Book 2017. Therefore, it can be seen that there are many advantages of Vietnamese law for the parties to choose the mechanism for resolving construction contract disputes through the DAB. Moreover, if the parties consider lack of fairness and justice in the solution given by the DAB, FIDIC also provides for another dispute resolution mechanism by way of arbitration. In addition, for the decision of the DAB that is considered final and binding on the parties, FIDIC also foresees for a mechanism to enforce this decision by an arbitration which will be analyzed below.

2.2. Dispute resolution by way of arbitration

Regarding the dispute resolution procedure by way of arbitration according to the FIDIC forms of contract, one of the special features of this procedure lies in the arbitrator's authority over the results of the dispute resolution procedure by the DAB. Notably, Article 20.7 of the Red Book 1999 and Article 21.7 of the Reb Book 2017 provide that the parties to the contract can refer disputes related to non-compliance with the dispute resolution decision of DAB to arbitration as follows:

Red Book 1999 – Article 20.7	**Red Book 2017 – Article 21.7**
In the event that: (a) Neither party has given notice of dissatisfaction within the period stated in subclause 20.4 [Obtaining dispute adjudication board decision],	In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration]) shall have the power,

(b) the DAB's related decision (if any) has become final and binding, and

(c) a party fails to comply with this decision,

then the other party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under sub-clause 20.6 [arbitration], sub-clause 20.4 [obtaining dispute adjudication board decision] and sub-clause 20.5 [amiable settlement shall not apply to this reference.

by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.

In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief.

Comparing the two provisions mentioned above, the notable difference between the 2017 Book and the 1999 Book is that the first one defines the arbitral tribunal's power more clearly at the point that the latter is able to issue an "award" when resolving a dispute related to a party's failure to comply with the DAB's dispute resolution results that have been considered final and binding – because it was not objected by any party within the time limit for objections provided in the contract -. Thus, the question arises whether or not, according to Vietnamese law, the parties can agree on the situations in which the arbitral tribunal can resolve the dispute related to the enforcement of the DAB's decision – especially for a decision that has been considered final and binding – by an award or by a decision? This question arises because currently, Vietnamese law still does not have specific provisions on a mechanism to help ensure the enforcement of the DAB's decision.

Regarding this issue, paragraph 10, Article 3 of the Law on Commercial Arbitration of Vietnam of 2010 provides that "an arbitral award is a decision of the arbitral tribunal resolving the entire content of the dispute and terminating the arbitration proceedings". Therefore, if the parties only bring a dispute related to the enforcement of the DAB decision, the arbitral tribunal's decision answering whether or not a party must enforce the DAB decision can be considered a final award to be

recognized and enforced in Vietnam. This mechanism can be an effective way to help the dispute resolution procedure through DAB gain more trust from relevant entities. Furthermore, in the context of international arbitration, the arbitration procedural rules of some international arbitration centers such as SIAC and ICC have streamlined and expedited procedures for simple cases with low value, allowing the arbitral tribunal to issue an award within 3[10] or 6 months[11]. If the above mentioned mechanisms are combined at the same time, they will help these contractual mechanisms of dipsute resolution to be more effective in practice and gain the trust of relevant entities.

Conclusion. In general, Vietnamese law encourages parties to resolve commercial business disputes through procedures established by the parties themselves. This is also reflected in paragraph 8, Article 146 of the Construction Law, which states that *"the principles and procedures for resolving construction contract disputes are as follows: a) Respecting contractual agreements and commitments during contract performance, ensuring equality and cooperation; b) Contracting parties are responsible for negotiating to resolve disputes themselves. In case the contracting parties cannot negotiate, the dispute shall be resolved through mediation, commercial arbitration or court in accordance with the provisions of law*". Therefore, the dispute resolution mechanisms under the FIDIC forms of contract are also supported by Vietnamese law. The remaining issue is the good faith of the parties in complying with those dispute resolution mechanisms. This article hopes to provide some suggestions for practitioners to refer to when applying dispute resolution mechanisms stipulated in FIDIC contract models so that these mechanisms can bring more advantages in Vietnam.

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ALTERNATIVE DISPUTE RESOLUTION PROCEDURES UNDER FIDIC FORMS OF CONTRACT IN CONTEXT OF VIETNAMESE LAW

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Lecturer at International Law faculty of Ho Chi Minh City University of Law
Member of the Executive Committee of SCLVN

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2. Application of FIDIC's ADRs in context of Vietnamese law

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1. ADR mechanisms under FIDIC forms of contract

When is there a dispute?

Art. 1.1.29: "Dispute " means any situation where:
(a) one Party makes a claim against the other Party (which may be a Claim, as defined in these Conditions, or a matter to be determined by the Engineer under these Conditions, or otherwise);
(b) the other Party (or the Engineer under Sub-Clause 3.7.2 [Engineer's Determination]) rejects the claim in whole or in part; and
(c) the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination] or otherwise),

provided however that a failure by the other Party (or the Engineer) to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.

1. ADR mechanisms under FIDIC forms of contract

When is there a dispute?

Claim → Response to claim/Silence from Engineer → Dissatisfaction from either party → **DISPUTE**

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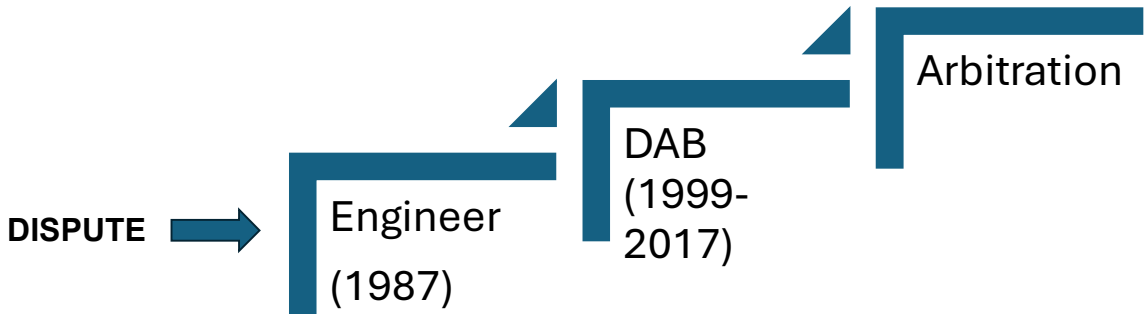
1. ADR mechanisms under FIDIC forms of contract



2. Application of FIDIC dispute resolution procedures in Vietnam

2.1. Dispute Adjudication Board (DAB)

Para. 2, Art. 45, Decree No. 37/2015/ND-CP

"In case the parties to a contract have an agreement to resolve a contract dispute through mediation conducted by an agency, organization or one or several expert individuals (generally referred to as the dispute resolution board), then the settlement of the dispute through the dispute resolution board is regulated as follows:

Qualification of DAB's members

*a) The dispute resolution board may be stated in the contract **at the time of signing or established after a dispute** occurred. The number of members of the dispute resolution board shall be agreed by the parties. **Members** of the dispute resolution board must be people with professional qualifications appropriate to the content of the dispute, experience in resolving contract disputes and **understanding legal regulations related to construction contracts**.*

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2. Application of FIDIC dispute resolution procedures in Vietnam

2.1. Dispute Adjudication Board (DAB)

Para. 2, Art. 45, Decree No. 37/2015/ND-CP

The proceedings of dispute resolution by DAB

b) Within twenty-eight (28) days from the date of receipt of the mediation conclusion of the dispute settlement board, if a party does not agree with the conclusion, it has the right to object and these disputes will be resolved by Arbitration or Court in accordance with the provisions of law; if after the above time limit, no party objects to the mediation conclusion, it is considered that the parties have agreed with the conclusion. Thus, the parties have to comply with the mediation conclusion.

Payment for DAB

c) The cost for the dispute resolution board is included in the construction contract price and is equally divided for each party to the contract, unless otherwise agreed by the parties."

2.1. Dispute Adjudication Board (DAB)

❖Qualification of DAB's members

Para. 2, Art. 45, Decree No. 37/2015/ND-CP

*a) **Members** of the dispute resolution board must be people ….**understanding legal regulations related to construction contracts**.*

Red Book 2017

"a) have experience and/or understanding of the type of works to be carried out under the contract;
b) have experience in interpreting construction contract documents and engineering contract documents;
c) be proficient in the language for communication specified in the contract documents (or the language agreed upon by the parties and the DAAB)".

2.1. Dispute Adjudication Board (DAB)

❖Qualification of DAB's members

Para. 2, Art. 45, Decree No. 37/2015/ND-CP

a) ***Members*** *of t*… *board must be people …* ***understanding legal regulations on contracts****.*

Red Book 2017

… of the type of works to be … construction contract documents and engineering contract documents … tion specified in the … n by the parties and …

What is evidence for **"understanding legal regulations related to construction contracts" if the law applicable to contract is Vietnamese law?**

Graduate from a University of Law of Viet Nam?

Certificate for participation in Vietnamese construction and contract law class?

2.1. Dispute Adjudication Board (DAB)

❖Qualification of DAB's members

Para. 2, Art. 45, Decree No. 37/2015/ND-CP

a) ***Members*** *of the dispute resolution board must be people …* ***legal regulations on contracts****.*

Red Book 2017

Where can practitioners find experts for DAB's members?

SCL VN's list of experts?

Expert list of arbitration centers?

Expert list of mediation centers?

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2.2. Arbitration under FIDIC form of contract

❖ Arbitration

Red Book 2017
Article 21.7

In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, ***refer the failure itself directly to arbitration*** *under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference.* ***The arbitral tribunal*** *(constituted under Sub-Clause 21.6 [Arbitration]) shall* ***have the power****, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure* ***or an award*** *(as may be appropriate under applicable law or otherwise),* ***the enforcement of that decision****.*

2.2. Arbitration under FIDIC form of contract

❖ Arbitration

Red Book 2017
Article 21.7

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Can the arbitral tribunal give an award to enforce a DAB's decision under Vietnamese law?

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2.2. Arbitration under FIDIC form of contract

❖Vietnamese Law on Commercial Arbitration 2010

Para. 10, Art. 3

"an arbitral award is a decision of the arbitral tribunal resolving the entire content of the dispute and terminating the arbitration proceedings".

Without interim or partial award

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Thank you for your attention!

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LOCALIZING FIDIC DISPUTE RESOLUTION MECHANISM IN CHINA'S CONSTRUCTION CONTRACTS: EXPERIENCES AND CHALLENGES

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Partner, DeHeng Law Offices

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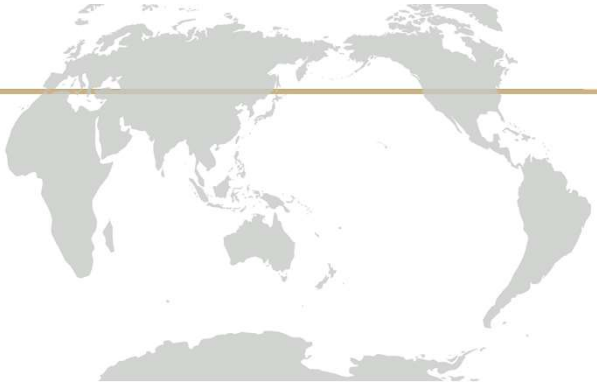

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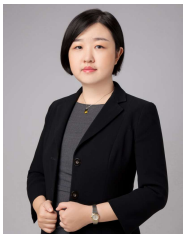

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- Arbitrator, Shanghai International Economic and Trade Arbitration Commission (SHIAC)
- Member and expert of the legal service committee of China Construction Industry Association
- Mediator in Construction sector, Mediation Platform of the People 's Supreme Court of China
- Team member for drafting of the model Design-Build/EPC Contract issued by the Ministry of Housing and Urban-Rural Development of the P.R. China (MHURD)

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Overview of Construction Disputes in China in Year 2024

Dispute Resolution Institution	Total Cases Accepted	Construction Cases Accepted	Percentage of Construction Cases
Chinese Courts (Data from Wolters Kluwer)	2695070	86594	3.21%
China International Economic and Trade Arbitration Commission (CIETAC)	6013	1735	28.85%
Beijing Arbitration Commission (BAC)	14060	6841	48.66%
Shanghai Arbitration Commission (SHAC)	8047	3378	41.98%
Shanghai International Economic and Trade Arbitration Commission (SHIAC)	4028	1289	32.00%
Shenzhen Court of International Arbitration (SCIA)	14518	956	6.58%

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FIDIC and China's Model Construction Contracts

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Type	FIDIC	China's Model Construction Contracts
Construction Contract	Conditions of Contract for Construction (Red Book)	Standard Construction Bidding Documents Issued by National Development and Reform Commission, etc.
	Short Form of Contract (Green Book)	Model Contract for Construction Works Issued by Ministry of Housing and Urban-Rural Development
DB/EPC Contract	Conditions of Contract for Plant & Design Build (Yellow Book)	Standard Design-Build Bidding Documents Issued by National Development and Reform Commission, etc.
	Conditions of Contract for EPC-Turnkey Projects (Silver Book)	Model DB/EPC Contract for Construction Projects Issued by Ministry of Housing and Urban-Rural Development
Contract for Specific Project	MDB Harmonised Edition of the Conditions of Contract for Construction (Pink Book)	Standard Construction Bidding Documents for Highway Projects Issued by Ministry of Transportation
	Conditions of Contract for Underground Works (Emerald Book)	Standard Construction Bidding Documents for Railway Projects Issued by National Railway Administration
	Form of Contract for Dredging and Reclamation Works (Blue Book)	Conditions of Contract for Civil Works of Water Resources and Hydropower Projects Issued by the Ministry of Water Resources
	.....	.....

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Comparison of Multi-Tier Dispute Resolution Mechanism under FIDIC and China's Model Construction Contracts

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(2017 FIDIC and 2020 China's MCC)		Engineer's Determination	DAB's Decision	Amicable Settlement	Mediation	Arbitration/ Litigation
Dispute Resolution Body	FIDIC	Engineer/Employer's Representative	DAB/DAAB	N/A	N/A	ICC
	China's MCC	Supervision Engineer	DAB	N/A	Mediator	Arbitration / Local Court
Optional or not	FIDIC	Not optional	Not optional	Optional	N/A	Not optional
	China's MCC	Not optional	Not optional if parties agree to use DAB	Optional	Optional	Not optional
Outcome is Binding or not	FIDIC	Binding unless challenged	Binding	Binding	N/A	Binding
	China's MCC	Binding unless challenged	Binding upon signing by the parties	Binding	Binding	Binding
Outcome is Final or not	FIDIC	Final unless challenged	Final unless challenged	Subject to judicial review	N/A	Final
	China's MCC	Subject to judicial review	Subject to judicial review	Subject to judicial review	Subject to judicial confirmation	Final

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Engage in Each Tier: Optional or Mandatory?

Duty to Engage in Each Tier

- **Model Contracts are not Mandatory in Nature**
  - Model contracts are subject to revisions by the parties
- **Optional Tiers**
  - Most tiers under model contracts are optional in general

Consequences of Refusal to Engage

- **Proceeding Unilaterally**
  - The other party may proceed unilaterally with this tier and the following tiers
- **Breach of Contract**
  - The other party may claim for damages, however it is not commonly seen in practice

Impact on Right to Arbitrate/Litigate

- **Substantive Impact**
  - Rarely leads to inadmissibility or dismissal
- **Procedural Impact**
  - Proceedings may be delayed at acceptance stage, or due to objections raised by the other party

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Outcome of Each Tier: Binding or Final ?

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Challenge – sending Notice of Dissatisfaction (NOD) within time limit

- Consequence 1 – Outcome will not become binding/final
- Consequence 2 – Proceed with the following tiers
- Consequence 3 – Distinguish the accepted and unacceptable outcome (partial challenge)

Binding – means the parties shall comply with the outcome

- Failure of sending NOD within time limit will render the outcome as binding on the parties
- Failure to comply with the outcome may constitute breach of contract and lead to damage claim even unilateral termination

Final – means arbitrators / judges have no power to open up the outcome

- Outcome cannot be enforced unless converted through Trial / Payment Order / Judicial Confirmation for Mediation Agreements, which involves different level of substantive review
- Outcome may be regarded as factual evidence/ expert witness statement

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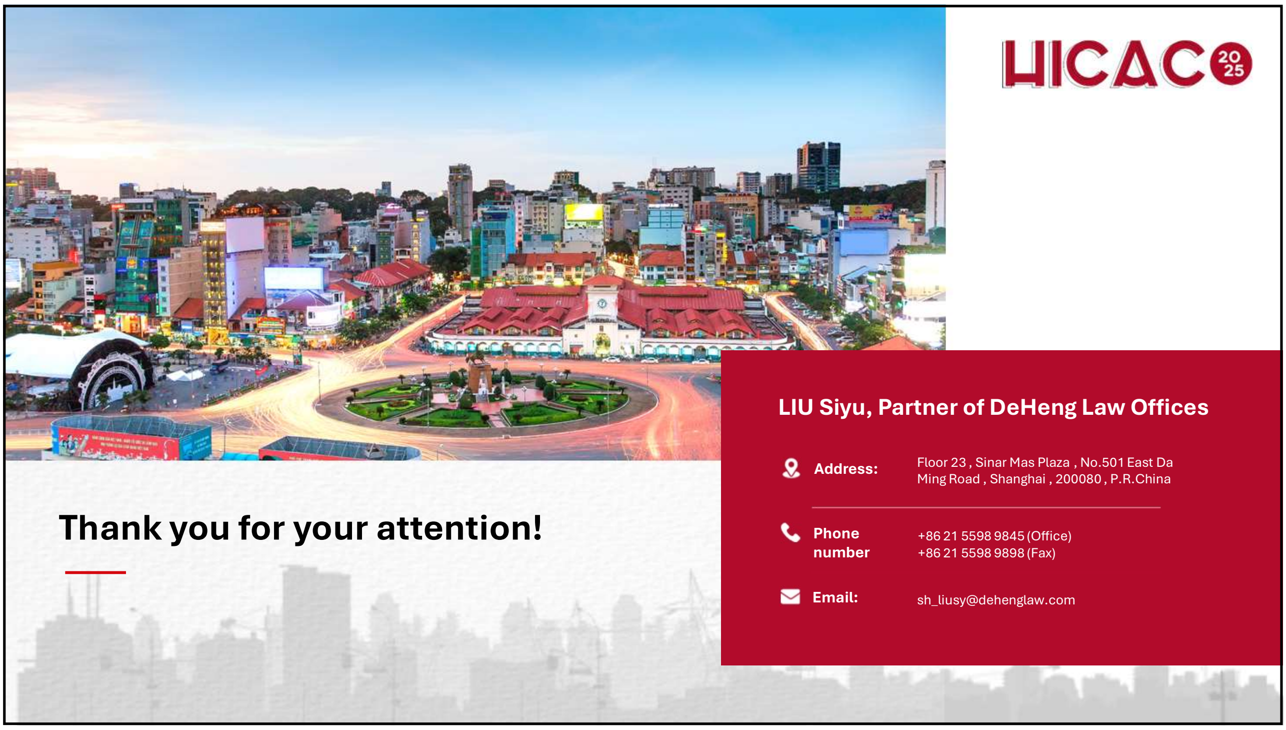
THE FIDIC GOLDEN PRINCIPLES
FIRST EDITION 2019
Government
Abitration Commisions
Industry Associations
Such period as may be agreed otherwise
Cost Sharing
Payment Order
Judicial Confirmation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Multi-tier Dispute Resolution under FIDIC Contracts

Asel El Housan
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Waivable and Non-Waivable Time Bars

- Non-Waivable Time Bar nullifies the claiming party's claim, while the Engineer has the power to waive the time bar in the waivable time bar.
- FIDIC 2017 changed the Notice and particular claim submission time bar and added a non-waivable time bar for the referral of the Dispute to the DAAB.

FIDIC 1999 Process

S/C	Action	Time Bar
2.5	Employer's Claim	ASAP
20.1	Contractor's Notice* Particular** Engineer's Response	28 Days 42 Days 42 Days
3.5	Agreement or Determination	No Time Bar
20.4	DAB Referral DAB Decision*	No Time Bar 84 Days
20.4	NOD*	28 Days
20.5	Amicable Settlement	56 Days
20.6	Arbitration	No Time Bar
20.8	No DAAB in place	No Time Bar
20.7	Enforcement of F&B DAB Decision	No Time Bar

* Non-Waivable Time Bar
** Waivable Time Bar

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FIDIC 2017 Process

S/C	Action	Time Bar
20.2.1 20.2.2 20.2.4 20.2.4	Notice of Claim** Engineer's Reply to delayed NOC Fully Detailed Claim** Engineer's Reply to delayed FDC (Partially)	28 Days 14 Days 84 Days 14 Days
3.7.3 3.7.3	Agreement Determination	42 Days 42 Days
3.7.5	NOD*	28 Days
21.4.1 21.4.3	DAB Referral* DAB Decision*	42 Days 84 Days
21.4.4	NOD*	28 Days
21.5	Amicable Settlement	28 Days
21.6	Arbitration	No Time Bar
21.8	No DAAB in place	No Time Bar
21.7	Enforcement of F&B DAB Decision	No Time Bar

* Non-Waivable Time Bar
** Waivable Time Bar

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Bridging the Gaps in Construction Dispute Claim Procedures under FIDIC Model Contracts and Vietnamese Law

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Abstract

Construction contract disputes are among the most complex and challenging disputes to resolve in Vietnam and globally. The dispute settlement process can be time-consuming and place a significant financial burden on both parties. At the same time, it may strain the cooperation between the contractor and the employer in fulfilling the construction contract. The concept of claim procedures has been created to help handle conflicts between parties during the performance, aiming to prevent them from escalating into challenging lawsuits and to reduce significant disputes between parties while enhancing the efficiency of the construction contracts.

The claim procedures are the pre-litigation stage outlined in both Vietnamese law – as a domestic framework – and the FIDIC model contracts – as an internationally recognized standard. Understanding and effectively implementing these claim procedures helps minimize conflicts and protects the parties' rights and interests. However, there are some gaps between the claim procedures and their consequences under the FIDIC model contracts and the law of Vietnam, which may practically result in significant obstacles to the application and the effect of claims.

This paper will examine the regulations for claim procedures for construction disputes under FIDIC model contracts and Vietnamese law from theoretical and practical perspectives. It will identify the challenges inherent in applying these frameworks and provide

recommendations to enhance the effectiveness of claims and dispute resolution processes in construction disputes to create a foundation for legal harmonization of the claim procedures and improve their efficiency.

Keywords: Claim procedures, FIDIC model contracts, Vietnamese construction contracts, construction dispute resolution.

1. Introduction

1.1 The Concept of Claim

During the execution of a construction project, disputes and unresolved issues may arise among stakeholders, potentially affecting the project timeline, costs, and the rights and interests of the involved parties.[1] These challenges highlight the critical need for an effective mechanism to allocate risks[2] and swiftly resolve conflicts to ensure the smooth progression of the project. The concept of "Claim" in construction contracts was established to provide a structured approach for addressing disputes, mitigating financial risks, and maintaining project efficiency, recognizing this necessity.

The concept of "Claim" was first introduced in the initial edition of the FIDIC Red Book, published in 1957, and has since been maintained and further developed in subsequent editions.[3] In Vietnam, this concept was first briefly mentioned under Circular 02/2005/TT-BXD as one of the clauses of an EPC contract without any stipulation or guidance.[4] Much

[1] Chaitanya Khekale, Nityanand Futane: Management of Claims and Disputes in Construction Industry. International Journal of Science and Research 4(5), 849 (2015), https://www.ijsr.net/archive/v4i5/SUB154227.pdf, last accessed 2025/03/02.

[2] Ellis Baker, Richard Hill, and Ibaad Hakim: Allocation of Risk in Construction Contracts. The Guide to Construction Arbitration. 5th edn. Global Arbitration Review (2023), https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition/article/allocation-of-risk-in-construction-contracts, last accessed 2025/03/02;

Axel-Volkmar Jaeger and Götz-Sebastian Hök: FIDIC - A Guide for Practitioners. p. 358. Springer (2010).

[3] Christopher R. Seppälä: Contractor's Claims Under the FIDIC Contracts for Major Works. Construction Law Journal, 5 (2005), https://www.fidic.org/sites/default/files/13%20seppala_cont_claims_2005.pdf, last accessed 2025/03/02.

[4] Construction Contract Form No. 03/BXD/HDXD of Decree 02/2005/TT-BXD.

later, it was formally incorporated and stipulated under Decree 48/2010/ND-CP.[5] It has continued to be regulated under the currently applicable Decree 37/2015/ND-CP,[6] reflecting the country's effort to align with international construction contract standards.

Under the current FIDIC Red Book, specifically the 2017 edition, which serves as the primary subject of discussion in this paper, a Claim is explicitly defined as a request or assertion by one party against the other based on an entitlement arising from the contract's terms and conditions or applicable laws.[7] In contrast, under Vietnamese law, a Claim is understood as the right of one party to redress against the other for a breach or incomplete performance of contractual obligations.[8]

Thus, it is commonly understood that a Claim in a construction contract typically refers to the Contractor's entitlement of additional payment, an extension of time (EOT), as reflected in former versions of FIDIC.[9] However, the Claim, nowadays, is not solely limited to the Contractor's entitlement. However, the Employer and any party to the contract can initiate any entitlement or relief they believe they should grant.[10]

1.2 The role of Claim procedures in construction disputes

Construction projects are inherently long-term processes, frequently involving competing interests related to project timelines, huge budgets, and enormous impacts on parties' benefits. Notwithstanding diligent planning and execution, disputes may arise at any stage of the construction progress concerning matters such as alleged breaches of contract or unforeseeable

[5] Article 43 of Decree 48/2010/ND-CP.

[6] Article 44 of Decree 37/2015/ND-CP.

[7] Sub-Clause 1.1.6, FIDIC 2017 Red Book.

[8] Article 44.1 of Decree 37/2015/ND-CP.

9 Sub-clause 20.1, FIDIC 1999 Red Book, Sub-clause 20.1, FIDIC 2017 Red Book.

[10] Sub-Clause 20.1, FIDIC 2017 Red Book.

physical conditions. When such conflicts cannot be resolved through negotiation or alternative dispute resolution mechanisms, litigation becomes necessary, presenting a distinct set of challenges for all involved parties.

Hence, the existence of the Claim process is to early resolve conflicts at the time when they arise since, at that time, every record, document, witness, and related person is still on the site,[11] and prevent challenging lawsuits later where the facts and evidence cannot be fully collected.

Indeed, the Claims procedures allow parties to promptly address contractual inadequacies before they escalate into disputes while protecting their rights through timely communication and documentation. By setting time bars, document requirements, and required procedures, a problem during the construction process shall be raised promptly and contemporarily via a Notice of Claim (NoC) for the parties' investigation. It ensures all parties are aware of potential issues and can take proactive measures. Notably, the Engineer can timely give instructions to the Contractor to solve problems, or the Employer has enough time to prepare finance for the additional work. Then, parties can continuously monitor, update, and assess the outcome of claims to account for changing circumstances or new information arising during the project. If the issue could be entirely settled through the Claim procedures, prolonged disputes would undoubtedly be avoided at the end of the construction project.[12]

Furthermore, establishing a Claim procedure mechanism facilitates a streamlined resolution of conflicts before a dispute, as parties can amicably settle these conflicts per the provisions stipulated under the FIDIC framework. It also strengthens the execution of a contract by fostering efficient cooperation between the parties, thereby promoting completion and avoiding unnecessary lawsuits that may impact the project’s progress and success.

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[11] Axel-Volkmar Jaeger and Götz-Sebastian Hök: FIDIC - A Guide for Practitioners. p. 361. Springer (2010).

[12] *Id, p. 359.*

In summary, the Claim procedures may bring advantages to parties to the construction contracts, as follows: (i) Every party shall be aware of arisen issues early which may affect the project and benefits of parties; (ii) Parties have opportunities to keep contemporary records to resolve issues and avoid future arguments; (iii) Parties can negotiate and apply alternative measures to reduce the effects of the issues and prevent disputes, and (iv) Parties can remain their goodwill cooperation for the completion of the project. The nature and purpose of Claim procedures are established in FIDIC; however, Vietnamese law has yet to provide a unified approach to their definition and application. As mentioned in the following sections, this matter has led to difficulty in practice.

1.3 The Prevalence of Claim Procedure in Vietnam

Claims and disputes are common in large-scale infrastructure projects. Most recently, as seen in Ho Chi Minh City's Metro Line No. 1 (Bến Thành – Suối Tiên), on June 6, 2024, the Ho Chi Minh City Urban Railway Management Board (MAUR) reported that the project has accumulated around 300 contractor claims worth more than VND 30 trillion—70% of the total project investment.[13] These include three significant disputes: two with the Sumitomo-Cienco 6 joint venture and one with Hitachi.[14] In particular, Hitachi has filed a claim at the Vietnam International Arbitration Centre (VIAC), seeking JPY 23.72 billion (approximately VND 4 trillion) for additional costs due to project delays.[15]

Similarly, in 2021, in the Nhon Station - Hanoi Railway Station Urban Railway Line project, in which the Hyundai - Ghella Contractor Joint Venture (HGU) was the contractor, HGU made three claims for additional costs against the Hanoi Management Railway Board

[13] VnEconomy, https://vneconomy.vn/bi-nha-thau-nhat-ban-kien-4-000-ty-dong-chu-dau-tu-metro-so-1-tp-hcm-len-tieng.htm, last accessed 2025/03/02.

[14] *Id.*

[15] *Id.*

(MRB) with a total value of around USD 114.7 million (equivalent to VND 2.5 trillion).[16] HGU exercised its right to claim under the FIDIC Contract in order to address the additional costs associated with MRB.[17] The settlement was prolonged due to the lack of documents provided by MRB and Systra, the project engineer.[18]

Both projects above applied FIDIC contracts, while construction projects are funded by public investment capital, which Decree 37/2015/ND-CP governs.[19] Indeed, the number of claims in both cases is enormous, namely 300 claims with the value of VND 30 trillion for Ho Chi Minh City's Metro Line No. 1[20] and three claims valued at USD 114.7 million for Nhon Station of Ha Noi metro.[21] If the progress to settle claims had been resolved to the mutual satisfaction and agreement of all parties, the dispute volume would have been reduced, and subsequently, the dispute resolution would have become less complex.

2. Legal framework for Claim procedures

2.1 Claim procedures under FIDIC

(a) Overview of Claim procedures

Under FIDIC Red Book, a Claim may raised by both Employer and Contractor when

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[16] Tuoi Tre Online, https://tuoitre.vn/bi-doi-boi-thuong-114-7-trieu-usd-chu-dau-tu-metro-nhon-ga-ha-noi-noi-gi-20211105174632634.htm, last accessed 2025/03/02.

[17] *Id*.

[18] *Id*.

[19] VnEconomy, https://vneconomy.vn/bi-nha-thau-nhat-ban-kien-4-000-ty-dong-chu-dau-tu-metro-so-1-tp-hcm-len-tieng.htm, last accessed 2025/03/02; Tuoi Tre Online, https://tuoitre.vn/bi-doi-boi-thuong-114-7-trieu-usd-chu-dau-tu-metro-nhon-ga-ha-noi-noi-gi-20211105174632634.htm, last accessed 2025/03/02.

[20] VnEconomy, https://vneconomy.vn/bi-nha-thau-nhat-ban-kien-4-000-ty-dong-chu-dau-tu-metro-so-1-tp-hcm-len-tieng.htm, last accessed 2025/03/02.

[21] Tuoi Tre Online, https://tuoitre.vn/bi-doi-boi-thuong-114-7-trieu-usd-chu-dau-tu-metro-nhon-ga-ha-noi-noi-gi-20211105174632634.htm, last accessed 2025/03/02.

the following circumstances happen: (i) The Employer is entitled to any additional payment or Defects Notification Period (DNP) from the Contractor; (ii) The Contractor is entitled to any additional payment or EOT from the Employer; (iii) Either party consider entitling any other entitlements or relief against the other. Concerning grounds (i) and (ii), which pertain to Claims for extensions of time and additional payment, adherence to the Claim procedures stipulated by the FIDIC contract is mandatory. Failure to comply with these procedures shall result in the discharge of all liability related to the event or circumstance giving rise to the Claim. Consequently, non-compliance may lead to waiving the claiming party's entitlement to such Claims.[22]

Conversely, the third ground encompasses Claims falling outside the purview of grounds (i) and (ii), wherein a party asserts entitlement to compensation, time extensions, or other forms of relief. As articulated in FIDIC guidance, this category may extend to encompass diverse forms of contractual relief associated with work execution, including the interpretation of contractual provisions for clarification, the rectification of ambiguities or discrepancies within contract documentation to ensure internal consistency or the issuance of a formal declaration affirming a party's contractual rights.[23] Notably, FIDIC does not prescribe a specific procedural framework for Claims under this third ground. Instead, it stipulates that such Claims are to be resolved by Sub-Clause 3.7 (Agreement and Determination), thereby vesting the Engineer with the authority to adjudicate their validity.[24]

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[22] Philip Norman, Leanie van de Merwe: Claims Resolution Procedures in Construction Contracts, In: GAR's The Guide to Construction Arbitration (Global Arbitration Review), Lexology (2019). https://www.lexology.com/library/detail.aspx?g=9da7a998-dc09-4b61-9387-080f6ee156fb, last accessed 2025/03/02.

[23] Guidance for the Preparation of Particular Conditions - FIDIC 2017 Red Book, p. 46.

[24] Sub-Clause 20.1, FIDIC 2017 Red Book.

(b) Notification and submission of claim

Initially, when a Contractor or Employer identifies a Claim in a construction project contract, they must submit a NoC to the Engineer as soon as practicable but no later than 28 days from the date that the claiming Party is aware or should have become aware of the event or circumstance giving rise to the Claim.[25] This timely submission is crucial, as failure to comply results in, on the one hand, the forfeiture of the right to any additional payment, an adjustment of the Contract Price, an extension of Time for Completion (for the Contractor as the claiming Party), or an extension of the DNP (for the Employer as the claiming Party).[26] On the other hand, the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

In cases where the NoC is served late, the Engineer must, within 14 days upon the reception of the NoC, issue a notice regarding the late submissions and determine its validity.[27] The NoC shall be deemed valid if the Engineer fails to respond within this time limit. The Engineer will then review any disagreement from the non-claiming party as part of the agreement or determination process for the claim. If NoC is confirmed valid, the claiming Party must submit a Fully Detailed Claim within the required time limit. When the NoC is deemed invalid by the Engineer, the claiming Party still has the right to justify the late submission within the Fully Detailed Claim.[28]

After serving the valid NoC, under Sub-Clause 20.2.4 of the FIDIC 2017 Red Book, a Fully Detailed Claim must be submitted to the Engineer within 84 days from when the party became aware or should have become aware of the event or circumstance giving rise to the

[25] Sub-Clause 20.2.1, FIDIC 2017 Red Book.

[26] *Id.*

[27] Sub-Clause 20.2.2, FIDIC 2017 Red Book.

[28] *Id.*

Claim, or another period approved by the Engineer.[29] If the claim arises from a continuing event, the 84-day period begins from when the event started to affect the project.[30] The Fully Detailed Claim must include a clear description of the event or circumstance giving rise to the claim, the legal and contractual basis for the claim (with references to relevant contractual provisions), a detailed calculation of any EOT and/or additional payment sought, contemporary records substantiating the Claim, and any other supporting documents necessary to justify the entitlement.[31] If the claiming Party has not submitted this Fully Detailed Claim within the agreed period, the NoC will lapse and become invalid.[32]

During the process of carrying out claim procedures, contemporary records are required to substantiate the claim. The FIDIC 2017 Red Book defines contemporary records as prepared or generated simultaneously, or immediately after, the event or circumstance giving rise to the Claim. The Engineer may monitor the Contractor's contemporary records, instruct the Contractor to maintain additional contemporary records and be responsible for overseeing compliance with these requirements. However, this does not imply that the Engineer accepts the accuracy or completeness of the Contractor's contemporary records.[33]

After the claiming Party submits a NoC and a Fully Detailed Claim, the Engineer plays a central role in reviewing, accepting, and determining the Claim by Sub-Clause 3.7 of the FIDIC 2017 Red Book.[34] Once the Fully Detailed Claim is submitted, the Engineer will check whether the Claim meets the procedural requirements under Clause 20, including whether the

[29] Sub-Clause 20.2.4, FIDIC 2017 Red Book.

[30] Sub-Clause 20.2.6, FIDIC 2017 Red Book.

[31] Sub-Clause 20.2.4, FIDIC 2017 Red Book.

[32] *Id.*

[33] Sub-Clause 20.2.3, FIDIC 2017 Red Book.

[34] Sub-Clause 20.2.5, FIDIC 2017 Red Book.

Claim was submitted within the prescribed time limits and whether it is supported by sufficient documentation, such as contemporary records, legal justifications, and calculations of entitlement. Then, the Engineer will respond with approval or disapproval and provide detailed comments within the required time limit by the agreement procedure and the Engineer's determination under Sub-Clause 3.7.[35] Once having approved or disapproved a claim, the Engineer shall attempt to reach an amicable settlement with parties or issue a determination.

Any agreement or determination then shall be binding on both Parties.[36] A party dissatisfied with the Engineer's determination must formally register their disagreement through a Notice of Dissatisfaction. This notification served upon both the other party and the Engineer, serves as the critical first step in initiating the dispute resolution process, as outlined within the contract.[37]

A detailed description and procedural flowchart of the FIDIC 2017 claims process are illustrated in the Appendix I for further reference.

(c) Key changes in FIDIC Claim procedures and their implications

Compared to the prevalent 1999 FIDIC edition, the FIDIC 2017 introduces several significant advancements and clarifications within the claim administration processes.

Firstly, a notable distinction lies in the separation of claim procedures from dispute resolution, as codified in distinct clauses within the FIDIC 2017 suite of contracts, in contrast to their combined treatment in the FIDIC 1999 editions. The claim procedures are consequently

[35] *Id.*

[36] Sub-Clause 3.7.4, FIDIC 2017 Red Book.

[37] Sub-Clauses 1.1.29 and 3.7.5, FIDIC 2017 Red Book.

regulated in the FIDIC 2017 more detailed than in the FIDIC 1999.[38]

Secondly, a significant amendment introduced in the FIDIC 2017 requires both the Employer's and the Contractor's claims to comply with the same Claim procedure.[39] Previously, the FIDIC 1999 specifically regulated the Employer's claims under Sub-Clause 2.5, with claim procedures for the Employer being separate and somewhat different from those for the Contractor's claims. Specifically, in the FIDIC Red Book 1999, the Contractor was required to issue its notice within 28 days of becoming aware of an event or circumstance giving rise to the claim and to submit a fully detailed claim within 42 days. By contrast, the Employer was merely required to notify the engineer *"as soon as reasonably practicable after [it] became aware of the event or circumstance giving rise to the claim."*[40] This version of the FIDIC Red Book did not explicitly set time limits/time bars or require the same level of detail for the Employer's claims as it did for the Contractor's claims. When comparing the Employer's and Contractor's claims as regulated in the FIDIC 1999 edition, it is evident that it favors the Employer in terms of claim procedures, as it does not explicitly stipulate a deadline for submitting claims. It means that the Employer's claims have a broader scope, as the absence of a strict time bar makes it easier for the Employer to enforce claims even when notification is delayed. In contrast, if the Contractor fails to provide notice within 28 days, the Contractor's claim may be lapsed.

As a result, the updated FIDIC 2017 addressed this significant imbalance by requiring

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[38] Frédéric Gillion, Rob Morson, Sarah Jackson, Chloé De Jager: The New FIDIC Suite 2017: Significant Developments and Key Changes. International Construction Law Review, p. 398 (2018), https://fidic.org/sites/default/files/ICLR%20Article_The%20New%20FIDIC%20Suite%202017_October%202018%20%5B2018%5D%20ICLR%20384.pdf, last accessed 2025/03/02.

[39] *Id, p. 399.*

[40] Sub-Clause 2.5, FIDIC 1999 Red Book.

the Employer to comply with the same standards as the Contractor. Thus, the Employer's and Contractor's claims were merged into a single regulation under Clause 20. This revision establishes parity between the Employer's and the Contractor's claims, ensuring that both are subject to equitable treatment.

Thirdly, the FIDIC 2017 emphasizes the role of the Engineer in ensuring that all claims are determined reasonably, acting with neutrality and without being deemed to represent the Employer,[41] a provision that was not explicitly stipulated in the previous edition. Although the Employer appoints the Engineer and typically represents the Employer in most aspects of the Contract, under this Sub-Clause, the Engineer must exercise impartiality, ensuring that both Parties are treated equitably, fairly, and without bias.[42]

Fourthly, the scope of the claim is widened by the inclusion of claims in the third ground that may have arisen from *"entitlement or relief ... of any kind whatsoever"* in the FIDIC 2017 Red Book, under Sub-Clause 20.1(c). This provision encompasses any entitlement or relief that a party may be granted under the applicable law governing the Contract, including, for instance, the right in certain civil law jurisdictions to suspend work in response to the other party's failure to fulfill its contractual obligations. Accordingly, the Engineer's authority is broad to issue determinations regarding legal entitlements arising beyond the contractual framework under the provisions of the applicable law. It represents a significant expansion of the Engineer's scope of authority in making determinations.

Fifthly, the time bars in relation to the claim submissions under the FIDIC 1999 and the FIDIC 2017 are quite different. While both the FIDIC 1999 and the FIDIC 2017 provide the time bar for the submission of the NoC being within 28 days after becoming aware, or when he should have become aware, of the event or circumstance giving rise to the claim, the time

[41] Sub-Clause 3.7, FIDIC 2017 Red Book.

[42] Sub-Clause 3.7, Guidance for the Preparation of Particular Conditions - FIDIC 2017 Red Book.

bar for the submission of the full detailed claim of the FIDIC 2017 is longer than the FIDIC 1999, with 84 days in the FIDIC 2017 and 42 days in the FIDIC 1999. Moreover, the FIDIC 2017 introduces a more structured and detailed mechanism, incorporating distinct time-bars that govern the lifecycle of a claim and subsequent dispute resolution, in particular:

(i) The time bar for Notice of Dissatisfaction (NOD): In accordance with Sub-Clause 20.2.5 the FIDIC 2017, after receiving a claim, the Engineer shall proceed under Sub-Clause 3.5 of the FIDIC 2017. If a Party is dissatisfied with the Engineer's determination under such Sub-Clause 3.7 of the FIDIC 2017, it must issue a NOD within 28 days, as required by Sub-Clause 3.7.5 of the FIDIC 2017. If no NOD is issued within this period, the Engineer's determination becomes final and binding on both Parties.

(ii) The time bar to refer DAAB: Following the issuance of the NOD, under Sub-Clause 21.4.1.(a) of the FIDIC 2017, the disputing Party must refer the matter to the Dispute Avoidance/Adjudication Board (DAAB) within 42 days. If the dispute is not referred within this timeframe, the NOD is rendered invalid, and the Engineer's determination prevails.

This evolution from FIDIC 1999 to FIDIC 2017 reflects a deliberate shift toward stricter procedural discipline, i.e., specific time bars to submit NOD and refer DAAB for the settlement of the NOD, but facilitates the claiming party in the preparation of full detailed claim, i.e., the longer time for the submission. The introduction of multiple time-bars under the 2017 edition underscores the importance of prompt notice, thorough substantiation, and timely progression of claims and disputes. By imposing distinct deadlines at each stage, FIDIC 2017 seeks to enhance contract administration, prevent delays, and ensure greater finality and certainty in the resolution of claims.

2.2 Claim under Vietnamese law

(a) Overview of Claim under the law of Vietnam

Within the Vietnamese legal framework, specifically under Decree 37/2015/ND-CP, as amended ("**Decree 37**") and subsequent amendments, procedures for addressing contractual issues and disputes during construction projects are established, wherein the concept of 'Claims' is implicitly recognized. According to Article 44 of Decree 37, a Claim may arise when one party detects the other party's failure to perform the obligations agreed upon during the contract performance.[43] In this case, the detecting party has the right to request the other party to fulfill such obligations by lodging a Claim with foundations or specific evidence against the other party about this matter.[44] It mirrors pretty similar to the Claims procedures following FIDIC provisions.

Nevertheless, it may be linguistic confusion that the wording of 'Khiếu nại' in Article 44 of Decree 37 may be susceptible to translation or interpretation as 'complaint' – an administrative procedure, thereby obscuring the distinct legal concept of 'claim.' This misinterpretation is prevalent in state-funded projects, where the contractual relationship risks being construed as an administrative hierarchy. Consequently, the non-state party's position is diminished to that of a complainant, subject to the state party's unilateral justification and approval through administrative procedures.

(b) Procedures for lodging Claims during contract performance

Within 56 days of an issue arising where one party fails to perform its contractual obligations per the terms agreed upon in the contract, the party detecting the breach must promptly notify the other party and lodge a formal Claim. If the Claim is submitted after these 56 days, both parties shall be required to comply strictly with the terms and conditions set out

[43] Article 44.1 of Decree 37.

[44] Article 44.1 and 44.2 of Decree 37.

in the contract.[45]

Under Vietnamese law, no explicit provisions detail the formal requirements or specific format for filing a complaint. The law just requires that Claims be sent to the correct transaction address or the designated communication address as agreed upon and specified in the contract.[46] The contents of the Claim must set out the legal grounds, accompanied by supporting evidence and detailed explanations to substantiate the claims being raised.[47]

Within 28 days from the date of receiving the Claim, the receiving party must provide grounds and evidence demonstrating that the complaint is inconsistent with the terms of the contract. If such grounds and evidence are deemed unreasonable or fail to prove that the complaint is unfounded, the receiving party shall be considered to have accepted the content of the Claim. Failure to respond within the prescribed 28-day period shall also be deemed as acceptance of the Claim's content.[48]

In cases where the parties under the contract cannot resolve the claims, they shall be escalated into disputes. They will be settled per the dispute resolution provisions set forth in this Decree.[49]

3. Gaps and recommendations in the Vietnamese legal framework

3.1 Difference between the Vietnamese regulatory framework and FIDIC regulations

The differences between the Vietnamese regulatory framework and FIDIC regulations likely stem from their distinct legal origins, risk allocation approaches, and enforcement

[45] Article 44.3 of Decree 37.

[46] Article 44.5 of Decree 37.

[47] Article 44.2 of Decree 37.

[48] Article 44.4 of Decree 37.

[49] Article 44.5 of Decree 37.

mechanisms. For instance, while FIDIC regulations are based on international best practices in construction law, emphasizing contractual autonomy, risk-sharing, and standardization to facilitate cross-border infrastructure projects, Vietnamese law follows a civil law system, where state control plays a dominant role in construction regulations. Decree 37 and other related laws impose mandatory requirements, prioritizing government oversight and the interest of parties over contract autonomy, which may cause unforeseeable damage to a party. These gaps affect the execution of construction contracts and the Claim procedure, leading to legal uncertainty and procedural inconsistencies.

Understanding the differences between the Vietnamese regulatory framework and FIDIC regulations is essential for parties involved in construction contracts in Vietnam. While FIDIC regulations follow internationally recognized standards with explicit provisions on risk allocation and contract management, Vietnamese laws impose mandatory requirements rooted in state management and the country's legal perspective. Therefore, the provisions under FIDIC and Vietnamese law differ in several aspects, and these differences can significantly affect the execution of construction contracts in general and the exercise of the Claim procedure in particular.

(a) The categories of Claims

The scope of claims under Vietnamese law and FIDIC regulations reflects a fundamental difference in approach.

Under Decree 37, the right to file a claim is narrowly confined to breaches arising from a party's failure to perform under the contractual terms. As reflected in Article 44.1 of Decree 37, this breach-centric approach ties claims directly to non-performance or improper performance under the contract.

In contrast, FIDIC contracts adopt a broader definition of claims, allowing parties to submit claims based on various factors, many of which are not necessarily contractual breaches.

This broader definition, set out in Sub-Clause 1.1.6 of the FIDIC 2017 Red Book, allows parties to seek relief for issues beyond simple breaches, as a "Claim" may include any entitlement or relief under any Clause of the FIDIC, or otherwise in connection with, or arising out of, the contract or the execution of the works. It enables parties to raise claims not only for breaches but also for events such as unforeseeable site conditions,[50] changes in law,[51] variations instructed by the engineer,[52] or adjustments to time and cost caused by external[53] or exceptional events.[54] This comprehensive approach reflects FIDIC's focus on equitable risk allocation and flexibility, ensuring that parties have precise mechanisms to address breach-related claims and those triggered by external factors beyond their control.

(b) The consequence of the failure to comply with the Claim procedure

While FIDIC expressly states that failure to initiate a claim for payment and/or EOT and DNP within the specified timeframe results in the loss of the right to claim,[55] Vietnamese law provides no clear guidance on the legal consequences of failing to submit a timely claim.

In particular, under Decree 37, if a party fails to raise a claim within the stipulated period, the law requires both parties to continue performing their obligations per the signed contract. This procedural flexibility may appear less rigid than FIDIC's strict time-bar mechanism, but it also introduces legal uncertainty, particularly in the event of disputes. Without clear legal consequences for late claims, parties may still attempt to pursue such claims during later stages of dispute resolution. It leads to prolonged arguments over admissibility and

[50] Sub-Clause 4.12, FIDIC 2017 Red Book.

[51] Sub-Clause 13.6, FIDIC 2017 Red Book.

[52] Sub-Clause 13.3.1, FIDIC 2017 Red Book.

[53] Clause 8, FIDIC 2017 Red Book.

[54] Sub-Clause 18.1, FIDIC 2017 Red Book.

[55] Sub-Clause 20.2.1, FIDIC 2017 Red Book.

potentially inconsistent interpretations by different dispute resolution bodies. This ambiguity can create significant risks for foreign investors, who may be more familiar with FIDIC's definitive time-bar rules and mistakenly assume that failing to claim on time automatically forfeits their rights when Vietnamese law takes a more open-ended approach. This consequential difference raises a legal question of whether FIDIC's provision on losing the right to claim after exceeding the stipulated time limit aligns with and is enforceable under Vietnamese law.

Given that although Vietnamese law provides a statute of limitations for enjoying rights or releasing from obligations,[56] this statute of limitations shall be regulated and determined by the law according to Article 149 of the 2015 Civil Code. It may be construed that the waiver of contractual rights and obligations due to non-compliance with stipulated timeframes is exclusively within the purview of statutory law, as exemplified by the waiver of rights under Article 13 of the Law on Commercial Arbitration.[57] Therefore, the loss of rights due to non-compliance with contractual timeframes may raise controversies in practice.

(c) The differences regarding the time limits for Claim procedures

Under Vietnamese law, Claim procedures in construction contracts are primarily governed by Decree 37, which applies mandatorily to contracts related to construction projects funded by public investment capital, state capital outside public investment, and construction contracts between enterprises executing public-private partnership (PPP) projects with its contractors.[58] It means that for construction projects funded by state capital, the application of

[56] Articles 150.1 and 150.2 of the Civil Code.

[57] Under Article 13 of the Law on Commercial Arbitration, a party that detects a violation of this Law or the arbitration agreement but continues to conduct arbitral proceedings and does not protest the violation within the time limit set by this Law will lose its right to protest at the arbitration or court.

[58] Article 1.2 of Decree 37.

Decree 37 is compulsory. On the other hand, Decree 37 just encourages relevant organizations and individuals to refer to its provisions when formulating and managing construction contracts for projects funded by non-state capital sources.[59] It indicates that Decree 37 serves as a non-binding reference framework for privately-funded construction projects, meaning parties can either adopt its provisions or apply alternative contractual standards, such as the FIDIC Model Contracts, based on mutual agreement between the contracting parties.

The issue is that it is typical for projects involving state capital - including those with the Employer being state authority and contractors and those where private main contractors engage subcontractors to execute state-funded projects - to be signed in the form of the FIDIC contract.[60] While the law of Vietnam allows the claiming party to raise a claim within 56 days from the date of the event and the response time bar for the recipient is 28 days, the corresponding timelines in FIDIC Contract 2017 are shorter, with 28 days for the submission of a Claim and 14 days for the Engineer's response. This discrepancy may raise a legal issue for the prevailing application of them since construction may be under the direct government of both the FIDIC contract and Decree 37, especially in the correlations (i) the state Employer and the Contractor, (ii) the private Employer and the Contractor and (iii) the main Contractor and the Sub-Contractor in the state-funded projects.

❖ *The state Employer and the Main Contractor*

The answer in this situation may be clear: the claim procedures and corresponding time limits set out under Decree 37 must be applied because the Employer is a state entity and the state funds the construction project.[61]

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[59] *Id.*

[60] International Bar Association, FIDIC – Construction Law International – October 2023, question 2. https://www.ibanet.org/fidic-clint-october-2023, last accessed 2025/03/02.

[61] Article 1.2 of Decree 37.

Given that the application of the FIDIC contract is allowable in this case, Decree 37 requests parties to adjust the FIDIC contracts to align with the regulatory framework of Decree 37.[62] Therefore, the claim procedures and consequences under the FIDIC contract may need to be adjusted in conformity with Decree 37. In such cases, the parties may mutually agree to amend the Particular Conditions of the FIDIC contract to ensure compliance with Decree 37. This approach aligns with the contractual flexibility permitted under FIDIC, which allows modifications through the Particular Conditions.[63]

❖ *The private Employer and the Contractor*

In contrast, for projects financed entirely by private capital, if the parties agree to adopt FIDIC contracts, the claim procedures and time limits will follow the provisions of FIDIC because, in this case, they are not the compulsory subject of Decree 37.[64]

❖ *The main Contractor and the Sub-Contractor in the state-funded projects*

The legal status of subcontracts between private main contractors and subcontractors within the state-capital projects presents a more complex regulatory challenge. Specifically, the direct and mandatory applicability of Decree 37 to such subcontracts remains a subject of legal ambiguity.

On one hand, it could be argued that the subject of these subcontracts pertains to state-funded projects, thereby necessitating the mandatory application of Decree 37. On the other hand, given that the parties to the subcontracts are private entities and the payment and cash flow associated with these agreements are derived from private funds, it may be more appropriate to recommend the application of Decree 37 rather than insisting on strict conformity.

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[62] Article 54.3 of Decree 37.

[63] Clause 1.5, FIDIC 2017 Red Book.

[64] Article 1.2 of Decree 37.

3.2 Recommendations

While Vietnamese law provides specific mechanisms for handling contractual disputes, its claim procedures remain underdeveloped compared to the structured approach under FIDIC contracts. The following recommendations are proposed to harmonize Vietnamese law with international best practices and improve dispute resolution efficiency.

One of the most significant limitations of Vietnamese law is the absence of a well-defined claim mechanism akin to Clause 20 of the FIDIC 2017 Red Book. The complaint mechanism under Decree 37 lacks detailed procedures regarding claim submission, required supporting documentation, and a structured timeline for claim resolution. Instead, it merely serves as a notification from one party to the other, asserting that the latter has failed to fulfill its contractual obligations. This results in ambiguity, inconsistency, and potential disputes between contractual parties since Decree 37 does not provide whether parties must proceed with Claim procedures to enjoy or be reset or waive their rights. To address this gap, Vietnamese construction law should introduce a requirement for detailed claim documentation, including contemporary records, legal justifications, financial calculations, and technical assessments, to facilitate fair and objective evaluations.[65] It would discourage frivolous claims and ensure that only well-substantiated claims move forward. These changes will help standardize claim-handling practices, reduce ambiguity, and ensure that claims are addressed before they escalate into disputes. It aligns Vietnamese law more closely with international contractual standards, increasing its attractiveness to foreign investors.

Beyond the amendment to the law, equipping project managers and engineers with

[65] Seminar on Legal Obstacles, Risks, and Solutions for Construction Contractors in Vietnam, p. 28, https://www.viac.vn/images/News-and-Events/Events/VAW2023/1205%20VIAC%20VACC/Tai-lieu-su-kien-12.05-chieu.pdf, last accessed 2025/03/02.

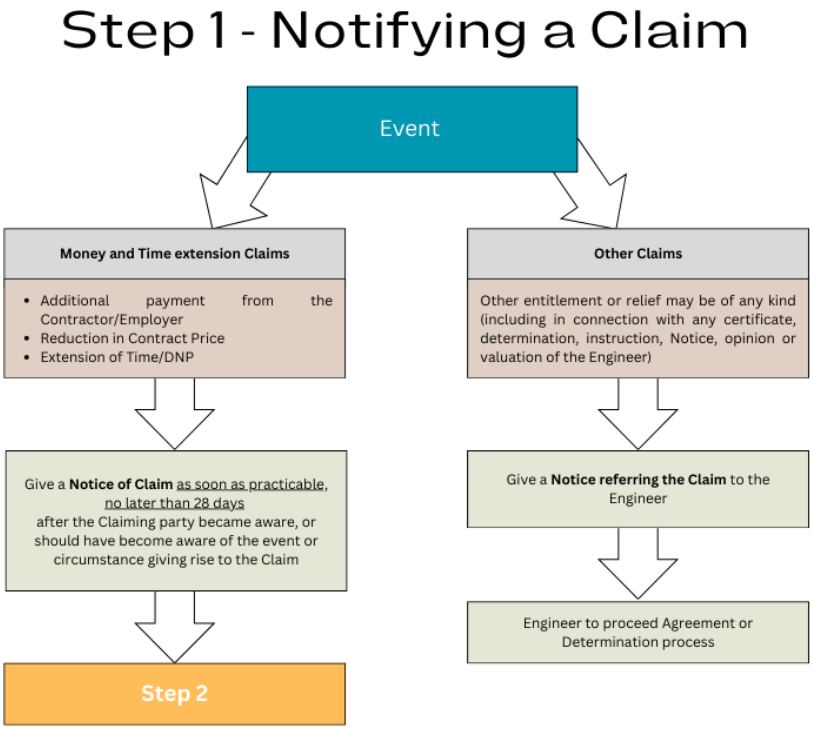
comprehensive legal knowledge concerning FIDIC claim procedures and relevant Vietnamese law will significantly enhance claim resolution efficiency.[66] Specifically, individuals whom parties appoint as their representatives at the site need to be provided with practical knowledge, helping professionals enhance their skills in managing claims and resolving disputes effectively because their awareness and action will be present to parties in the execution of the claim procedures. Suppose they could analyze and handle claims and understand claim procedures under FIDIC contracts and Vietnam law. In that case, they can recognize and proactively address potential claim situations as soon as they arise rather than reacting after disputes emerge. A proactive approach to dispute prevention will encourage these personnel to diligently collect and record pertinent information, documents, data, and factual evidence throughout the project lifecycle. This meticulous record-keeping documentation practice will facilitate prompt and informed decision-making during entitlement-generating events, thereby streamlining the settlement of arising claims and reducing the likelihood and severity of potential disputes.[67]

Furthermore, the contract management and conclusion should be focused on making the claim procedures more transparent and efficient. Specifically, the harmonization and customization of claim procedures within the construction contract should be prioritized, considering national regulatory frameworks and FIDIC model contract provisions.

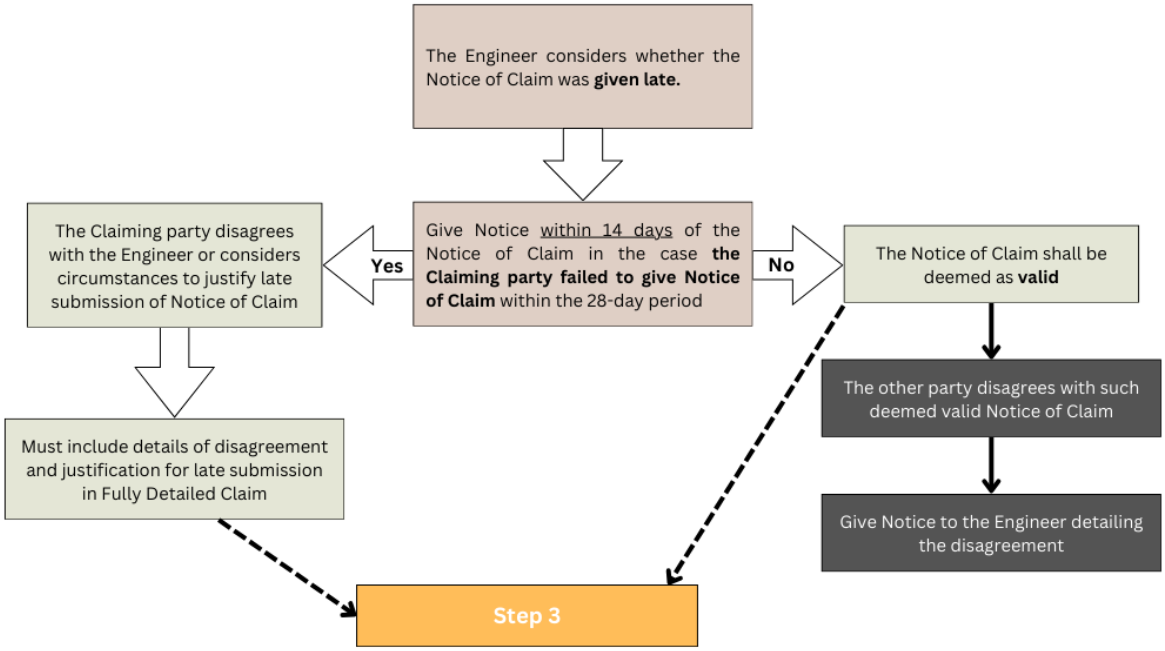
[66] Enterprise News Magazine, https://diendandoanhnghiep.vn/phong-tranh-rui-ro-trong-hop-dong-xay-dung-10143482.html, last accessed 2025/03/02.

[67] *Id*.

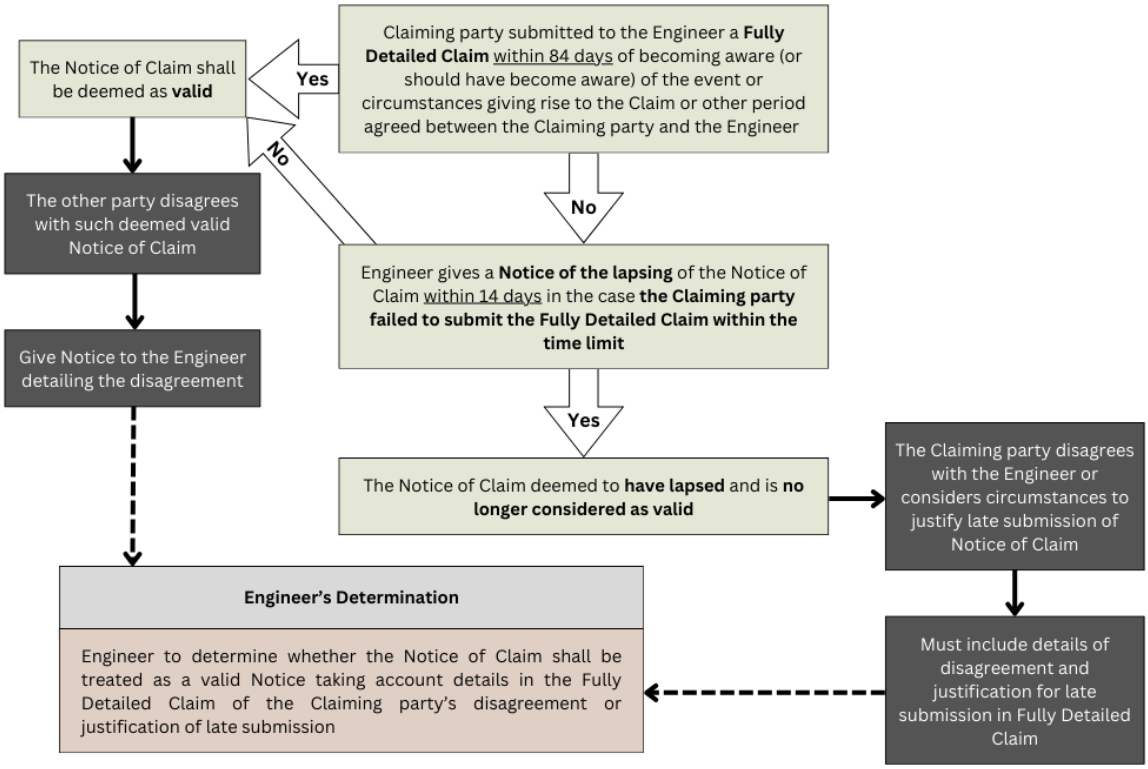
Appendix 1: ILLUSTRATION OF CLAIM PROCEDURES



Step 2 - The Engineer's Initial Response



Step 3 - Particularising the Claim



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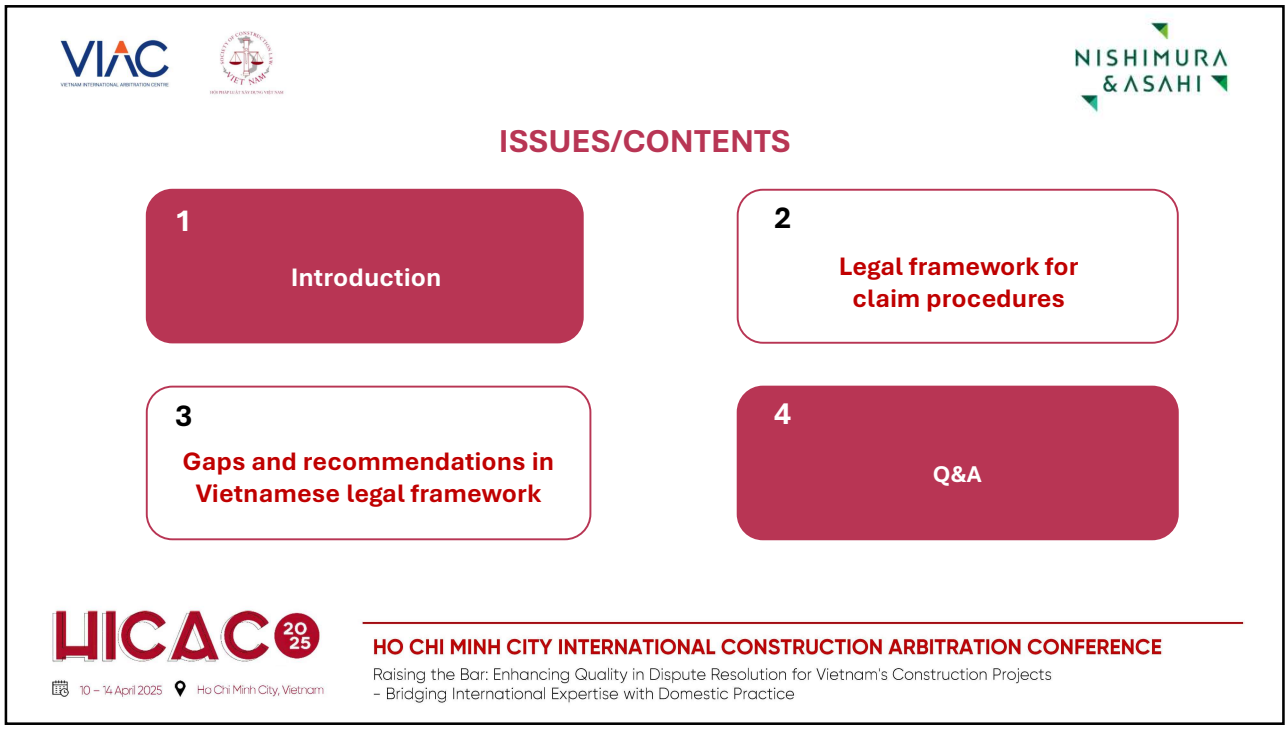
VU LE BANG - SPEAKER
Partner/HCMC Office Co-Representatives, Nishimura & Asahi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3 Gaps and recommendations in Vietnamese legal framework
4 Q&A
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INTRODUCTION

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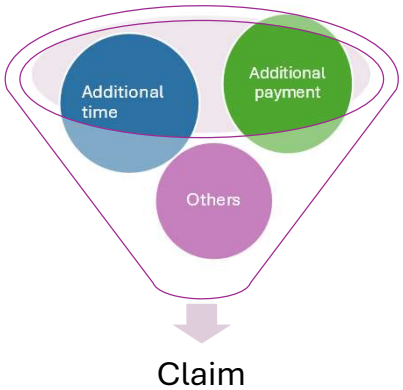
NISHIMURA & ASAHI

THE CONCEPT OF CLAIM

FIDIC	**FIDIC Red Book, 1957**
Vietnamese law	**Decree 48/2010/ND-CP** **Circular 02/2005/TT-BXD:** (a clause of EPC Contract)



Claim

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THE CONCEPT OF CLAIM

Claim

2017 FIDIC Red Book

Sub-Clause 1.1.6

A request or assertion by one party against the other, based on an entitlement arising from the contract's terms and conditions or, alternatively, from applicable laws

Decree 37/2015/ND-CP

Article 44.1

The right of one party to redress against the other for a breach or incomplete performance of contractual obligations

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THE ROLE OF CLAIM PROCEDURES IN CONSTRUCTION DISPUTES

- **Resolve conflicts early when they arise**
- **Prevent challenging lawsuits later**
- **Allow parties to promptly address contractual inadequacies**
- **Facilitate a streamlined resolution of conflicts prior to a dispute**

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THE ROLE OF CLAIM PROCEDURES IN CONSTRUCTION DISPUTES

Advatanges to parties to the construction contracts

1. Every party shall be aware of arisen issues early which may affect to the project and benefits of parties
2. Parties have opportunities to keep contemporary records to resolve issues and avoid future arguments
3. Parties can negotiate and apply alternative measures to reduce the effects of the issues and prevent disputes
4. Parties can remain their goodwill cooperation for the completion of the project

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THE PREVALENCE OF CLAIMS IN CONSTRUCTION PROJECTS

Case 1: Metro Line No. 1 (Bến Thành – Suối Tiên)

- **Total contractor claims:** ~300 claims, valued at **VND 30 trillion** (≈70% of project investment)
- There are three major disputes between MAUR and contractors, i.e., Sumitomo-Cienco 6 and Hitachi.

Case 2: Nhon - Hanoi Railway Station Urban Railway Line project

- **Total contractor claims:** USD 114.7 million (equivalent to VND 2.5 trillion)
- The settlement was prolonged due to the lack of provided documents

=> If the progress to settle claims had been resolved satisfactorily to all parties, the dispute volume would have been reduced, and the dispute resolution progress would have become less complex.

LEGAL FRAMEWORK FOR CLAIM PROCEDURES

CLAIM PROCEDURES UNDER FIDIC

OVERVIEW

Claim

by Employer or Contractor

1. **Employer is entitled to any additional payment or Defects Notification Period (DNP) from Contractor**
2. **Contractor is entitled to any additional payment or EOT from Employer**
3. **Either party consider entitling any other entitlements or relief against the other**

(*) *Failure to follow the procedures may result in loss of liability and the claiming party's right to make the Claim.*

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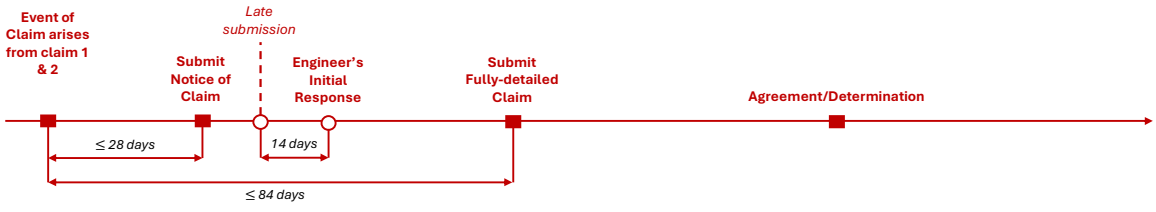
CLAIM PROCEDURES UNDER FIDIC



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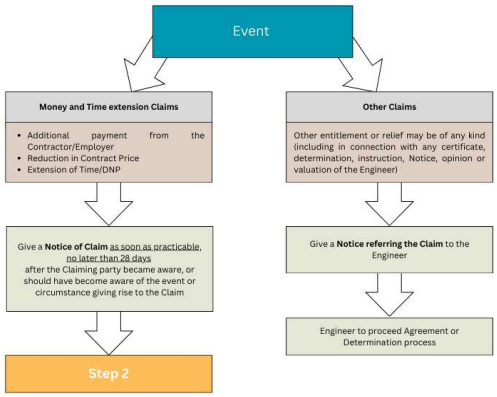
Step 1 - Notifying a Claim



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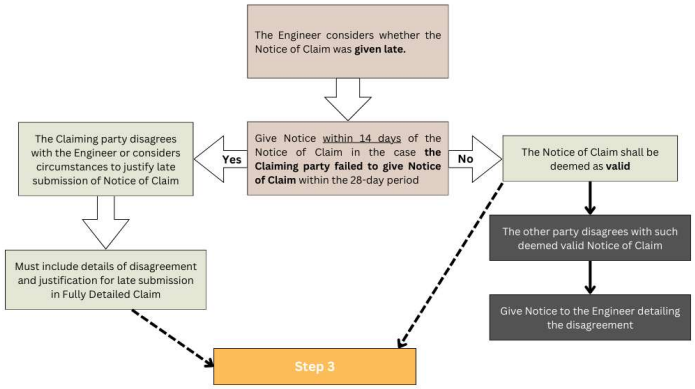

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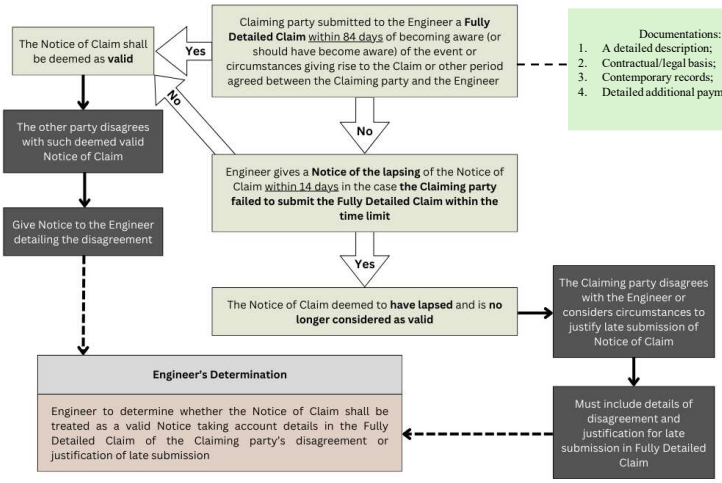
Step 3 - Particularising the Claim



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CLAIM PROCEDURES UNDER FIDIC

Key changes in FIDIC Claim procedures

Comparison:
1999 and 2017

1. Separation of claim procedures from dispute resolution
2. Same claim procedures for Employer and Contractor
3. Emphasizes the role of the Engineer
4. Scope of the claim is widened by the inclusion of claims in third ground
5. Different time bars for claim procedure-related submissions

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CLAIM PROCEDURES UNDER VIETNAMESE LAW

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OVERVIEW

One party detects the other party's **failure to perform the obligations as agreed in the contract** during the contract performance

The detecting party may **lodge a Claim**

(*) The term "Khiếu nại" in Article 44 of Decree 37 may cause confusion, as it can be misinterpreted as "complaint" (an administrative procedure), rather than the legal concept of a "claim"

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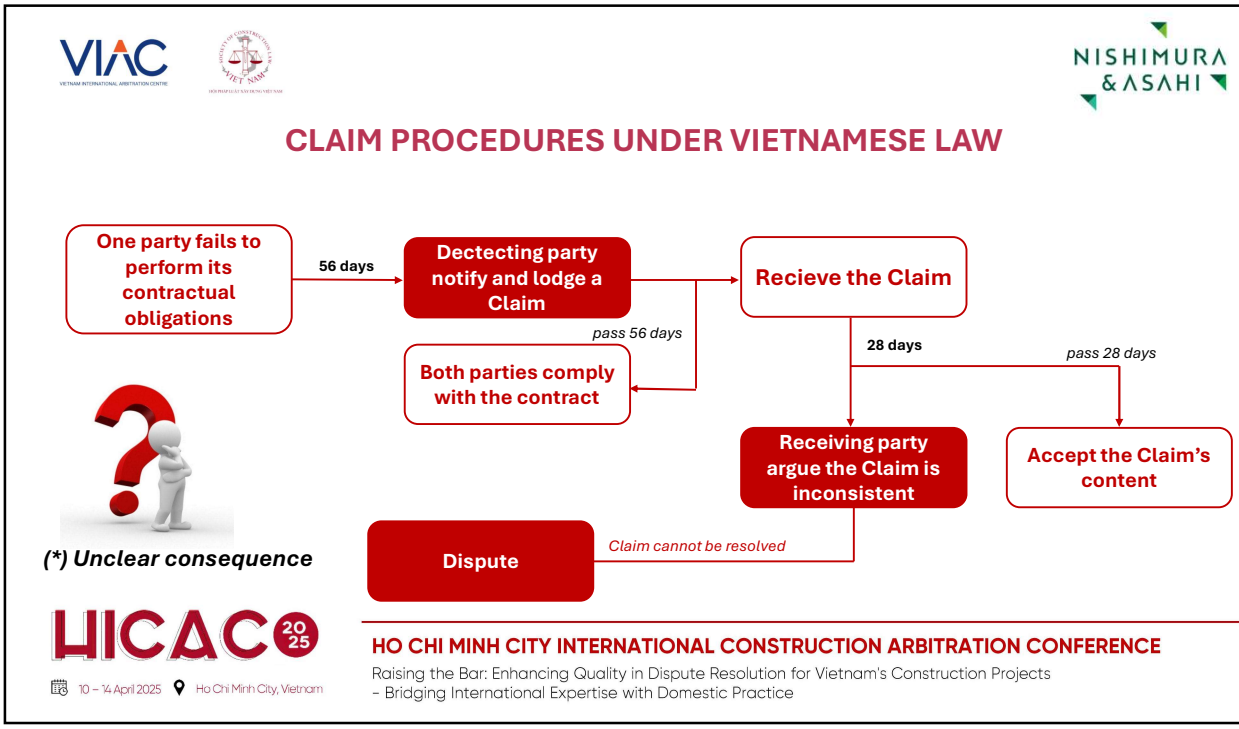
CLAIM PROCEDURES UNDER VIETNAMESE LAW



(*) Unclear consequence

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GAPS AND RECOMMENDATION IN VIETNAMESE LEGAL FRAMEWORK

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VIETNAMESE REGULATORY FRAMEWORK VS. FIDIC REGULATIONS

The categories of Claims	The consequence of failure to comply	The difference in time limits

• *Decree 37*: ties claims directly to **non-performance or improper performance** under the contract
• *FIDIC:* allows parties to submit claims based on various factors which are **not necessarily contractual breaches**
	• *Decree 37*: the law merely requires both parties to **continue performing their obligations** in accordance with the signed contract.
	  • **Unclear consequence** (loss of right) if claiming party fails to comply with regulations.
	• *FIDIC:* failure to initiate a claim results in the **loss of the right to claim**
		• *Decree 37*:
		  • raise a claim within 56 days
		  • response within 28 days by the receipt party
		• *FIDIC:*
		  • raise a claim within 28 days
		  • Engineer's response within 14 days

RECOMMENDATIONS

Vietnamese construction law should detail claim documentation, procedures and consequence (compliance and non-compliance).

Equipping project managers and engineers with legal knowledge on claim procedures.

Ensuring that claim procedures in construction contracts are clear, transparent, and efficient by harmonizing and tailoring them to align with both national law and FIDIC regulations.

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Q&A

Thank you for your attention!

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Evaluating the Efficacy of Dispute Adjudication Boards (DAB) and Dispute Avoidance/Adjudication Boards (DAAB) in Infrastructure Dispute Resolution in India: Practical Implementation or Mere a Stepping Step Before Arbitration? [1]

Abstract:

This paper examines the practical impact of Dispute Adjudication Boards (DAB) and Dispute Avoidance/ Adjudication Boards (DAAB) in resolving infrastructure disputes in India, as well as whether they represent a genuinely effective mechanism or merely serve as a preliminary step before arbitration. Drawing on FIDIC's binding/interim-binding approach, the paper highlights how these boards—particularly DAABs under the 2017 FIDIC suite—provide real-time, expert-led adjudications and encourage proactive dispute avoidance.

Empirical evidence, including multi-lateral development bank project data, suggests that only a small fraction of DAB/DAAB decisions progress to full arbitral proceedings, indicating a high acceptance rate among contracting parties. Yet, in Indian public-sector contexts (e.g., Airports Authority of India and National Highways Authority of India), the efficacy varies depending on whether boards are structured as standing bodies with external experts (closer to FIDIC's vision) or internal committees vulnerable to bias and delays.

Indian courts, generally upholding contract autonomy, treat such pre-arbitral steps as mandatory unless the contract is silent or unworkable, while Singaporean jurisprudence—relevant when it is the seat of arbitration—reinforces this procedural requirement under the lex arbitri.

This paper thus evaluates whether FIDIC-style DAB/DAAB provisions in Indian public contracts offer a genuinely quicker, cost-effective path to resolution, or if they function mainly as a formal hurdle before arbitration. Findings suggest that, when properly constituted and adhered to, DAB/DAAB can significantly reduce adversarial proceedings, yet partial or internal implementations risk undermining its potential as a robust dispute resolution tool.

Keywords: FIDIC Contracts, DAB, DAAB, binding decision, enforceability, adjudication, Indian Law

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Evaluating the Efficacy of Dispute Adjudication Boards (DAB) and Dispute Avoidance/Adjudication Boards (DAAB) in Infrastructure Dispute Resolution in India: Practical Implementation or Mere a Stepping Step Before Arbitration?

Contents

1. Introduction

Infrastructure projects in India—ranging from large-scale highway ventures to airport expansions—commonly experience disputes over time extensions, additional payments, and unforeseen site conditions. Traditionally, such controversies have proceeded to litigation or arbitration, each of which can be costly and time-consuming. Increasingly, Dispute Adjudication Boards (DAB) and Dispute Avoidance/Adjudication Boards (DAAB) are seen as a more expedient solution, largely due to the international influence of the Fédération Internationale des Ingénieurs-Conseils (FIDIC) suite of contracts.

Notwithstanding these international endorsements, the actual effectiveness of DAB/DAAB in India's public sector has been inconsistent. The Airports Authority of India (AAI) and the National Highways Authority of India (NHAI), for example, have adopted dispute board mechanisms but differ significantly in structural execution. Additionally, the question arises whether such boards genuinely resolve disputes or merely serve as a contractual box-ticking exercise before the main event of arbitration.[2]

Against this backdrop, this paper aims to:

1. Examine the FIDIC-based concept of DAB and DAAB, explaining how it arose historically.
2. Assess how Indian public-sector bodies implement or modify DAB/DAAB processes in practice.
3. Analyse case law from Indian courts, exploring whether a referral to a DAB is considered mandatory or can be treated as "directory."
4. Address the interplay between Indian law as the governing law of the contract and Singaporean law as a potential seat of arbitration.

Through these discussions, the paper clarifies whether the DAB/DAAB framework is indeed efficacious or if it stands as a stepping stone overshadowed by eventual arbitration.

2. Historical Background of Dispute Boards

2.1 Emergence of the Dispute Review Board (DRB) in the United States

The roots of Dispute Boards lie in the United States, where the technique was pioneered in the mid-1970s. One of the earliest reported successes was in the

[2] 'Standard Operating Procedures for Dispute Boards in India' (ICA 2016), available at https://icaindia.co.in/pdf/Final-SOP.pdf

Eisenhower Tunnel project (1975), Colorado. Here, a panel of independent experts was placed on site to review emerging disputes, issuing non-binding recommendations—a concept soon replicated in major tunnelling, highway, and dam projects.[3]

Over the 1980s, DRBs gained a strong track record, especially in states like Florida and California, which mandated a form of DRB for large public works. Construction litigators and engineers praised DRBs for dramatically reducing both the scope and cost of formal disputes.[4]

2.2 The FIDIC Endorsement: From DAB to DAAB

Outside the U.S., the Dispute Board model caught international attention. The World Bank and other multi-lateral lenders encouraged or required such boards for large-scale financing. Yet, the real turning point was FIDIC's 1995 Orange Book, which introduced Dispute Adjudication Boards (DABs) featuring interim-binding or binding decisions, rather than mere recommendations.[5]

FIDIC's 1999 "Rainbow Suite" (Red, Yellow, and Silver Books) enshrined DABs as a staple:

- Sub-Clause 20.4 provided a standard procedure wherein disputes were referred to the DAB for decision, with a 28-day Notice of Dissatisfaction allowed thereafter.
- The DAB's decision was binding immediately—"pay now, argue later."

By 2017, FIDIC refined DABs into DAABs (Dispute Avoidance/Adjudication Boards), highlighting a stronger dispute-avoidance function.[6] Under the 2017 forms, DAAB members must visit sites regularly, proactively offering informal opinions to pre-empt disputes from maturing.

3. FIDIC's DAB/DAAB Framework

3.1 Mechanism and Philosophy

The FIDIC approach to dispute boards rests on two major premises:

[3] "The History of the Dispute Review Board," DRBF Foundation Papers, 2003. Available at https://www.drb.org/history.
[4] "Prevention and Resolution of Disputes using Dispute Review Boards", IR23-2, CII, University of Texas.
[5] FIDIC Conditions of Contract for Design-Build and Turnkey (Orange Book), First Edition, 1995.
[6] Sub-clause 21, FIDIC Conditions of Contract for Construction (Red Book), Second Edition, 2017.

1. Standing Panel: The board is typically appointed at contract start, visiting the site at intervals. This fosters continuity and real-time familiarity with the project's technical and contractual environment.
2. Prompt Decisions: Once a dispute is formally referred, the board must decide within a short, fixed time (commonly 84 days).[7] Parties are bound to comply, though they may serve a Notice of Dissatisfaction within 28 days if they wish to escalate.

This structure aims to minimize project disruption, preserve relationships, and ensure liquidity: if a contractor is owed money, it can receive payment swiftly; if additional time is due, it is granted expeditiously. Importantly, the board's authority is derived from contractual clauses typically found in Sub-Clauses 20.4–20.8 (1999) or 21.3–21.7 (2017).

3.2 The "Pay Now, Argue Later" Principle

A hallmark of the DAB/DAAB system is the interim-binding effect of decisions.[8] The losing party must comply—often paying the required amount or taking corrective measures—while retaining the right to initiate arbitration. This approach addresses the recurring problem in construction: cash-flow. Contractors often face crippling delays if they do not receive timely payments for recognized entitlements, while employers benefit from the continuity of works.

3.3 DAAB's Additional Focus on Avoidance

Under the 2017 FIDIC forms, the rename from DAB to DAAB underscores an avoidance dimension.[9] The board is encouraged to provide informal advice at the parties' joint request, preventing controversies from escalating into formal disputes. This evolution aligns with the growing global interest in dispute prevention rather than mere resolution.

4. The Indian Public-Sector Experience

4.1 Overview

India's public sector faces major pressure to deliver infrastructure expansions: roads, railways, airports, and ports. The inherent complexity of multi-year projects—where land acquisition, design changes, contractor-subcontractor relationships, and unforeseen site conditions frequently spark claims—necessitates robust dispute resolution frameworks.

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[7] Sub-clause 21.4.3, FIDIC Conditions of Contract for Construction (Red Book), Second Edition, 2017.
[8] Sub-clause 21.4.4, FIDIC Conditions of Contract for Construction (Red Book), Second Edition, 2017.
[9] "FIDIC RAINBOW SUITE ed.2017 , Second edition of the Red, Yellow & Silver Books", available at https://fidic.org/sites/default/files/press%20release_rainbow%20suite_2018_03.pdf.

The World Bank and Asian Development Bank have financed numerous Indian projects on condition that multi-tier dispute resolution is embedded. While DRB or DAB processes appear in these contracts, local adaptations in agencies like the Airports Authority of India (AAI) and the National Highways Authority of India (NHAI) show varying degrees of alignment with FIDIC.

4.2 Airports Authority of India (AAI) and the "Dispute Resolution Committee" (DRC)

The AAI calls its board a Dispute Resolution Committee (DRC), typically constituted ad hoc once a dispute arises.[10] Key issues:

1. Internal Composition: DRC members often come from different AAI departments—engineering, finance, legal. Consequently, contractors frequently allege partiality or at least a lack of independence.
2. Extended Duration: While the official timeline might be 45 or 75 days, actual data shows the DRC can take 200–300 days or longer.
3. High Arbitral Reversal Rate: In studied cases, about 92% of claims were denied by the DRC, but multiple arbitral tribunals later awarded contractors significantly higher sums.

Hence, the AAI's approach appears to stray from the FIDIC concept of independent experts, reducing the board's perceived legitimacy and fueling further disputes.

4.3 National Highways Authority of India (NHAI) FIDIC-Based DAB

NHAI, conversely, often adheres more closely to the FIDIC model:

1. Three-Member Panel: Each side nominates one member subject to mutual acceptance, with the pair selecting a neutral chair.
2. Standing Role: The board (sometimes referred to as "Dispute Review Board" but effectively an adjudicative body) is typically in place from project start.
3. Enforceable Decisions: Once decided, parties comply or issue a Notice of Dissatisfaction. Many disputes remain resolved at that stage, though about 60% of initial decisions have favored NHAI, resulting in some arbitration challenges.

Despite some confusion in nomenclature—DRB vs. DAB—the principle is consistent with FIDIC Sub-Clause 20.4[11], requiring the board to provide binding determinations. Indian courts have repeatedly upheld the mandatory nature of this step.[12]

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[10] Airports Authority of India, "General Conditions of Contract," Clause 25.
[11] Sub-clause 20.4, FIDIC Conditions of Contract for Construction (Red Book), Second Edition, 2017.
[12] Abhiram Infra Projects Pvt. Ltd. v. Bangalore Water Supply and Sewerage Board, Com.A.P.No.49/2020.

5. Empirical Indicators and DRBF Data

5.1 Indian Cases: Summarized Observations

- **AAI Cases**:
    - Out of around 75 claims in 10 studied instances, the internal DRC ruled in favor of AAI ~92% of the time.[13]
    - The average time from the first hearing to final DRC recommendation could exceed 200–300 days, far above the recommended period.
    - Arbitration consistently reversed or modified many DRC findings, awarding contractors greater sums.
- **NHAI Cases**:
    - In about 18 disputes, the DAB initially supported NHAI in ~60% of claims.[14]
    - Some decisions were reversed or heavily revised in arbitration, but significantly fewer than under the AAI approach.
    - Because these boards were typically external, neutral experts, contractors more often accepted decisions, reducing friction.

5.2 DRBF's ~10–15% Escalation Rate

On a global scale, the **Dispute Resolution Board Foundation (DRBF)** references a broad statistic: only **10–15%** of disputes decided by DAB proceed to full arbitration or litigation.[15] The rest are accepted or minimally negotiated. This suggests DABs perform effectively, saving time and cost.

5.3 Empirical Insights from the 2024 King's College International Survey

The 2024 King's College Dispute Boards International Survey[16] collected data from ~300 respondents worldwide, in which, approximately 15% of total respondents were from India or dealt with Indian projects, with an additional 10% from the broader South Asia region.

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[13] Sumit Sharma & Sushil Kumar Solanki, "An Analysis of Dispute Review Boards in Public Sector Organizations in India", International Journal of Advances in Engineering and Management (IJAEM) Volume 4, Issue 5 May 2022, pp 90-100.

[14] Ibid.

[15] Dispute Board FAQs, The Dispute Resolution Board Foundation, available at https://www.drb.org/db-faqs.

[16] King's College London, *2024 Dispute Boards International Survey: A Study on the Worldwide Use of Dispute Boards over the Past Six Years* (2024) (Nazzini and Macedo Moreira) https://doi.org/10.18742/pub01-203 accessed 1 November 2024

The survey presented that the non-binding recommendations were accepted without further challenge in ~80% of instances, interim-binding decisions were complied with immediately in ~70% of cases, with ~15% seeing partial compliance or delayed compliance and only ~10% escalated to arbitration.

Multi-lateral development banks like the World Bank have also reported that the DAB approach fosters better project continuity, given the immediate compliance.[17] However, the presence of an external panel of experts is frequently highlighted as a key success factor; boards staffed by internal employees can erode trust.

6. Legal Framework: Pre-Arbitral DAB Requirements

6.1 Indian Legal Perspective

6.1.1 Contractual Autonomy and Mandatory Steps

Under Indian contract law, parties generally have the freedom to stipulate multi-tier dispute resolution processes, and courts uphold such clauses unless they contravene public policy or become unworkable.[18] As long as the contract states that DAB referral is a condition precedent to arbitration, Indian courts treat it as mandatory.

National Highways Authority of India (NHAI) v Pati-Bel (JV)

In this Delhi High Court case, the court refused to entertain an arbitration reference for certain disputes because they had not first been presented to the DAB.[19] The bench emphasized that FIDIC-style Clause 20.4 confers a clear contractual right for the parties to demand the dispute be first adjudicated by the board. This underscores India's pro-enforcement stance.

Union Territory of J & K v SP Singla Constructions Pvt Ltd

A portion of an arbitral award—pertaining to prolongation costs—was set aside when the court found that claim had never been raised before the DAB.[20] The court held that if the contract spells out the DAB as a first-tier forum, the parties must honour that method. Failing to do so invalidates the subsequent arbitral award on that dispute.

6.1.2 Exceptions and Directory Interpretation

Some parties cite older rulings or alternative lines of case law where conciliation or mediation steps were found "directory."[21] Yet courts typically distinguished such

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[17][17] World Bank, *Procurement Guidance: Standard Bidding Documents for Works, Harmonized Edition*, 2020.
[18] *M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd.*, (2009) 7 SCC 696.
[19] *National Highways Authority of India (NHAI) v Pati-Bel (JV)*, O.M.P. (COMM) 314/2017.
[20] *Union Territory of J & K v SP Singla Constructions Pvt Ltd.*, (02.02.2023 - JKHC) : MANU/JK/0027/2023.
[21] *M/s Oasis Projects Ltd v. The Managing Director, National Highway and Infrastructure Development Corporation Ltd.*, 2023/DHC/000828.

purely consensual processes (where either party can unilaterally halt negotiations) from a robust DAB mechanism with formal timelines and binding decisions. The presence of language akin to "shall refer the dispute to the DAB" strongly indicates mandatory compliance.

Moreover, where the DAB cannot be constituted or fails to issue a timely decision, Clause 20.8 (1999 FIDIC) or 21.7 (2017 FIDIC) sometimes permits direct arbitration.[22] Such exceptions do not undermine the mandatory principle; rather, they clarify that the parties must use the DAB route if it is properly functional.

6.2 Singaporean Law as Lex Arbitri

When Indian contracts opt for foreign seat for examples, Singapore as the seat of arbitration, the lex arbitri typically controls issues of compliance with multi-tier steps. Under judgments like *IRC v Lufthansa*,[23] the seat court examines whether the tribunal has jurisdiction or whether claims are admissible if the mandatory precondition was bypassed.

BBA v BAZ[24] clarified that a precondition to arbitration might be classified as going to jurisdiction or "admissibility," yet either way, the seat's law typically enforces the requirement. The default approach is that an arbitral tribunal seated in Singapore must ensure that "the dispute is ripe for arbitration" by verifying DAB compliance.

7. Is DAB/DAAB a Mere Stepping Stone Before Arbitration?

7.1 The Step-Before-Arbitration Critique

Critics argue that a DAB or DAAB is merely an extra rung—especially if parties commonly file a Notice of Dissatisfaction or eventually arbitrate. Indeed, some studies show that in heavily contested claims, the dissatisfied side almost automatically escalates. However, the real question is whether a significant portion of disputes never reach the arbitration stage at all.

7.2 Practical Evidence of Efficacy

The 10–15% escalation statistic from DRBF data stands out: meaning, roughly 85–90% of disputes see acceptance of the board's decision, or at least do not proceed to formal arbitration.[25] Even in India, a portion of NHAI's disputes do conclude at the DAB level. The reason might be that the losing party, after evaluating the board's reasoning, finds the cost-risk of arbitration unworthy. Moreover, once money is "paid now" or time is extended, parties can progress with fewer hindrances.

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[22] Sub-Clause 20.8, FIDIC 1999 Red Book; Sub-Clause 21.7, FIDIC 2017 Red Book.
[23] *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd.*, [2013] SGCA 55.
[24] *BBA v. BAZ*, [2020] SGCA 53.
[25] Supra note 15.

7.3 The Indian Public Sector's Mixed Record

Under the AAI's DRC system, the high reversal rate in arbitration leads to a suspicion that DRC is, for contractors, merely a stepping stone.[26] Yet that stems primarily from the board's composition—internal employees of AAI—leading to perceived bias. If AAI were to adopt a fully neutral DAB or DAAB with external experts, the acceptance rate might rise, resembling the NHAI or global experiences.

Hence, the challenge is not that the DAB/DAAB concept is inherently flawed, but that partial or incomplete implementations degrade its effectiveness.

8. Discussion and Analysis

8.1 Strengths and Weaknesses of the FIDIC Approach

1. Strengths
    - Timely Resolution: A standard 84-day limit fosters swift outcomes.
    - Binding Nature: "Pay now, argue later" ensures compliance, crucial for contractor cash-flow.
    - Institutional Legitimacy: FIDIC's global reputation underpins acceptance across jurisdictions.
2. Weaknesses
    - Needs Proper Experts: If the board lacks recognized independence or relevant expertise, results may not be trusted.
    - Requires Commitment: If one party simply ignores the board or fails to comply, the contract's remedies revolve around arbitration anyway, undermining the speed advantage.

8.2 Key Observations for India

- Need for External Membership: As shown in AAI's DRC, purely internal staff fosters minimal trust. The high reversal rate leads to protracted disputes.
- Mandatory Clause Enforcement: Indian courts consistently treat DAB/DAAB references as condition precedents. Parties cannot unilaterally bypass them absent express textual or factual justification (such as the board not being formed in time).[27]

[26] Mathusha Francis, Thanuja Ramachandra & Srinath Perera, Disputes in Construction Projects: A Perspective of Project Characteristics, 14 J. Legal Aff. & Disp. Resol. Eng'g & Constr. (May 1, 2022).
[27] National Highways Authority of India (NHAI) v Pati-Bel (JV), O.M.P. (COMM) 314/2017.

- Efficiency Gains: Where properly implemented, the NHAI approach more closely mirrors FIDIC's neutral panel concept, delivering at least partial acceptance, with fewer fully escalated disputes.

8.3 Potential Reforms

1. Enhanced Neutrality: Procuring Entity could revise its works manual and contract documents to require at least one or two external experts. This would align with the 2017 DAAB emphasis on independence.
2. Time Compliance: Procuring Entity needs to reinforce the scheduling discipline—if a board is consistently missing deadlines, or parties are stalling appointments, the step's value erodes.
3. Judicial Guidelines: Indian courts may consider standard guidelines clarifying that pre-arbitral DAB processes in FIDIC-based contracts are enforceable absent a direct contractual exception.

9. Conclusion

DAB and DAAB systems, entrenched in FIDIC's standard forms and embraced by multi-lateral development banks, present a powerful mechanism for timely, on-site dispute resolution. Critically, they can reduce the cost and prevalence of full-scale arbitration, consistent with DRBF's statistic that only around 10–15% of DAB decisions proceed further.

In India, the concept has found traction in organizations and in projects funded by the multilateral banks, which largely follow the FIDIC approach. Some departments though maintain an internal committee model that frequently see a mismatch between board outcomes and subsequent arbitral awards, hinting that "internal DAB" can undercut the notion of neutrality.

From a legal standpoint, Indian courts:

1. Typically uphold multi-tier dispute resolution clauses, especially if FIDIC-based contract clause, as mandatory.
2. Require disputants to exhaust the DAB step before arbitration, except if forming or convening the board is impossible or severely delayed.
3. In parallel, Singapore law—as a favored seat for many cross-border Indian contracts—also enforces the precondition under the lex arbitri, making it a procedural barrier.

Hence, whether DAB or DAAB truly addresses disputes or stands as a stepping step partially depends on the independence and efficiency of the board's structure. When

boards are external and pre-arbitral steps are adhered to, they often effect a genuine solution without further escalation. However, if boards remain internal, biased, or unworkably slow, they may become mere preludes to eventual arbitration.

Overall, FIDIC's "avoid now or adjudicate promptly" ethos holds substantial promise for Indian infrastructure disputes—provided that the parties comply with the precondition in good faith, the board is sufficiently neutral, and the mandatory timelines are enforced.

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5. *IRC v Lufthansa* [2013] SGHC 62 (High Court of Singapore).
6. *National Highways Authority of India v Pati-Bel (JV)* (2017) (Delhi High Court, unreported).
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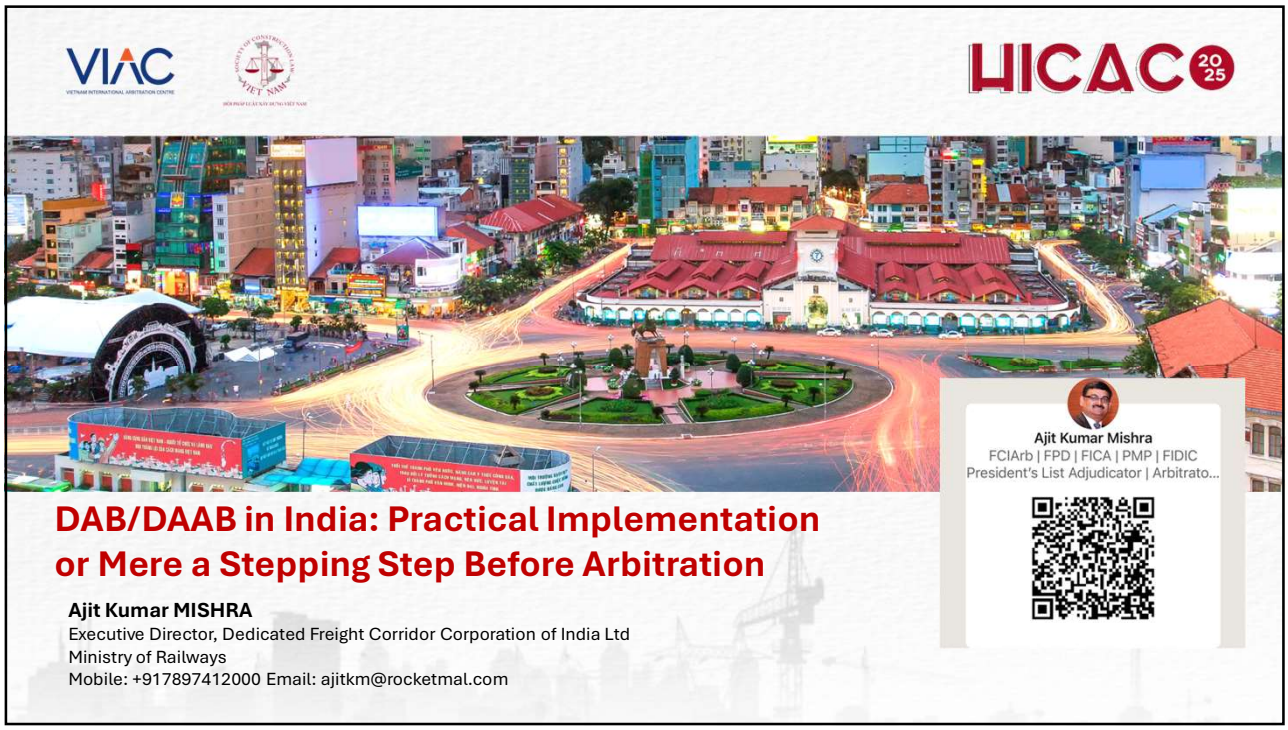

DAB/DAAB in India: Practical Implementation or Mere a Stepping Step Before Arbitration

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Presentation Scheme

1 FIDIC Dispute Resolution Framework

2 Global Perspective

3 Indian Public Sector Scenarios

4 Legal Framework in India

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FIDIC Evolution with Dispute Resolution

1995

Orange Book

Orange Book introduced DAB with binding or interim-binding decisions

1999

Rainbow Editions

Rainbow Suite (Red, Yellow, Silver) made DAB standard: Clause 20.4

2017

Rainbow- 2nd Ed

DAAB with more emphasis on dispute avoidance.

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FIDIC Dispute Resolution Framework

Mechanism & Philosophy

- Quick timeline (~84 days) to issue decisions.
- Party Autonomy in DB Constitution
- Power to adopt inquisitorial approach
- DB appointed at contract start (preferably standing board).
- Periodic site visits to become familiar with progress.

"Pay Now, Argue Later" Principle

- DAB/DAAB decisions 'typically' binding.
- Immediate compliance required; any dissatisfaction can go to arbitration
- Aims to maintain cash flow & avoid work slowdowns.

DAAB's Additional Focus on Avoidance

- 2017 FIDIC: the Board can give informal opinions if both parties request.
- Goal: prevent disagreements from turning into formal claims.
- Regular site visits (every 70–140 days).

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Indian Public Sector Scenario

- Large expansions in roads, airports, railways and other infrastructure projects in India.
- Infrastructure investments in India are expected to grow at a CAGR of 15.3%, reaching a market value of $1.45 trillion in the next five years
- Settlement of disputes through Arbitration and Litigation is long drawn and expensive
- Dispute settlement through pre-arbitral and pre-litigation stage needs emphasis and concerted implementation
- Often financed by multi-lateral banks viz. the World Bak, ADB, requiring multi-tier dispute resolution.
- In addition to DAB as in FIDIC, pre-arbitral adjudication have been adopted:
  - Dispute Resolution Board (DRB)
  - Dispute Resolution Committee (DRC)
  - Conciliation
  - Mediation
  - Expert Determination

Empirical Indicators

Dispute Resolution Board Foundation (DRBF) Data:

~10–15% of DAB decisions globally proceed to final arbitration.

India:

- Mixed performance across departments
- AAI Cases: 92% claims rejected at DRC, but large portion reversed or revised in arbitration.
- NHAI Cases: 60% claims for the employer, fewer escalations, smaller reversals.

Driving Parameter:

- DAB acceptance rate is high if neutral & timely.
- Board composition (internal vs. external) significantly affects trust.

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Empirical Indicators – KCL Survey 2024

•Survey from ~300 respondents worldwide (15% India-based).

•**Key Points**:

- 80% acceptance of non-binding DRB recommendations.
- 70% immediate compliance with interim-binding DAB decisions.
- Only ~10% eventually escalate to arbitration.
- Regular site visits & "informal opinions" reduce claims.

Indian Legal Framework: Pre-Arbitral Steps

•**Indian Perspective**:

- Contractual autonomy = if DAB is mandatory, must be followed.
- Courts see DAB as condition precedent to arbitration.

•**Example**: *NHAI v. Pati-Bel*: Arbitration not entertained if DAB step not exhausted.

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Indian Legal Framework: Status of DAB

•Courts generally treat multi-tier Dispute Resolution clauses as mandatory if "shall refer."

•However, if the DAB is not formed or fails to issue a decision on time, arbitration can proceed.

•Notable rulings:

- *Union Territory of J&K v. SP Singla*
- *Capacite Infraprojects v. T. Bhimjyani Realty*

Indian Legal Framework: Status of DAB

•DAB/DAAB, as used in FIDIC forms, significantly reduce adversarial proceedings: only ~10–15% escalate.
•With proliferation of FIDIC Contract Forms in India, dispute resolution through adjudication route will increase
•Indian courts:
- Enforce the "condition precedent" approach.
- Provide narrower grounds for bypassing the DAB.

- Real problem id Parties' deference due to bad decisions from the Board
- With increased training and exposure, the quality of board will increase and so does the Parties' reliance on Dispute Boards

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Avoiding Construction Disputes in Thailand
Assistant Professor Dr. AMNART TANGKIRIPHIMARN – SPEAKER
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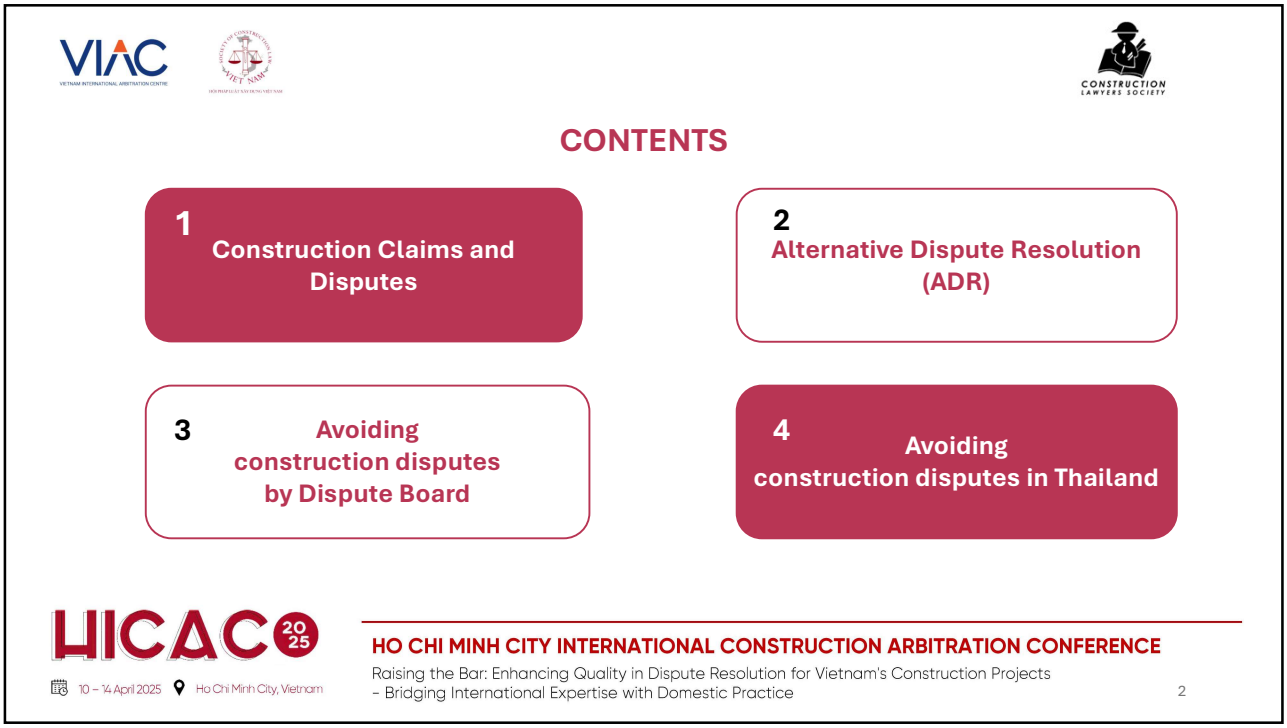
VIAC
CONSTRUCTION LAWYERS SOCIETY
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HICAC 2025
10 – 14 April 2025
Ho Chi Minh City, Vietnam
HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE
Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects
- Bridging International Expertise with Domestic Practice
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Construction Claims and Disputes

1. Claim occurs in every project
2. Claim evolves into Dispute
3. Quick resolution needed
4. Court in not best option
5. Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution

1. Negotiation or Amicable Settlement
2. Mediation or Conciliation
3. Dispute Board
4. Arbitration

Avoiding Construction Disputes

- **Pre-Claim**
  - **contract drafting**
  - **use of standard contract**
  - **how to address claim & dispute resolution clause**
- **Post-Claim**

Our Standard of Contract

HICAC 2025
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- Bridging International Expertise with Domestic Practice

Construction Lawyers Society Thailand

Established in 2019, the Construction Lawyers Society aims to promote and develop practical knowledge in cross-sectoral areas involving construction and law, comparative construction contract, and construction management.

The Construction Lawyers Society provides legal advices, capacity building activities, and knowledge sharing via different platforms including seminars, Facebook, Podcast, and YouTube.

In collaboration with several partners in public and private sectors such as professional associations, universities, and arbitration institutes, the Construction Lawyers Association also actively produce series of standard model contracts, books, guidelines. Additionally, members of the team are occasionally invited to give lectures and conduct workshops on relevant topics.

Avoiding construction disputes by Dispute Board

- **Dispute Board has 2 important functions**
  - **Avoidance**
  - **Adjudication**
- **Combined functions**
- **Appointed from the start**

Avoiding construction disputes in Thailand

- Avoidance is important
  - time, money & quality
- Difficulties of appointing Dispute Board in Thailand
  - Private sector
  - Public sector
- Use of FIDIC DAAB in Thailand

HICAC 2025

Thank you for your attention!

Construction Lawyers Society Thailand

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Bridging Conflicts:
The Role of Dispute Boards in Indonesia's Legal System

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He is a Civil Engineer and a Lecturer, an accredited Mediator and a Fellow of the Institute of Dispute Board for construction. He deals with disputes on major infrastructure, energy and building projects throughout Indonesia, including as mediator, secretary of arbiter, adjudicator, counsel, expert, Dispute Board member and chair.

Received "Award for Best Lecturer" from Mercubuana University in August 2019.
Co-translator for Indonesian translation of "FIDIC 1999: Conditions of Contract for Building and Engineering works (Red Book)" in 2008 and also "FIDIC 1999: Conditions of Contract for PLANT and Design-Build (Yellow Book)" in 2015 ,

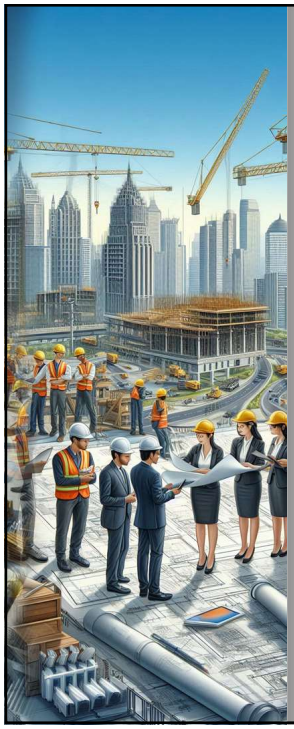
He lectures on International Construction Contracts at Mercu Buana University in Jakarta-Indonesia. He also teaches at major state-owned companies, and the PII (Institute of Engineers Indonesia).
Consultant for Ministry of Public works and Housing at the Directorate General of Housing
Consultant for National Public Procurement Agency(LKPP)

The Dispute Board: A Global Perspective

1. Origin in the 1970s (USA):
- First used in the Boundary Dam Tunnel Project (Washington, USA) in 1975.
- Designed to reduce delays and legal costs in long-term construction projects.

2. Adopted by Multilateral Agencies:
- World Bank, ADB, EBRD, and other IFIs began requiring Dispute Boards in funded projects.
- Especially effective in international, multi-stakeholder infrastructure projects.

3. Dispute Board Types:
- DRB (Dispute Review Board) – recommends a solution (non-binding).
- DAB (Dispute Adjudication Board) – issues binding decisions, used in FIDIC.
- DAAB (Dispute Avoidance/Adjudication Board) – both avoids and resolves disputes (FIDIC 2017).



The Dispute Board: A Global Perspective

4. Key Benefits:
- Solves disputes on-site and in real time.
- Reduces arbitration and litigation cases.
- Improves project delivery, cash flow, and relationships.

5. Global Practice:
- Successfully used in over 60 countries
- Recognized as international best practice for major construction projects.

The FIDIC Model & Dispute Boards

1. FIDIC's Role in Global Construction:

- FIDIC = International Federation of Consulting Engineers
- Its contracts are **globally used in infrastructure**, especially donor-funded projects
- Promotes **fairness, neutrality, and balanced risk allocation**

2. Evolution of Dispute Boards in FIDIC:

- **1999 FIDIC (Red/Yellow/Silver Books):** Introduced **DAB** (Dispute Adjudication Board)
- **2017 FIDIC Suite:** Replaced DAB with **DAAB** (Dispute Avoidance/Adjudication Board)
- DAAB is **standing**, proactive, and empowered to assist in **avoiding** disputes

3. Types of Dispute Boards:

- **Ad-hoc:** Formed *after* a dispute arises
- **Standing:** Formed *at the start* of the contract and active throughout
- FIDIC 2017 mandates a **Standing DAAB** for all major contracts

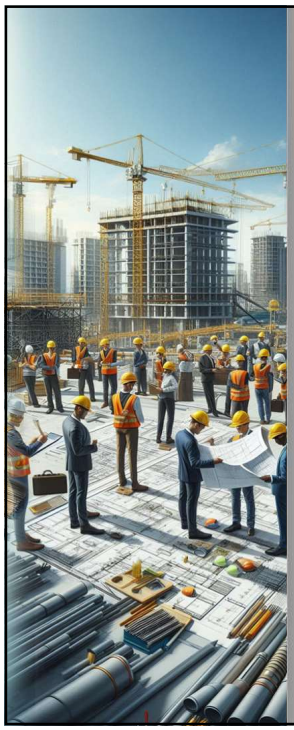
The FIDIC Model & Dispute Boards

4. DAAB Responsibilities:

- Issue **binding decisions** (can be referred to arbitration if not accepted)
- Give **informal advice** to prevent disputes
- Participate in **site visits**, meetings, and progress monitoring

5. Benefits for Contractors & Employers:

- Quicker resolution = **less disruption** to work
- Expert-driven = **more technical accuracy**
- Reduces overall **legal and reputational risk**



Understanding Legal Foundations: Civil Law vs. Common Law

1. Two Major Legal Traditions:

- **Common Law**
  - Origin: UK, USA, Australia, etc.
  - Law evolves from **court decisions (precedents)**
  - Judges have **greater discretion**
- **Civil Law**
  - Origin: Continental Europe (e.g., France, Germany)
  - Law is based on **codified statutes**
  - Judges apply and interpret written law with **less discretion**

Key Differences in Dispute Resolution:

2.

Aspect	Common Law	Civil Law
Source of Law	Precedents + Statutes	Codified statutes
Judge's Role	Active interpreter	Neutral applier
Role of ADR	Flexible, contract-based	Needs statutory support
Contract Interpretation	Based on prior rulings	Based on literal meaning

3. Implications for Dispute Boards:

- **In Common Law** countries: Dispute Boards are often accepted even without formal legal backing
- **In Civil Law** countries (like Indonesia & Vietnam): Legal tools (e.g., laws, decrees) must **explicitly recognize ADR**
- Therefore, **formal legal basis is *crucial*** for Dispute Boards to be enforceable

Indonesia's Civil Law System in Practice

1. Historical Foundation:
- Based on Dutch Civil Code (Burgerlijk Wetboek) Kitab Undang Undang Hukum Perdata
- Adopted during colonial era and still forms the backbone of private and commercial law
- Emphasizes codified rules over judicial precedent

2. Characteristics of Indonesian Civil Law:
- Judges interpret statutes, not create new rules
- Court decisions do not bind future cases
- Customary law (adat) and religion may supplement but not override statutes
- Legal certainty depends on written law

Indonesia's Civil Law System in Practice

3. Implications for ADR (Alternative Dispute Resolution):
- ADR mechanisms must be expressly authorized by law
- Contractual ADR clauses (e.g., Dispute Board clauses) require statutory legitimacy to be enforceable
- Legal evolution is gradual and must follow formal legislative processes

4. Role of Government Institutions:
- Ministry of Public Works, Supreme Court, and BPKP /BPK(audit agency) have significant influence
- Presidential Regulations, Ministerial Decrees, and Government Rules are legally binding and critical for ADR development

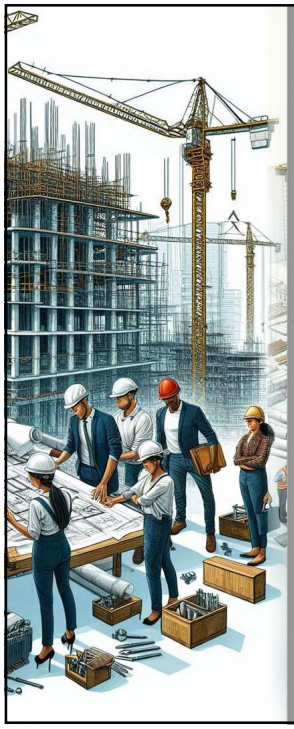
Modernizing Construction Law: Law No. 2/2017

1. Law No. 2 of 2017 (New Law):

- **Replaces and updates** previous Law
- More aligned with **modern construction practices and international standards**
- Removes problematic clauses (especially on **mandatory litigation**)
- Emphasizes **professionalism, quality assurance, and legal clarity**

2. Key Improvement:

- **No longer mandates litigation** for construction disputes
- Opens the door for **formal ADR mechanisms**
- Recognizes the need for **early, technical resolution methods** like **Dispute Boards**

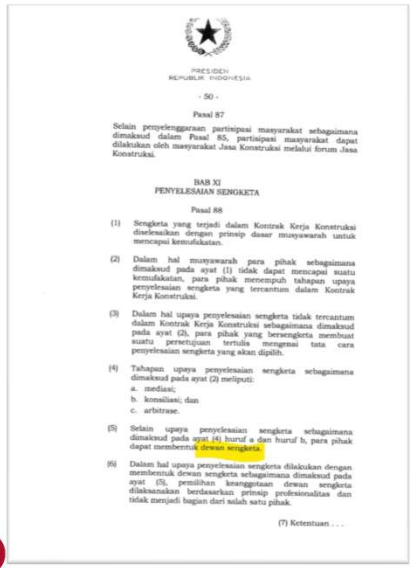


Article 88 of Law No. 2/2017: A Foundation for ADR

1. Article 88 – Key Provisions:

"Disputes in construction services shall be resolved through Alternative Dispute Resolution (ADR)"

- Lists of **dispute resolution** options:
  - **Mediation**
  - **Conciliation**
  - **Arbitration**
  - **Mediation and Conciliation can be combined to form a Dispute Board**



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Pasal 87

Selain penyelenggaraan partisipasi masyarakat sebagaimana dimaksud dalam Pasal 85, partisipasi masyarakat dapat dilakukan oleh masyarakat Jasa Konstruksi melalui forum Jasa Konstruksi.

BAB XI
PENYELESAIAN SENGKETA

Pasal 88

(1) Sengketa yang terjadi dalam Kontrak Kerja Konstruksi diselesaikan dengan prinsip dasar musyawarah untuk mencapai kemufakatan.

(2) Dalam hal musyawarah para pihak sebagaimana dimaksud pada ayat (1) tidak dapat mencapai suatu kemufakatan, para pihak menempuh tahapan upaya penyelesaian sengketa yang tercantum dalam Kontrak Kerja Konstruksi.

(3) Dalam hal upaya penyelesaian sengketa tidak tercantum dalam Kontrak Kerja Konstruksi sebagaimana dimaksud pada ayat (2), para pihak yang bersengketa membuat suatu persetujuan tertulis mengenai tata cara penyelesaian sengketa yang akan dipilih.

(4) Tahapan upaya penyelesaian sengketa sebagaimana dimaksud pada ayat (2) meliputi:
a. mediasi;
b. konsiliasi; dan
c. arbitrase.

(5) Selain upaya penyelesaian sengketa sebagaimana dimaksud pada ayat (4) huruf a dan huruf b, para pihak dapat membentuk dewan sengketa.

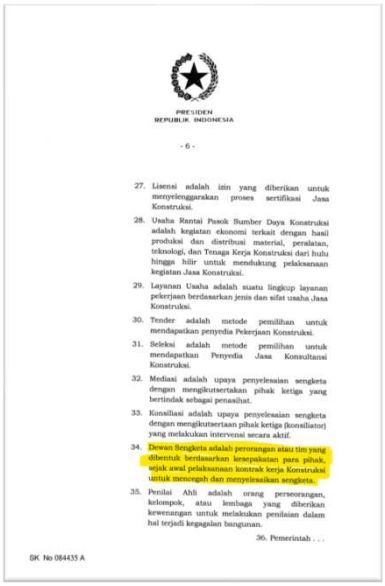
(6) Dalam hal upaya penyelesaian sengketa dilakukan dengan membentuk dewan sengketa sebagaimana dimaksud pada ayat (5), pemilihan keanggotaan dewan sengketa dilaksanakan berdasarkan prinsip profesionalitas dan tidak menjadi bagian dari salah satu pihak.

(7) Ketentuan ...

From Law to Practice: Regulatory Support for Dispute Boards in Indonesia

Other than Article 88, Law No. 2 of 2017
There are some supporting Regulations
That Empower Dispute Boards:

- PP (Peraturan Pemerintah/Government Regulation)No. 14/2021
  - Amendment to PP No. 22/2020 (Implementation Regulation of Law 2/2017)
  - Recognizes non-litigation dispute resolution mechanisms and introduces Dispute Board



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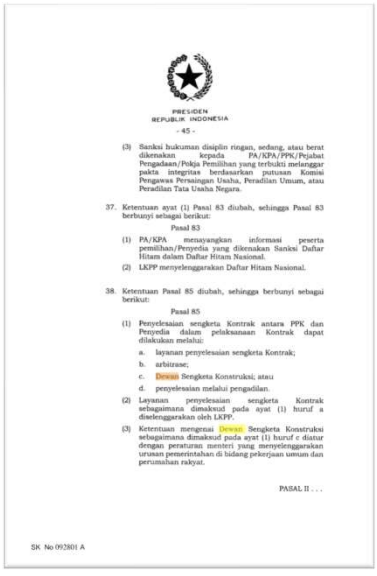
27. Lisensi adalah izin yang diberikan untuk menyelenggarakan proses sertifikasi Jasa Konstruksi.
28. Usaha Rantai Pasok Sumber Daya Konstruksi adalah kegiatan ekonomi terkait dengan hasil produksi dan distribusi material, peralatan, teknologi, dan Tenaga Kerja Konstruksi dari hulu hingga hilir untuk mendukung pelaksanaan kegiatan Jasa Konstruksi.
29. Layanan Usaha adalah suatu lingkup layanan pekerjaan berdasarkan jenis dan sifat usaha Jasa Konstruksi.
30. Tender adalah metode pemilihan untuk mendapatkan penyedia Pekerjaan Konstruksi.
31. Seleksi adalah metode pemilihan untuk mendapatkan Penyedia Jasa Konsultansi Konstruksi.
32. Mediasi adalah upaya penyelesaian sengketa dengan mengikutsertakan pihak ketiga yang bertindak sebagai penasihat.
33. Konsiliasi adalah upaya penyelesaian sengketa dengan mengikutsertakan pihak ketiga (konsiliator) yang melakukan intervensi secara aktif.
34. Dewan Sengketa adalah perorangan atau tim yang dibentuk berdasarkan kesepakatan para pihak, sejak awal pelaksanaan kontrak kerja Konstruksi untuk mencegah dan menyelesaikan sengketa.
35. Penilai Ahli adalah orang perseorangan, kelompok, atau lembaga yang diberikan kewenangan untuk melakukan penilaian dalam hal terjadi kegagalan bangunan.

36. Pemerintah . . .

SK No 084435 A

From Law to Practice: Regulatory Support for Dispute Boards in Indonesia

- Perpres (Peraturan Presiden/Presidential Decree)No. 12/2021
  - Amendment to Perpres No. 16/2018 on Government Procurement
  - Includes ADR options (including Dispute Boards) in government project procurement



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(3) Sanksi hukuman disiplin ringan, sedang, atau berat dikenakan kepada PA/KPA/PPK/Pejabat Pengadaan/Pokja Pemilihan yang terbukti melanggar pakta integritas berdasarkan putusan Komisi Pengawas Persaingan Usaha, Peradilan Umum, atau Peradilan Tata Usaha Negara.

37. Ketentuan ayat (1) Pasal 83 diubah, sehingga Pasal 83 berbunyi sebagai berikut:

Pasal 83

(1) PA/KPA menayangkan informasi peserta pemilihan/Penyedia yang dikenakan Sanksi Daftar Hitam dalam Daftar Hitam Nasional.
(2) LKPP menyelenggarakan Daftar Hitam Nasional.

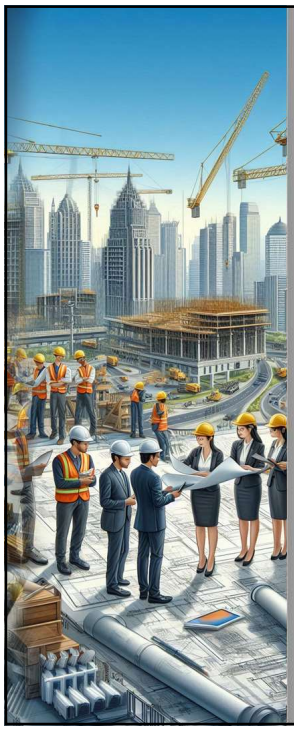
38. Ketentuan Pasal 85 diubah, sehingga berbunyi sebagai berikut:

Pasal 85

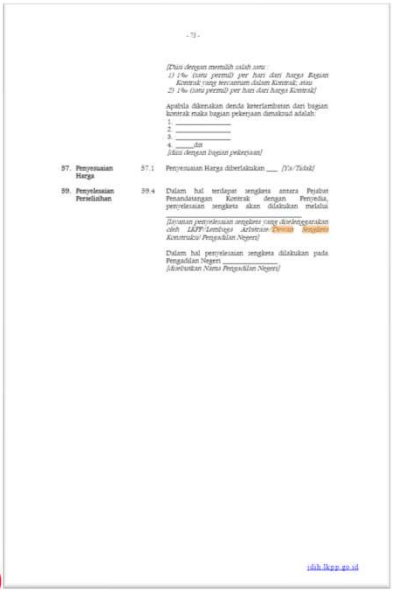
(1) Penyelesaian sengketa Kontrak antara PPK dan Penyedia dalam pelaksanaan Kontrak dapat dilakukan melalui:
a. layanan penyelesaian sengketa Kontrak;
b. arbitrase;
c. Dewan Sengketa Konstruksi; atau
d. penyelesaian melalui pengadilan.
(2) Layanan penyelesaian sengketa Kontrak sebagaimana dimaksud pada ayat (1) huruf a diselenggarakan oleh LKPP.
(3) Ketentuan mengenai Dewan Sengketa Konstruksi sebagaimana dimaksud pada ayat (1) huruf c diatur dengan peraturan menteri yang menyelenggarakan urusan pemerintahan di bidang pekerjaan umum dan perumahan rakyat.

PASAL II . . .

SK No 092801 A



- LKPP Regulation No. 12/2021
  - Guideline on Government Goods/Services Procurement
  - Outlines technical procedures for resolving disputes in state-funded projects
  - Supports early dispute resolution to maintain project timelines and budgets
  - Dispute Boards mentioned as part of the ADR landscape



- Ministerial Regulation No. 11/2021 (PUPR)
  - Technical Guidance on Construction Dispute Boards
  - First regulation to explicitly regulate Dispute Boards (Dewan Sengketa)
  - Provides clear rules on:
  - How and when to establish a Dispute Board

MENTERI PEKERJAAN UMUM DAN PERUMAHAN RAKYAT
REPUBLIK INDONESIA

PERATURAN MENTERI PEKERJAAN UMUM DAN PERUMAHAN RAKYAT
REPUBLIK INDONESIA
NOMOR 11 TAHUN 2021
TENTANG
TATA CARA DAN PETUNJUK TEKNIS DEWAN SENGKETA KONSTRUKSI

DENGAN RAHMAT TUHAN YANG MAHA ESA

MENTERI PEKERJAAN UMUM DAN PERUMAHAN RAKYAT
REPUBLIK INDONESIA,

Menimbang : bahwa untuk melaksanakan ketentuan Pasal 96 ayat (6) Peraturan Pemerintah Nomor 22 Tahun 2020 tentang Peraturan Pelaksanaan Undang-Undang Nomor 2 Tahun 2017 tentang Jasa Konstruksi sebagaimana telah diubah dengan Peraturan Pemerintah Nomor 14 Tahun 2021 tentang Perubahan atas Peraturan Pemerintah Nomor 22 Tahun 2020 tentang Peraturan Pelaksanaan Undang-Undang Nomor 2 Tahun 2017 tentang Jasa Konstruksi dan Pasal 85 ayat (3) Peraturan Presiden Nomor 12 Tahun 2021 tentang Perubahan atas Peraturan Presiden Nomor 16 Tahun 2018 tentang Pengadaan Barang/Jasa Pemerintah, perlu menetapkan Peraturan Menteri Pekerjaan Umum dan Perumahan Rakyat tentang Tata Cara dan Petunjuk Teknis Dewan Sengketa Konstruksi.

Mengingat : 1. Pasal 17 Ayat (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945;
2. Undang-Undang Nomor 39 Tahun 2008 tentang Kementerian Negara (Lembaran Negara Republik

jdih.pu.go.id

From Theory to Reality: Implementing Dispute Boards in Indonesia

1. Current Implementation Status:

KUHPer – Indonesian Civil Code (Burgerlijk Wetboek)

- Inherited from Dutch Civil Code
- Still serves as the foundation of private law in Indonesia
- Article 1338 of KUHPer:

"Semua perjanjian yang dibuat secara sah berlaku sebagai undang-undang bagi mereka yang membuatnya."

("All legally made agreements shall bind the parties as law.")

✅ Reinforces freedom of contract

✅ Strong basis to enforce Dispute Board provisions in contracts

✅ Dispute Boards are increasingly adopted in public infrastructure projects, Supported by Ministry of Public Works (PUPR), National Public Procurement Agency (Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah), SOE" (State-Owned Enterprises) "BUMN" (Badan Usaha Milik Negara),

From Theory to Reality: Implementing Dispute Boards in Indonesia

2. Notable Projects Using Dispute Boards:

- Toll Road Projects – Managed by BUMNs
- ADB/WB funded
- Urban Transport (MRT)
- Australian Embassy in Indonesia was one among the first to adopt Dispute Board

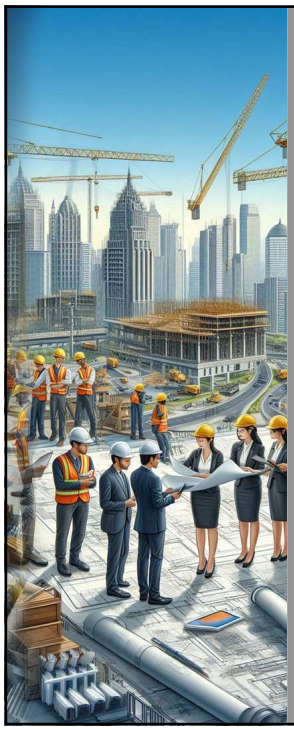
Prof Sarwono Hardjomuljadi

The Court of Appeal in Persero II: How to enforce "binding but non-final" Dispute Board Decisions under the FIDIC Form of Contract

By Robbie McCrea, Associate, Fenwick Elliott

PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30

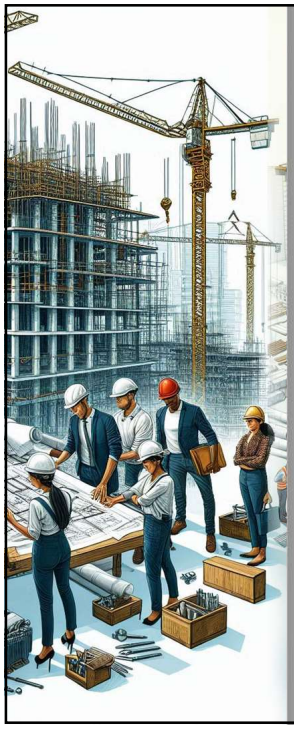
This article is a follow-up to two International Quarterly ("IQ") articles on the Persero series of cases, the first of which followed the Persero I Court of Appeal decision in Issue 01, 2011 and the second followed the Persero II High Court decision in Issue 12, 2014.[1] As promised we have continued to monitor the progress of this influential series of cases, and we set out below our conclusions on the enforcement of non-final DAB decisions following the latest (and final) decision by the Court of Appeal in Persero II.



3. Institutional and Contractual Support:
PUPR Ministry Circulars often require dispute boards for high-risk projects
SOEs increasingly insert DB clauses in contracts (especially with foreign contractors)
Multilateral Development Banks (ADB, World Bank) now encourage or require DBs
Government-funded and donor-funded projects now include Dispute Boards (Dewan Sengketa)

4. Challenges Still Faced:
⚠️ Limited awareness among project owners
⚠️ Some DB clauses inserted late or with unclear procedures
⚠️ Cultural tendency toward post-dispute escalation vs. early prevention

5. Opportunities for Collaboration with other countries:
🤝 Countries with Common law traditions
🤝 Countries with Civil law traditions
🤝 Potential for joint capacity building, knowledge exchange, or harmonization of DB practices

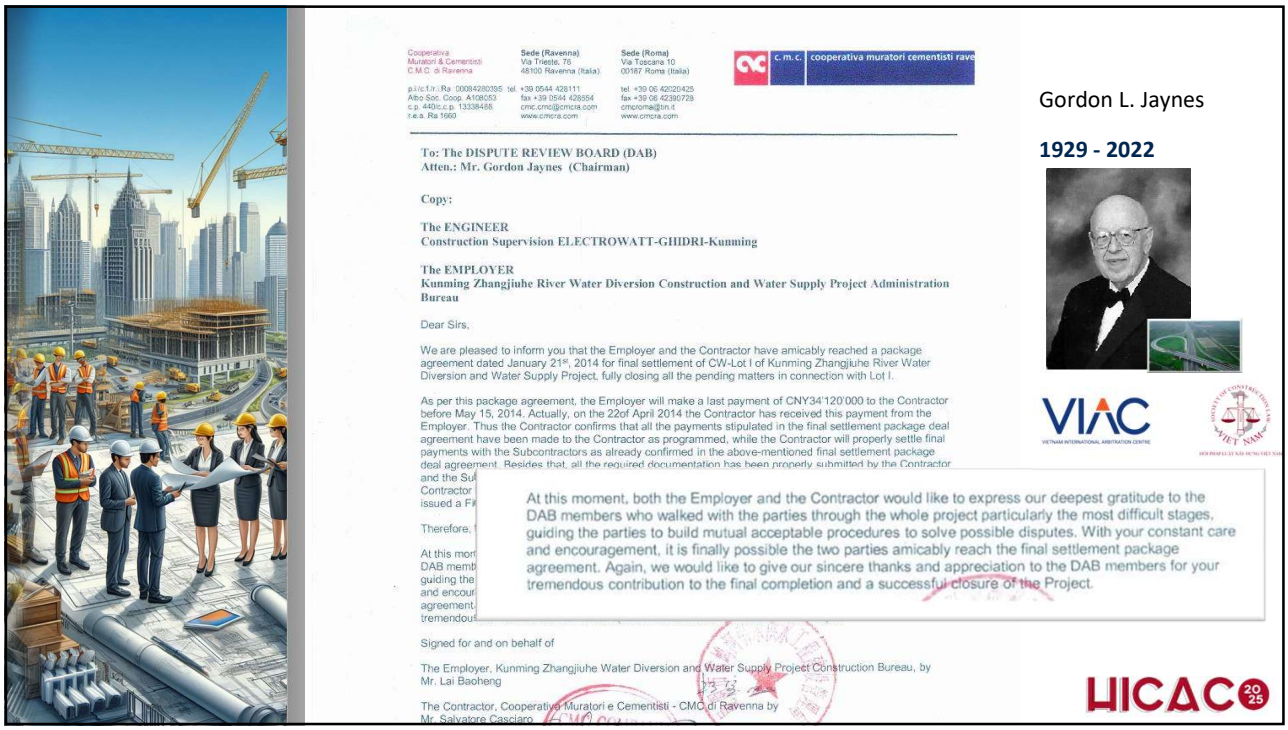


Dispute Boards in Civil Law Countries: Indonesia's Journey & Future Collaboration

1. Key Takeaways from Indonesia's Experience:
✅ Strong legal foundation through Law No. 2/2017 Article 88
✅ Formal support from PP, Perpres, LKPP, and Ministerial regulations
✅ Dispute Boards now used in major national and international projects

2. Lessons Learned:
🔍 Early integration of Dispute Boards is more effective than reactive disputes
🔍 Legal clarity enables ADR legitimacy and contract enforceability
🔍 Regulatory alignment helps bridge international standards and national law

3. Shared Opportunities with ：
🤝 Countries operate under civil law systems
🤝 Common interest in reducing project delays and litigation
🤝 Potential for ASEAN-level knowledge-sharing on DB standards and best practices
🤝 Opportunity to build joint training programs, cross-border DB panels, or regional dispute resolution frameworks


Cooperativa Muratori & Cementisti C.M.C. di Ravenna
Sede (Ravenna) Via Trieste, 76 48100 Ravenna (Italia)
Sede (Roma) Via Toscana 10 00187 Roma (Italia)
c. m. c. cooperativa muratori cementisti rave
To: The DISPUTE REVIEW BOARD (DAB)
Atten.: Mr. Gordon Jaynes (Chairman)
Copy:
The ENGINEER
Construction Supervision ELECTROWATT-GHIDRI-Kunming
The EMPLOYER
Kunming Zhangjiuhe River Water Diversion Construction and Water Supply Project Administration Bureau
Dear Sirs,
We are pleased to inform you that the Employer and the Contractor have amicably reached a package agreement dated January 21st, 2014 for final settlement of CW-Lot I of Kunming Zhangjiuhe River Water Diversion and Water Supply Project, fully closing all the pending matters in connection with Lot I.
As per this package agreement, the Employer will make a last payment of CNY34'120'000 to the Contractor before May 15, 2014. Actually, on the 22of April 2014 the Contractor has received this payment from the Employer. Thus the Contractor confirms that all the payments stipulated in the final settlement package deal agreement have been made to the Contractor as programmed, while the Contractor will properly settle final payments with the Subcontractors as already confirmed in the above-mentioned final settlement package deal agreement. Besides that, all the required documentation has been properly submitted by the Contractor
At this moment, both the Employer and the Contractor would like to express our deepest gratitude to the DAB members who walked with the parties through the whole project particularly the most difficult stages, guiding the parties to build mutual acceptable procedures to solve possible disputes. With your constant care and encouragement, it is finally possible the two parties amicably reach the final settlement package agreement. Again, we would like to give our sincere thanks and appreciation to the DAB members for your tremendous contribution to the final completion and a successful closure of the Project.
Signed for and on behalf of
The Employer, Kunming Zhangjiuhe Water Diversion and Water Supply Project Construction Bureau, by Mr. Lai Baoheng
The Contractor, Cooperativa Muratori e Cementisti - CMC di Ravenna by Mr. Salvatore Casciaro
Gordon L. Jaynes
1929 - 2022
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Resources
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https://www.drb.org/dispute-board-manual
https://www.jica.go.jp/Resource/activities/schemes/finance_co/procedure/guideline/pdf/DisputeBoardManual_201203_e.pdf
https://www.fidic.org
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Dispute Board Manual
March 2012
International Conference On Dispute Resolution Improvement of Construction Quality
Forthcoming Events
News
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Cảm ơn rất nhiều

Thank you for your attention!

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VIAC

HICAC 2025

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Work Experience

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2022 – sekarang	Tenaga Ahli Pengadaan dan Kontrak Konstruksi **PT. Transportasi Jakarta**
2021 – 2022	Tenaga Ahli Kontrak Konstruksi pada **Proyek Jalan Tol Cisumdawu Phase 2 dan Phase 3**
2000 – 2021	Pejabat Struktural pada **Kementerian PUPR & Pemerintah Daerah**
	Kepala Balai Pengadaan Jasa Konstruksi Jawa Barat
	Kepala Bagian Hukum & Komunikasi Publik Ditjen Bina Konstruksi
	Kepala Balai Pelatihan Konstruksi Surabaya
	Kepala Sub Bagian Data dan Informasi Setditjen Bina Konstruksi
	Kepala Seksi Jalan dan Jembatan Dinas PU Kabupaten Kaur
	Kepala Seksi Perencanaan Dinas Tata Kota dan Permukiman Kota Lubuklinggau

Organization / Other Activities

Dosen Manajemen dan Kontrak Konstruksi ITENAS Bandung
Asesor pada LSP SAKTI Ikatan Ahli Konstruksi Indonesia Bandung
Pengurus dan Anggota Perkumpulan Ahli Dewan Sengketa Konstruksi
Anggota Dispute Resolution Board Foundation (DRBF USA)
Anggota Society of Construction Law – Indonesia

TENTATIVE AGENDA

SECTION D *(held concurrently with Section C)*

Role of Experts and Evaluation of Damages in Construction Arbitration

8.30 am – 12.00 pm, 11 April 2025 (Fri)
Lotus B Meeting Room, Rex Hotel Saigon

Duration (AM)	Content
	Session D1 – Role of Experts in Construction Arbitration
8.30 – 10.00	**Expert evidence in Vietnam-seated construction arbitrations: a comparative and procedural analysis** **Ms. Dao Linh Chi** – *Arbitral Assistant at ADR Vietnam Chambers LLC*
	Enhancing Expert Evidence in International Construction Arbitrations **Ms. Kua Lay Theng** – *Partner at WongPartnership*
	Expert Evidence in Arbitration: Avoiding Ships Passing in the Night **Mr. Johnny Tan Cheng Hye** – *Independent Expert, Arbitrator/Mediator*
	The Expert's Journey: From Fact-Finding to Decision-Making **Mr. Vivek Malviya** – *Director, Claims & Contracts – Masin*
	Panel Discussion **Moderator: Mr. Bui Truong Minh Loc** – *Contract Manager at SOL E&C, Standing Committee Member of SCLVN*
10.00 – 10.30	**Tea-break**
	Session D2 – Delays and Damages in Construction Arbitration
10.30 – 12.00 PM	**A Critical examination of Liquidated damages: Do the Challenges to their Application justify reform?** **Mr. Yasir G. Kadhim** – *Director at Secretariat Consulting*
	Concurrent delays in the Construction Arbitration and Judicial purview **Mr. Ramasubramanian** – *Lead consultant – Construction Arbitration, ADROIT Claims and ADR Consultants*
	Delay, Disruption and Pacing – a Singapore and English law perspective **Mr. Akshay Kishore** – *Partner at Bird & Bird LLP*
	Panel Discussion **Moderator: Mr. Tran Pham Hoang Tung** – *Senior Associate, CNC Counsel*
12.00 PM	**End of Section D**

Expert Evidence in Vietnam-Seated Construction Arbitrations:

A Comparative and Procedural Analysis

Dao Linh Chi[1]

Abstract

This paper examines the Vietnamese legal framework governing expert evidence in arbitrations seated in Vietnam, focusing on the Law on Commercial Arbitration 2010 (LCA) and the Vietnam International Arbitration Centre's Rules (VIAC Rules). Drawing comparisons with the ICC, SIAC, IBA Rules, and related soft law instruments, the analysis addresses key procedural aspects such as expert appointment, inspection, and the tribunal's discretion in evaluating evidence. Particular attention is paid to the limited role of party-appointed experts and the potential legal implications of inspection practices rooted in Vietnam's civil law tradition. The paper concludes with recommendations for both institutional and legislative reform, aiming to enhance procedural clarity and bring Vietnamese arbitration practice closer in line with international standards.

Keywords: *Expert Evidence, Inspection, Tribunal-Appointed Experts*

I. Introduction

Expert evidence is central to the resolution of technically complex disputes in international arbitration, particularly in sectors such as construction and valuation. As arbitration continues to gain traction in Vietnam, questions arise regarding how the domestic legal framework accommodates expert evidence and how it aligns with international practice.

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[1] Ms. Dao Linh Chi is an Arbitral Assistant at ADR Vietnam Chambers. She holds an LL.M. in International and Comparative Dispute Resolution from the School of International Arbitration, Queen Mary University of London (UK), where she focused her studies and research on international arbitration, mediation, and the resolution of construction disputes. Prior to joining ADR Vietnam Chambers, Ms. Chi interned at the Secretariat of the Vietnam International Arbitration Centre (VIAC) and in the dispute resolution departments of various law firms. She has experience assisting the Secretariat in managing and administering arbitration cases across a range of dispute areas, including construction, mergers and acquisitions, and the sale of goods. She has also supported lawyers in representing clients in both arbitration and court proceedings.

In Vietnam, expert evidence in arbitration is regulated under the Law on Commercial Arbitration 2010 (LCA) and in the VIAC Rules. While these instruments grant arbitral tribunals broad discretion in collecting evidence, including through inspection and expert appointment, they lack the procedural safeguards and role differentiation commonly found in international rules, such as those of the ICC, SIAC, or the IBA.

This paper explores the procedural treatment of expert evidence in Vietnamese-seated arbitrations. It considers the roles of tribunal- and party-appointed experts, the evidentiary weight of inspection, and the tribunal's discretion in assessing expert input. By drawing comparisons with international models, the paper identifies areas for improvement and proposes a path toward greater procedural coherence and harmonisation with global standards.

II. Vietnam's legal framework for the use of expert in arbitration

1. The power of the Tribunal to collect evidence

Under Vietnamese arbitration law, the arbitral tribunal's authority to collect evidence is primarily governed by the Law on Commercial Arbitration 2010 (LCA), and is adopted in the Rules of the Vietnam International Arbitration Centre (VIAC Rules). These instruments reflect a framework that permits the tribunal to adopt a more interventionist role in the evidentiary process than is commonly seen in international arbitration conducted under common law traditions.

"***Article 19. Power of the Arbitral Tribunal to collect evidence***

[...]

2. The Arbitral Tribunal shall have the power, at the request of a party or the parties, to request witnesses to provide information and documents relevant to the dispute.

3. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek inspection or valuation of the assets in dispute [...]

4. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek expert advice. The Arbitral Tribunal shall have the power to request the parties to provide experts with relevant information or access to relevant documents, goods or assets. The experts shall submit a written report to the Arbitral Tribunal."

These provisions establish a broad procedural mandate for tribunals seated in Vietnam, enabling them to play an active role in ensuring that the evidentiary record is complete and reliable. In particular, the tribunal may not only request witnesses to produce information but may also independently seek inspection or valuation of disputed property, or appoint experts to provide technical input. The authority to act *sua sponte* in these respects reflects the influence of civil law principles, where adjudicators are expected to assist actively in the development of the case.

Notably, while Article 19 permits the tribunal to take such steps either upon party request or on its own initiative, it does not prescribe detailed procedural safeguards or consultation mechanisms akin to those found in rules issued by institutions such as the ICC or the SIAC. Nor does it expressly address the status or admissibility of evidence obtained through tribunal-directed measures, leaving such matters largely to the tribunal's discretion.

This approach stands in contrast to international arbitral practice as codified in instruments like the IBA Rules on the Taking of Evidence in International Arbitration. Under the IBA Rules, party autonomy in the presentation of evidence is a core tenet, with the tribunal's role being primarily to supervise and assess rather than to independently procure evidence. Where the tribunal does appoint an expert or order the production of evidence, procedural safeguards – such as consultation with the parties and disclosure obligations – are built into the process to ensure transparency and equal treatment.

In the Vietnamese context, however, tribunals are often influenced by the procedural style of local courts, where judges are tasked with actively developing the factual record. This orientation can result in tribunals adopting a more inquisitorial role, particularly in domestic arbitrations or those seated in Vietnam. In practice, this may be advantageous where the parties are unable or unwilling to produce sufficient evidence on their own, or where technical clarification is needed to support the tribunal's reasoning.

Nonetheless, the broad discretion granted to VIAC tribunals in the collection of evidence also raises questions regarding procedural predictability and the scope of party participation in such processes. As arbitration in Vietnam continues to evolve and integrate into the global arbitration community, a more structured and harmonised approach – drawing upon international best practices – may serve to enhance user confidence and procedural efficiency.

a. Witness and Expert

The distinction between witnesses and experts is expressly recognised under both the Law on Commercial Arbitration 2010 (LCA) and the Rules of the Vietnam International Arbitration Centre (VIAC Rules). Under these instruments, a witness is primarily concerned with providing factual evidence, including contemporaneous documents and information directly related to the dispute[2]. By contrast, the role of an expert is to offer professional or technical insight on matters that require specialist knowledge[3]. This distinction under the VIAC framework appears to exclude the concept of the "expert witness" as commonly understood in other arbitral rules, such as those of the Singapore International Arbitration Centre (SIAC), where experts giving opinion evidence are sometimes categorised alongside witnesses[4].

The practice of distinguishing between witness and expert is by no means unique to VIAC. Several other arbitral regimes maintain a similar dichotomy. For example, Article 25.2 of the 2021 ICC Arbitration Rules states: "*The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned*". Similarly, the 2020 IBA Rules on the Taking of Evidence in International Arbitration treat fact witnesses and experts in separate provisions: Article

[2] Article 19.2 of the VIAC Rules

[3] Article 19.4 of the VIAC Rules

[4] Rule 40.1 of the SIAC Rules provides that: "*Prior to any hearing, the Tribunal may direct the parties to give notice of the identity of witnesses, including expert witnesses, whom the parties intend to produce, the subject matter of their testimony, and its relevance to the issues*".

4 addresses the former[5], while Articles 5[6] and Article 6[7] set out rules for party-appointed and tribunal-appointed experts, respectively.

This distinction, however, goes beyond mere terminology. It has practical implications for the parties' role in the arbitral process, particularly in terms of who appoints the witness or expert, and the obligations that follow from that appointment. Under the VIAC Rules, it is not expressly stated whether parties have the right to appoint witnesses. In practice, however, it is common for parties to submit witness statements as annexes to their main submissions, treating them as normal documentary evidence in support of their case. This stands in contrast with the more explicit provisions under the ICC Rules, SIAC Rules and the IBA Rules, where the parties' entitlement to present witness evidence is clearly affirmed.

With regard to experts, the position under VIAC Rules is more nuanced. Article 19.4 provides that the tribunal may, either on its own initiative or at the request of a party, appoint an expert to report on issues relevant to the dispute. While the parties may request the tribunal to appoint an expert, there is no express provision allowing the parties to submit expert evidence of their own volition. Nevertheless, it is not uncommon in practice for parties to engage experts independently and submit their reports as part of the evidentiary record, treating them much like other forms of documentary evidence. This pragmatic approach by practitioners fills the gap left by the silence of the VIAC Rules.

By comparison, the ICC, SIAC and IBA Rules adopt a more flexible and detailed approach. These rules allow both party-appointed and tribunal-appointed experts and provide procedural

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[5] Article 4.1 of the IBA Rules provides that: "Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony".

[6] Article 5.1 of the IBA Rules provides that: "A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report".

[7] Article 6.1 of the IBA Rules provides that: "The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties".

safeguards, such as prior consultation with the parties on the appointment of a tribunal expert. The issues for determination, the scope of the expert's mandate, the format of the expert's report and the timeline for submission are typically discussed in advance with the parties to ensure procedural fairness and transparency.

The divergence between these approaches reflects broader differences in legal culture. Vietnam's arbitral practice, rooted in its civil law tradition, tends to adopt a more inquisitorial posture, with tribunals often taking an active role in managing the case and gathering evidence. This contrasts with the adversarial model predominant in common law jurisdictions, where the responsibility for presenting and testing evidence, including expert evidence, lies squarely with the parties. In such systems, expert testimony is not only a tool to prove the technical aspects of a claim but also a strategic asset deployed to persuade the tribunal.

In sum, while the VIAC Rules and the LCA make provision for tribunal-appointed experts, they do not expressly accommodate party-appointed experts, resulting in a lack of clarity in practice. As international arbitration in Vietnam continues to grow, a more explicit recognition of party-appointed experts may be warranted to align local practice with international expectations and to ensure consistency in the evidentiary process

b. Seeking inspection

While some arbitration rules are silent on the issue of inspection, others address it explicitly, albeit in different forms and with varying levels of procedural guidance. The SIAC Rules, for instance, provide that the tribunal may "*order any party to produce to the Tribunal and to the other parties for inspection, in a manner to be determined by the Tribunal, any document, property, or item in its possession or control which the Tribunal considers relevant to the case and material to its outcome*"[8] and In addition, parties are obliged to provide any tribunal-appointed expert with relevant information and access to documents, goods, or property for inspection purposes[9].

By contrast, the ICC Rules do not specifically provide for an inspection mechanism. Similarly, other institutional rules often remain silent on the procedural aspects of inspection,

[8] Rule 50.2(f) of the SIAC Rules

[9] Rule 41.4 of the SIAC Rules

treating it as a matter to be determined by the tribunal in the exercise of its general procedural powers. It is therefore notable that the Law on Commercial Arbitration (LCA) and the VIAC Rules expressly provide for inspection as a standalone method of evidence collection. Under the VIAC framework, inspection is considered a distinct evidentiary tool, separate from the expert mechanism, and may be initiated by the tribunal either on its own initiative or at the request of a party. According to Article 19.3 of the VIAC Rules, inspection is to be conducted by an expert appointed by the tribunal, although the rule does not require the submission of a formal report following the inspection.

The IBA Rules, by contrast, address inspection in Article 7. This provision states that the tribunal may, on its own motion or at the request of a party, "inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate." However, under the IBA framework, inspection is understood as a component of expert activity rather than a separate procedural tool. In other words, inspection is treated as a function to be carried out by an expert already appointed in the arbitration, whether appointed by a party or the tribunal, rather than as a procedural mechanism in its own right. In this respect, the approach taken by the VIAC Rules is distinct. Inspection and expert opinion are regulated as separate mechanisms, with differing procedural consequences. For example, while Article 19.4 of the VIAC Rules explicitly requires tribunal-appointed experts to produce a written report, Article 19.3, governing inspection, contains no such requirement for the entity conducting the inspection.

In practice, inspection under the VIAC Rules is often approached in a manner closely resembling Court-directed inspections in Vietnamese civil or criminal proceedings. Under the procedural codes governing court litigation in Vietnam, it is the Court – not the parties – that holds the power to order inspection. Parties may only request such a measure, but cannot initiate it independently[10]. This reflects the legal culture of Vietnam as a civil law jurisdiction where where

[10] Article 97.2(c) of the Vietnam's Civil Procedure Code 2015 provides that: "2. In cases prescribed by this Code, the Courts may take one or a number of the following measures to collect materials and evidences: [...] seeking inspection [...]"

Article 252.5 of the Vietnam's Criminal Procedure Code 2015 provides that: "A Court verifies, collects and adds evidences through the following activities: [...] 5. Seeking inspection [...]"

adjudicators are tasked with actively gathering and verifying facts, and experts appointed by the court are treated as independent "assistants" to the judiciary[11]. This civil law orientation has inevitably shaped the way arbitral tribunals under the VIAC Rules approach inspection. In practice, tribunal-directed inspections in arbitration are frequently viewed through the same lens as court-supervised inspections, with parties playing a largely passive role.

This procedural model gives rise to recurring concerns among counsel and parties. In particular, tribunal-appointed experts, whether conducting inspections or providing technical opinions, may come to exert disproportionate influence over the outcome of the case. In some instances, inspection reports issued by professional or state-sanctioned agencies are treated as final and binding, akin to judicial expert conclusions. This dynamic raises the spectre of the "fourth arbitrator," in which the expert's findings effectively shape the tribunal's reasoning, thereby undermining the principle that adjudicative authority must rest solely with the tribunal. Although the tribunal must not delegate decision-making power to any other party, the boundary between technical assistance and undue influence is not always easily drawn.

Compounding the issue is the lack of a clearly defined role for party-appointed experts under Vietnamese arbitration framework. This is particularly problematic in complex construction disputes, where competing expert views are often essential to resolving technical disagreements. In contrast, international arbitral practice tends to rely on a balanced use of both party-appointed and tribunal-appointed experts, whose opinions are subject to adversarial testing through submissions, written comments, and oral examination at the hearing. This model preserves party equality and ensures that expert evidence remains within the scope of procedural fairness.

Vietnamese arbitration, particularly within the VIAC framework, would benefit from recalibrating this balance. The inspection mechanism should be used more sparingly and confined to cases where it is strictly necessary. For disputes involving substantial technical complexity, VIAC could promote greater reliance on expert evidence through mechanisms that recognise and facilitate the role of party-appointed experts. Such a shift would enhance procedural transparency,

[11] Sundra Rajoo, *Expert Evidence in Construction Disputes – An Arbitrator's Perspective*, in: *The Guide to Construction Arbitration*, 5th edn., GAR (2023), https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition/article/expert-evidence-in-construction-disputes-arbitrator-perspective

safeguard party autonomy, and reaffirm the tribunal's responsibility as the ultimate decision-maker.

2. The powers of the Tribunal and the parties' right over the expert evidence

a. Request expert report in written form

A key procedural feature of expert evidence in arbitration is the requirement that the expert produce a written report. Article 19.4 of the VIAC Rules explicitly provides that when the arbitral tribunal seeks expert advice, the expert appointed by the tribunal must submit a written report. Similar requirements are found in the ICC Rules, the SIAC Rules, and the IBA Rules, reflecting a consistent practice across institutional frameworks[12]. In each case, the production of a written report ensures that the expert's opinions are made available to the parties in a transparent and reviewable form. More importantly, the rules typically provide the parties with the opportunity to comment on the expert's findings, thereby preserving their right to be heard and their ability to respond to the conclusions reached by the expert and prepare the questions for examine the expers in the hearing. This procedural safeguard plays an important role in maintaining fairness and balance in the proceedings. It also recognises that while the tribunal may rely on the expertise of a third party, such reliance should not come at the expense of party participation or adversarial testing of the evidence.

However, this safeguard under Article 19.4 of the VIAC Rules appears to apply exclusively in cases where the tribunal appoints an expert to provide a professional opinion. When the tribunal appoints an expert to conduct an inspection pursuant to Article 19.3, the rule is silent as to whether the expert or entity conducting the inspection is obliged to submit a written report elaborating on the results. The absence of an express reporting obligation in such cases creates a degree of legal uncertainty, particularly when the inspection is expected to yield findings central to the resolution of the dispute.

In practice, the entities retained to carry out inspections are often professional organisations with experience in technical assessments. As such, they are typically cooperative and willing to document their findings in the form of a written report. Moreover, where the tribunal has

[12] See Article 25.3 of the ICC Rules, Rule 41.6 of the SIAC Rules, and Article 6.4 of the IBA Rules

determined that an inspection is necessary, it is standard for VIAC to enter into a contract with the inspection entity. This contract usually contains terms regarding the conduct of the inspection, including the requirement to produce a report upon completion. These practical arrangements help address the procedural gap in the Rules and ensure that the results of the inspection can be properly introduced into the arbitral record.

Nonetheless, the lack of a clear rule-based requirement leaves open the possibility that, in an undesirable scenario, the inspection party may decline to produce a written report. In such cases, the tribunal may find itself without a reliable procedural basis to compel the production of the report. This could potentially undermine the evidentiary value of the inspection and, by extension, the tribunal's ability to assess the disputed issues with sufficient clarity.

The contrast with other institutional rules is worth noting. Under the IBA Rules, for example, inspections are treated as part of the expert mechanism, and the requirement to produce a written report would generally flow from the expert's appointment. This approach provides greater procedural certainty and ensures that any technical evaluation – whether based on expert analysis or on-site inspection – forms part of the official record.

In conclusion, while the VIAC Rules do provide for expert reports in certain scenarios, they fall short of imposing a general reporting obligation across all instances of tribunal-appointed technical assistance. As arbitration in Vietnam becomes more international in scope, a clearer alignment with established international practices may help enhance predictability and procedural robustness in the handling of expert evidence.

b. Summon expert to attend a hearing for examination

Article 20.1 of the VIAC Rules, which mirrors Article 47.1 of the Law on Commercial Arbitration 2010 (LCA), provides:

"***Article 20. Power of the Arbitral Tribunal to summon witnesses***

1. The Arbitral Tribunal shall have the power, at the request of a party or the parties and if the Tribunal considers it necessary, to summon witnesses to attend a hearing. The witness expenses shall be paid by the requesting party or allocated by the Arbitral Tribunal.

[...]"

In addition, Article Article 25.3 of the VIAC Rules provides that:

"***Article 25. Hearings***

3. [...] The Arbitral Tribunal, on its own initiative or at the request of a party, shall have the power to invite the organization or individual conducting the inspection or the valuation of assets and the experts as stipulated in Article 19 to attend hearings. The Arbitral Tribunal may permit other persons to attend hearings if the parties so consent.

[...]"

Read together with Article 19, these provisions indicate that the tribunal has the authority to summon not only fact witnesses but also tribunal-appointed experts and inspection entities to attend the hearing. However, the framework remains silent on the treatment of party-appointed experts, whether they may be summoned to the hearing, and on what legal basis.

In practice, parties who wish to present expert evidence often submit expert reports as part of their written submissions. If a party intends to have its expert examined at the hearing, the expert is typically characterised as a "witness" under Article 20.1, or alternatively, as an "other person" whose attendance may be permitted under Article 25.3, subject to party consent. Similarly, if the tribunal wishes to hear a party-appointed expert, it may rely on Article 25.3 to invite such individual to attend the hearing. Despite these practical workarounds, the absence of express provisions on the examination of party-appointed experts creates legal uncertainty

By contrast, rules of other major institutions such as the ICC and SIAC clearly contemplate the possibility of both party-appointed and tribunal-appointed experts being examined at the hearing[13]. Under these rules, not only may the tribunal require the expert to give oral testimony,

[13] Article 25.2 and Article 26.3 of the SIAC Rules provides that: "*25.2 The Tribunal may allow, refuse or limit the appearance of witnesses to give oral evidence at any hearing*"; "*26.3 Unless otherwise agreed by the parties, if the Tribunal considers it necessary or at the request of any party, an expert appointed under Rule 26.1(a) shall, after delivery of his written report, participate in a hearing. At the hearing, the parties shall have the opportunity to examine such expert*".

Article 25.3 of the ICC Rules provides that: "At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert".

but the parties are also entitled to cross-examine the expert. This procedural right forms a critical part of the adversarial process and is widely regarded as an important safeguard to ensure that the expert's evidence is adequately testified and subjected to scrutiny.

In the absence of an express provision in the VIAC Rules, parties and tribunals often resort to a practical workaround. Article 20 may be interpreted as implicitly encompassing both fact and expert witnesses, allowing either the tribunal or the parties to request an expert's attendance at the hearing. In practice, this interpretation is commonly adopted. However, the lack of express guidance creates legal uncertainty and may lead to procedural challenges, particularly in cases where the tribunal-appointed expert's result plays an influential role in the tribunal's resolution of the dispute.

This concern is heightened by the fact that parties frequently retain competing experts who offer conflicting technical opinions. Even when both experts are examined at the hearing, tribunals often face a difficult task in reconciling diverging views and reaching a well-reasoned conclusion. The problem is exacerbated where the expert is not summoned to the hearing, as this deprives the parties of an opportunity to challenge the expert's methodology or conclusions through direct questioning.

The concern is especially acute in the case of tribunal-appointed experts. Although such experts are subject to the same standards of independence and impartiality as arbitrators, they are not selected by the parties and may therefore be perceived as lacking legitimacy. Parties may also worry about the absence of procedural control over how the expert's findings – potentially determinative to the outcome – are introduced and presented. These issues underscore the importance of clear procedural safeguards to preserve party autonomy and procedural fairness in expert evidence.

c. The Tribunal's power to assess the evidence

In the context of evidentiary management, most institutional rules afford tribunals broad procedural discretion but often lack detailed guidance on how that discretion should be exercised in practice. As a result, many tribunals turn to soft law instruments, such as the IBA Rules on the

Taking of Evidence in International Arbitration, to supplement the applicable arbitration rules[14]. The IBA Rules are particularly useful in complex, evidence-heavy disputes, such as international construction arbitrations, where technical issues and voluminous documentation are commonplace.

The IBA Rules set out a comprehensive framework for the handling of evidence, including specific provisions on document production, witness examination, expert evidence, and, notably, the tribunal's power to assess the relevance, materiality, weight, and admissibility of evidence. These provisions empower the tribunal to make determinations regarding the probative value of each piece of evidence and to manage the proceedings efficiently and fairly.

However, neither the LCA nor the VIAC Rules contain an equivalent provision expressly authorising the tribunal to assess the admissibility or weight of evidence. While it is generally accepted that, in principle, tribunals have such discretion as part of their procedural mandate, the absence of an express legal basis can create practical difficulties – especially in jurisdictions like Vietnam, where court intervention remains a possibility at the enforcement stage.

Indeed, in Vietnam-seated arbitrations, the adoption of the IBA Rules by agreement of the parties or through procedural orders is rare. This hesitation may stem from concerns about the risk of award annulment if the tribunal is perceived to have applied soft law in a manner inconsistent with Vietnamese public policy. In *Decision No. 11/2019/QD-PQTT* issued by the Hanoi People's Court on 14 November 2019[15], the tribunal's reliance on the IBA Rules to reject certain evidence submitted by the respondent – despite Vietnamese law being the governing law of the dispute – was found to be a violation of fundamental legal principles, resulting in the annulment of the award.

As a result, Vietnamese tribunals tend to exercise significant caution when dealing with evidence, often refraining from dismissing any evidence outright. This leads to a situation in which the tribunal's ability to control the evidentiary record may be compromised by concerns about

[14] Article 9.1 of the IBA Rules provides that: "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence".

[15] Decision No. 11/2019/QD-PQTT at https://congbobanan.toaan.gov.vn/2ta428188t1cvn/chi-tiet-ban-an

enforceability. In effect, there is no explicit legal foundation under the LCA or VIAC Rules that provides the tribunal with a secure basis to exclude or disregard evidence without running the risk of being perceived as procedurally unfair by the court.

This gap reinforces the argument that the evidentiary framework under Vietnamese arbitration law could benefit from further development – either through revisions to the LCA and VIAC Rules, or through greater acceptance of international best practices, such as the IBA Rules. Until such developments occur, tribunals and counsel must carefully navigate the delicate balance between procedural efficiency and legal certainty in the handling and assessment of evidence.

III. Recommendations

1. Short-term recommendations

In the short term, while the Law on Commercial Arbitration (LCA) remains under review and institutional arbitration rules are still required to align with this legal framework, meaningful reform may be pursued at the institutional level. Given its prominence in the Vietnamese arbitration landscape, the Vietnam International Arbitration Centre (VIAC) is well-placed to take the lead in initiating such improvements.

First, the VIAC Rules should explicitly grant the arbitral tribunal the authority to summon witnesses to attend hearings and, importantly, allow the parties to examine those witnesses during the hearing. This would bring the Rules into closer alignment with international standards and enhance the procedural balance between tribunal powers and party rights.

Second, the Rules should expressly recognise the parties' right to appoint witnesses. Such a provision would reinforce the principle that parties must be given a reasonable opportunity to present their case before the tribunal, including the ability to introduce testimony that supports their case.

Third, in the case of tribunal-appointed experts, the tribunal should be required to consult with the parties prior to appointment. This consultation should include discussion of the proposed expert's identity as well as the scope of issues on which the expert will be asked to provide an opinion. This procedural safeguard would increase transparency and party confidence in the tribunal's reliance on third-party expertise.

Fourth, the production of a written report should be made mandatory for all experts – whether appointed to provide technical advice or to carry out an inspection. A uniform requirement for written reports would strengthen the evidentiary record, promote consistency, and ensure that the expert's findings are available for scrutiny by both the tribunal and the parties.

2. Amending the LCA

In the longer term, the author supports a more comprehensive reform of the LCA itself. In particular, the law should be revised to clearly distinguish between party-appointed experts and tribunal-appointed experts, thereby encouraging a more active role for parties in the evidence-gathering process. Tribunal-appointed experts, under this revised framework, would cover both expert advice and inspection functions, streamlining the evidentiary process and reducing ambiguity between different types of technical assistance.

Additionally, the LCA should affirm the tribunal's broad discretion to assess all aspects of the evidence, including admissibility, relevance, materiality, and probative value. Such a provision would bring Vietnamese arbitration practice closer in line with international standards and reduce uncertainty regarding the tribunal's authority to manage the evidentiary record.

3. Drawing on soft law and regional practice to develop VIAC's own evidentiary guidelines

The author advocates for greater openness toward the application of soft law instruments, such as the IBA Rules on the Taking of Evidence in International Arbitration. Increased acceptance of such instruments – whether by agreement of the parties or through institutional practice – would contribute to greater procedural efficiency and predictability. As arbitration in Vietnam continues to integrate with the international system, it is also timely to consider the development of evidentiary guidelines tailored to the Vietnamese context. In this respect, the experience of the China International Economic and Trade Arbitration Commission (CIETAC) – an institution operating within a civil law tradition broadly similar to Vietnam's – may serve as a valuable reference point. At the same time, recent developments at the United Nations Commission on International Trade Law (UNCITRAL), particularly its work on the potential use of technical advisors in arbitration, offer additional options for supporting the tribunal in resolving technically complex disputes. These instruments and practices provide useful insights for shaping a more structured and coherent evidentiary framework for VIAC-administered arbitrations.

Learning from CIETAC's Guidelines and the Civil Law Approach

One notable example is the 2015 Guidelines on Evidence issued by the China International Economic and Trade Arbitration Commission (CIETAC)[16]. These guidelines are based on international best practices but adapted to fit the Chinese legal and procedural environment, which, like Vietnam's, is rooted in the civil law tradition. The CIETAC Guidelines incorporate key elements of the IBA Rules while modifying their application to ensure compatibility with local norms. They also reflect procedural values found in the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)[17], such as tribunal-led evidence gathering, restrained use of oral testimony, and emphasis on efficiency.

For VIAC, this model demonstrates that institutional guidelines can strike a balance between global expectations and domestic procedural culture. By learning from CIETAC and selectively integrating features from both the IBA Rules and the Prague Rules, VIAC can establish its own evidentiary framework. Such guidelines could clarify procedures on expert appointment, inspection, and party access to technical reports, while also reinforcing party equality and transparency.

Exploring the Use of Technical Advisors: Insights from UNCITRAL

A further development worth considering is the recent work of UNCITRAL Working Group II, particularly in Working Paper A/CN.9/WG.II/WP.236 – *Technology-related dispute resolution and adjudication: Model clauses and guidance texts*[18], which explores the potential role of *technical advisors* in international arbitration. Unlike tribunal-appointed or party-appointed experts, technical advisors serve as confidential assistants to the tribunal. Their role is not to issue binding conclusions but to help the tribunal understand technical issues more effectively during the course of the proceedings.

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[16] China International Economic and Trade Arbitration Commission (CIETAC), *Guidelines on Evidence*, available at: https://www.cietac.org/en/articles/25113

[17] rague Rules Drafting Committee, *Inquisitorial Rules of Taking Evidence in International Arbitration (Prague Rules)*, entered into force on 14 December 2018, available at: https://praguerules.com/upload/iblock/a00/a00568c6787a8bc955f4fdfe93db5a10.pdf

[18] UNCITRAL Working Group II, *Settlement of commercial disputes: Use of technology in arbitration*, A/CN.9/WG.II/WP.236, available at: https://docs.un.org/en/A/CN.9/WG.II/WP.236

This mechanism can be especially useful in construction disputes or other technically complex cases, where a neutral consultant may assist the tribunal in navigating highly specialised subject matter without disrupting the balance of party rights. While not yet widely institutionalised, the concept of technical advisors provides an alternative to formal expert appointment and may help address concerns over the perceived dominance of tribunal-appointed experts in Vietnam, particularly in cases involving inspection. If clearly regulated, with disclosure to and consultation with the parties, this model could be adapted within VIAC's procedural framework to enhance efficiency and safeguard procedural fairness.

IV. Conclusion

Expert evidence plays a critical role in ensuring fairness and accuracy in arbitral proceedings involving technical issues. The Vietnamese framework, anchored in the LCA and VIAC Rules, provides tribunals with general powers to appoint experts and seek inspections, but lacks detailed procedural guidance and mechanisms to ensure party equality.

Challenges persist due to the absence of clear provisions on party-appointed experts, inconsistent requirements for expert reporting, and the limited use of adversarial testing through cross-examination. These are further compounded by the cautious attitude toward soft law instruments such as the IBA Rules, stemming from concerns about compatibility with domestic legal standards.

Short-term institutional reforms. particularly through revisions to the VIAC Rules. could introduce greater procedural transparency and encourage more effective use of expert evidence. In the longer term, legislative amendments to the LCA may be necessary to clarify expert roles, empower tribunals in evidentiary assessment, and align more closely with international practice.

As Vietnam's arbitration regime continues to develop, embracing structured and internationally informed approaches to expert evidence will be key to reinforcing user confidence and the credibility of proceedings seated in Vietnam.

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Expert Evidence in Vietnamese-Seated Arbitrations: A Comparative and Procedural Analysis

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INTRODUCTION

- **Expert evidence plays an indispensable role in international arbitration**, particularly in disputes involving complex technical issues, construction claims, or specialised valuation matters.
- **Vietnam's framework:**

  LCA 2010 & **VIAC Rules** vs. **global standards (ICC/SIAC/IBA)**

- **Gaps:** Procedural safeguards, party autonomy, soft law acceptance.

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Vietnam's legal framework for the use of expert in arbitration

- **LCA 2010 & VIAC Rules** grant tribunals broad discretion (Article 19):
  - Tribunal-appointed experts.
  - Inspection/valuation powers.

VIAC vs. **ICC/SIAC**

- **Civil law influence:** Inquisitorial vs. adversarial approaches.

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1. The power of the Tribunal to collect evidence

Under the Law on Commercial Arbitration 2010 and the VIAC Rules, arbitral tribunals in Vietnam have broad authority to collect evidence, including summoning witnesses, ordering inspections or valuations, and appointing experts—either on their own initiative or at party request. This reflects Vietnam's civil law tradition, where adjudicators play an active role in fact-finding. Unlike international rules such as the IBA or ICC, the VIAC framework lacks detailed procedural safeguards or consultation requirements, giving tribunals significant discretion. While this approach can be practical in evidentiary gaps, a more structured system aligned with global best practices could enhance procedural predictability and user confidence.

1. The power of the Tribunal to collect evidence

- **Article 19 of VIAC Rules:**

"Article 19. Power of the Arbitral Tribunal to collect evidence

[...]

2. The Arbitral Tribunal shall have the power, at the request of a party or the parties, to request witnesses to provide information and documents relevant to the dispute.

3. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek inspection or valuation of the assets in dispute [...]

4. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek expert advice. The Arbitral Tribunal shall have the power to request the parties to provide experts with relevant information or access to relevant documents, goods or assets. The experts shall submit a written report to the Arbitral Tribunal."

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a. Witnesses vs. Experts

Under the **LCA 2010** and the **VIAC Rules**, a clear distinction is made between witnesses and experts. **Witnesses** provide factual evidence, while **experts** contribute technical or professional opinions on specialized matters. Unlike other arbitral frameworks such as SIAC or ICC, the VIAC Rules do not explicitly allow for party-appointed experts, although in practice, parties often submit expert reports as part of their evidence. This omission reflects Vietnam's civil law tradition, where tribunals adopt a more inquisitorial role. To align with international standards, a clearer framework recognizing party-appointed experts may be necessary to support procedural fairness and ensure balanced representation of technical issues.

b. Seeking inspection

The **VIAC Rules** treat inspection as a separate evidentiary tool distinct from expert evidence. While the **ICC Rules** are silent and the IBA Rules incorporate inspection as part of expert functions, VIAC expressly allows tribunal-initiated inspections under Article 19.3, without requiring a formal report. Rooted in Vietnam's civil law system, this approach limits party control and reflects court-like procedures. However, this may risk excessive influence by tribunal-appointed experts, raising concerns of the "fourth arbitrator." To mitigate this, VIAC could encourage more balanced use of party-appointed experts in complex disputes, promoting transparency and preserving the tribunal's adjudicative authority.

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2. The powers of the Tribunal and the parties' right over the expert evidence

a. Request expert report in written form

b. Summon expert to attend a hearing for examination

a. Request expert report in written form

Under the **VIAC Rules**, when the tribunal appoints an **expert** to provide professional advice, the expert must submit a **written report**, ensuring **transparency** and allowing parties to **comment** and prepare for **cross-examination**. This procedural safeguard is consistent with other institutional rules, such as the **ICC** and **SIAC**. However, there is no explicit requirement for a written report when the tribunal appoints an **expert** for **inspections**, creating potential **uncertainty**. While practical arrangements, like **contracts** with inspection entities, often ensure written reports, the lack of a clear **reporting obligation** could undermine the **evidentiary value** of such inspections and complicate the arbitral process.

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b. Summon expert to attend a hearing for examination

The **VIAC Rules** grant tribunals the power to **summon witnesses**, **tribunal-appointed experts**, and **inspection entities** to attend hearings. However, the treatment of **party-appointed experts** is not explicitly addressed, leading to **legal uncertainty**. In practice, tribunals often summon experts by interpreting Article 20 as applicable to both **fact and expert witnesses**. This uncertainty is compounded by the **lack of explicit provisions** on the examination of **party-appointed experts**, potentially hindering the ability to challenge **conflicting technical opinions** and raise concerns about **procedural fairness** and **party autonomy**.

- **Article 20.1 of the VIAC Rules:**

*"**Article 20. Power of the Arbitral Tribunal to summon witnesses***

1. *The Arbitral Tribunal shall have the power, at the request of a party or the parties and if the Tribunal considers it necessary, to summon witnesses to attend a hearing. The witness expenses shall be paid by the requesting party or allocated by the Arbitral Tribunal.*

[...]"

- **Article 25.3 of the VIAC Rules**

Article 25. Hearings

3. [...] The Arbitral Tribunal, on its own initiative or at the request of a party, shall have the power to invite the organization or individual conducting the inspection or the valuation of assets and the experts as stipulated in Article 19 to attend hearings. The Arbitral Tribunal may permit other persons to attend hearings if the parties so consent.

[...]"

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c. The Tribunal's power to assess the evidence

The **LCA** and **VIAC Rules** grant tribunals broad discretion over evidentiary matters but lack a clear legal foundation for the **assessment of evidence**. Unlike the **IBA Rules**, which explicitly empower tribunals to assess the **relevance**, **materiality**, **weight**, and **admissibility** of evidence, the VIAC Rules do not provide such detailed guidance. This gap creates **practical difficulties**, particularly regarding **enforceability** in Vietnam, where courts may intervene in the annulment of awards. The **absence of express authority** to exclude evidence limits the tribunal's ability to manage the evidentiary record effectively, calling for greater alignment with **international best practices** to enhance procedural **certainty**.

.II.

RECOMMENDATIONS

1. Short-term recommendations

In the short term, while the Law on Commercial Arbitration (LCA) remains under review and institutional arbitration rules are still required to align with this legal framework, meaningful reform may be pursued at the institutional level. Given its prominence in the Vietnamese arbitration landscape, the Vietnam International Arbitration Centre (VIAC) is well-placed to take the lead in initiating such improvements.

First

VIAC Rules should explicitly authorize tribunals to summon witnesses and grant parties examination rights, aligning with international standards for procedural fairness.

Second

The Rules should formally recognize parties' right to appoint witnesses, ensuring their ability to fully present their case.

Third

Mandate tribunal consultation with parties before appointing experts, covering both expert selection and scope of inquiry to enhance confidence in the process.

Fourth

Require written reports for all expert evidence (both advisory and inspection), creating a consistent, scrutinizable evidentiary record.

2. Amending the LCA

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In the longer term, the author supports a more comprehensive reform of the LCA itself. The law should distinguish between party-appointed and tribunal-appointed experts, promoting a more active role for parties in evidence-gathering. Tribunal-appointed experts would handle both expert advice and inspections, streamlining the process.

Additionally, the LCA should affirm the tribunal's discretion to assess evidence, including admissibility, relevance, materiality, and probative value, aligning with international standards and reducing uncertainty.

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3. Drawing on Soft Law and Regional Practice to Develop VIAC's Evidentiary Guidelines

The author advocates for greater openness towards applying soft law instruments, like the IBA Rules on the Taking of Evidence in International Arbitration, to enhance procedural efficiency and predictability in Vietnam. By adopting such instruments, either through party agreements or institutional practices, VIAC can create a more structured evidentiary framework that aligns with international standards while considering the Vietnamese legal context.

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Learning from CIETAC's Guidelines and the Civil Law Approach

A valuable model for **VIAC** is the **2015 CIETAC Guidelines on Evidence**, which adapt international best practices to the **civil law tradition**. These guidelines integrate the **IBA Rules** and the **Prague Rules**, focusing on **tribunal-led evidence gathering** and **efficiency**. VIAC can draw from CIETAC's approach to establish a balanced framework that addresses **expert appointment**, **inspection**, and **party access to technical reports**, ensuring **party equality** and **transparency**.

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Exploring the Use of Technical Advisors: Insights from UNCITRAL

Another key development is **UNCITRAL's** exploration of **technical advisors** in arbitration. These advisors assist the tribunal with **technical issues** without issuing binding conclusions, ensuring that the tribunal better understands complex topics. This mechanism, particularly useful in **construction disputes**, could help balance the role of **tribunal-appointed experts** in Vietnam's arbitration system. If properly regulated, **technical advisors** can enhance **efficiency** and **procedural fairness**, offering an alternative to formal expert appointments.

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Thank you for your attention!

Navigating the Stages of Expert Evidence in Arbitration: A Comparative Analysis of Practices

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Abstract: Expert evidence is often used as a proxy for advocacy by disputing parties, sometimes serving to strengthen an evidentially weak case. This paper compares the use of expert evidence across Singapore, the United Kingdom and various arbitration guidelines, highlighting the differing approaches and practices that have recently emerged. By examining these different frameworks, the paper underscores key considerations for parties, legal counsel, and arbitral tribunals when selecting appropriate guidelines. Ultimately, it argues that the parties themselves hold the greatest power to control the effectiveness of expert evidence in their dispute.

Keywords: Appointment of experts, Joint expert evidence, Tribunal-appointed experts

1 Introduction

The introduction of expert evidence is often a necessity when dealing with a dispute with complex technical issues that lawyers themselves are barely equipped to make submissions on. Yet, at the same time, this has led to arbitral tribunals having to grapple with expert reports or opinions that are hardly any simpler than the technical issues which they purport to address. It has been observed that there is a "*need for parties to instruct and rely on expert opinions from an early pre-action stage*",[1] leading to parties incurring the cost of expert evidence early, sometimes prior to the commencement of a dispute. The issue is made more complex by the arbitral tribunal's obligation to observe due process. If an expert report is rejected out of hand by a tribunal, the latter may face claims of breaching natural justice, potentially leading to the award being challenged.

1.1 What Constitutes Expert Evidence

Expert evidence is not a carte blanche to introduce any evidence from a third party. Instead, expert evidence is opinion evidence, which is deemed to be relevant to a dispute because the knowledge expressed in that opinion will be relevant to the courts. In Singapore, Section 5 of the Evidence Act 1893 stipulates that evidence can only be given of facts in issue and relevant facts, with all other evidence to be excluded. Expert evidence is admissible as opinion evidence which is deemed to be a relevant fact under Section 47 of the Evidence Act 1893. A similar provision exists in Section 56 read with Section 79 of the Australian Evidence Act 1995.

[1] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.3.1

As can be seen above, for evidence to qualify as expert evidence, it must be an opinion premised on specialised knowledge; if ordinary persons exercising sound judgement can understand a matter, no expert evidence can be admissible in respect of that matter.[2]

Furthermore, expert evidence is evidence of *opinion*, as opposed to a pure analysis. The *CIArb Guideline on Party-appointed and Tribunal-appointed Experts* (the "***CIArb Guideline***") draws a distinction between expert evidence and the work of data assessors appointed by the arbitral tribunal with the parties' approval. A data assessor may be engaged to assist the tribunal evaluate and/or interpret data which evaluation or interpretation is generally not disclosable to parties.[3]

1.2 The Procedure in Introducing Expert Evidence

In arbitration, the admission or exclusion of expert evidence is part of the arbitral procedure which is subject to parties' agreement. In the event that parties cannot reach an agreement on the arbitral procedure, the arbitral tribunal will have the discretion to decide on the admissibility of evidence, including expert evidence. By illustration, Article 19 of the UNCITRAL Model Law on International Commercial Arbitration (as unchanged from the original 1985 version to the Model Law as amended in 2006) provides that:

> *Article 19. Determination of rules of procedure*
>
> *(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

Parties play an important role in preventing expert evidence from becoming ineffectual. There are two main points in time at which parties may enter into an agreement on arbitral procedure: when parties are entering into the agreement to arbitrate, and when the arbitral tribunal consults parties on the procedural timetable after the tribunal is constituted.

Typically, the counsel representing the parties at these two stages will come from vastly different backgrounds, with one being a transactional lawyer, and the other a disputes lawyer. At the risk of generalisation, most parties - along with transactional lawyers- often overlook evidentiary issues, including the potential need for expert evidence, when drafting arbitration clauses in their contracts.

It is instead at the second point in time, after the initiation of arbitration and in consultation with the arbitral tribunal, that parties are more inclined to direct their attention to the matter of the evidence that is required to prove their case, including whether they would need expert evidence to bolster or substantiate their positions. It is also at this point in time that parties will have an opportunity to prevent future problems from arising with expert evidence, by considering and agreeing on the procedures that they wish to adopt with respect to expert evidence.

Expert evidence begins with the appointment of an expert, followed by the expert's deliberations, and then the presentation of the expert's opinion and finally, the subsequent examination by the arbitral tribunal. In these four stages, the following issues become important:

[2] Reserve Capital v Seascapes Supermarket WA Pty Ltd [2022] WASC 56 at [19]
[3] CIArb Guideline on Party-appointed and Tribunal-appointed Experts, commentary on Article 2

a. How expert(s) are appointed, whether expert(s) are appointed by the arbitral tribunal, jointly by parties or separately by parties, and the extent to which expert(s)' independence and impartiality could be challenged;
b. The issues which expert(s) will be dealing with, and the mechanism by which expert(s) will investigate the said issues;
c. Engagement between expert(s) from both parties, the procedure by which expert(s) would request documents or information from parties, and in the case of multiple experts, whether expert reports are rendered jointly or separately; and
d. How the expert evidence will be tested by the arbitral tribunal, such as by way of hot-tubbing/ joint examination or otherwise.

2 The Process of Appointing an Expert

The preamble to the CIArb Guideline helpfully sets out four permutations of appointment of experts in an arbitration:[4]

> *(1) where each party appoints their own experts;*
> *(2) where parties jointly agree to appoint a single expert;*
> *(3) where tribunals appoint a single expert instead of the parties doing so; and*
> *(4) where tribunals appoint a tribunal-appointed expert in addition to the party-appointed expert(s).*

In the appointment of an expert, whether a party-appointed expert or a tribunal-appointed expert, it is imperative that the expert is seen as providing his or her honest, impartial and independent opinion. An expert who lacks independence or is seen as acting as an advocate for a particular party will almost certainly not be a convincing witness. It is therefore common that expert opinions or statements include a declaration as to the relationship between the expert and the parties, the instructions provided to the expert, and that the expert affirms his or her genuine belief in the opinions expressed in the expert report.[5]

2.1 Impartiality and Independence of Experts

When expert evidence is adduced in a national court, it is subject to the rules of that court regarding the relevancy and admissibility of evidence. In certain jurisdictions, such as the United Kingdom, court approval is required prior to the appointment of any expert.[6]

It should be noted that the impartiality and independence of an expert witness is a duty which arises under the common law and applicable statutes.

For example, Order 12, Rule 1 of the Singapore Rules of Court 2021 prescribes that an expert's duty to the court overrides their duty to their client:

> *Expert (O. 12, r. 1)*
> *1.—(1) An expert is a person with scientific, technical or other specialised knowledge based on training, study or experience.*
> *(2) An expert has the duty to assist the Court in the matters within his or her expertise and on the issues referred to him or her.*

[4] CIArb Guideline on Party-appointed and Tribunal-appointed Experts, Preamble
[5] See for example, Article 5(2)(c) of the IBA Rules on the Taking of Evidence in International Arbitration and Article 4.4(k) of the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration
[6] United Kingdom Civil Procedure Rules, Practice Directions to Part 35

> *(3) The expert's duty to the Court overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.*

When an expert disregards his or her duty to the court and engages in partisan advocacy, the expert's evidence will often be disregarded. Even a mere lack of objectivity can lead a court to disregard an expert's evidence.[7] This also extends to an expert's failure to disclose any prior opinion made to or a prior appointment by one of the disputing parties.[8]

The court can intervene in and control the expert appointment process by either directing that parties appoint a joint expert, or that the court itself makes the appointment of an expert. In addition, it should be noted that courts, as with arbitral tribunals, have the discretion not to award costs incurred by a party in obtaining expert evidence, especially when such costs are incurred unnecessarily or vexatiously.

When to Appoint a Joint Expert Witness

The appointment of a joint expert is provided in a number of common law rules of court or guidelines. For example, Order 12, Rule 3 of the Singapore Rules of Court 2021 stipulates that "*as far as possible, parties must agree on one common expert*." In addition, paragraph 13.4.3 of the United Kingdom *Technology and Construction Court Guide (October 2022)* (the "***TCC Guide***") also sets out examples of when a single joint expert is appropriate:

- *in low value cases, where technical evidence is required but the cost of adversarial expert evidence may be prohibitive;*
- *where the topic with which the single joint expert's report deals is a separate and self-contained part of the case, such as the valuation of particular heads of claim;*
- *where there is a subsidiary issue, which requires particular expertise of a relatively uncontroversial nature to resolve;*
- *where testing or analysis is required, and this can conveniently be done by one laboratory or firm on behalf of all parties.*

While the above would imply that a single joint expert would ordinarily be unsuitable in complex cases with substantial technical issues, such as a construction dispute, the Hong Kong Court of First Instance has made the observation in Perpetual Wealth (HK) Ltd v Be Solutions Co Ltd [2022] HKCFI 2539 at paragraph 8 that "*[s]ingle joint expert evidence is preferred and has been used as the starting point for expert directions by the Construction Court for some time*."

Specific to arbitration, the preamble to the CIArb Guideline observes that *"[t]he appointment of a single joint [expert] is rare as the parties will not have any basis on which to challenge the expert opinion, if it is unfavourable to them*." While the power to appoint is contemplated and provided by the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"), the Rules on the Efficient Conduct of Proceedings in International Arbitration (the "**Prague Rules**"), the CIArb Guideline and other arbitration guidelines, there is a lack of guidance on the types of cases or disputes where a single joint expert or tribunal appointed expert is applicable.

[7] Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd [2019] SGHC 122 at [95]

[8] HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd [2012] 4 SLR 0738 (CA) at [71]

Experts Appointed by the Courts

It should be noted that the appointment of a joint experts by parties is distinct from the appointment of an expert by the courts. The applicable law may provide that the courts may appoint an expert in addition to, or in replacement of, an expert by the parties. The appointment of an expert by the courts is not based on parties' failing to appoint an expert.

The court's exercise of discretion in an expert appointment is premised on the assessment of prospective *costs and efficiency*, once the time and cost impact of mandatory procedural fairness is included. For example, if an expert will be required to access confidential information in the making of their report, the Singapore Courts have considered that "*where one party has no knowledge of the material underlying the report of a single court expert, it is unreasonable to expect it to accept that report at face value unless, of course, it is wholly favourable to that party's case. ...*".[9] While this case was prior to the revision of the Singapore Rules of Court in 2021 to provide that parties should, as far as possible, agree on a common expert, the case nonetheless illustrates the due process considerations underlying the use of a joint or court appointed expert. If an opposing party needs to satisfy itself as to the fullness and fairness of a report, it is quicker and cheaper for a party to instruct its own expert, compared to the court appointing experts.[10]

2.2 Expert Appointments in Arbitration

Insofar as evidence arises from an expert appointed solely by one party, that evidence would be admissible. However, when evidence arises from an expert jointly appointed by both parties or appointed by the arbitral tribunal, such evidence would naturally be more credible than evidence from an expert appointed by one party.

Party-Appointed Experts

Under the IBA Rules, a party can rely on a party-appointed expert as a means of evidence on specific issues. Article 5.1 states that "*[w]ithin the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report*." The arbitral tribunal takes control of the expert appointment by setting a deadline for parties to give notice as to the experts and subject matter of the experts' testimony.

This is similar to Article 3 of the CIArb Guideline, which states that "[h]aving determined that expert evidence will be adduced, arbitrators should discuss with the parties the precise manner in which such evidence should be adduced, bearing in mind the need to conduct the arbitral proceedings in an efficient and cost-effective manner." However, the IBA Rules and the CIArb Guideline are both silent as to the appointment of an expert outside of this identification by parties. A party's opportunity to present its case includes that party's right to adduce expert evidence.[11] It is worth noting that even if a party in an arbitration has represented that it would not be relying on expert evidence, it is rare for arbitral tribunals to rely on such a representation to reject expert evidence adduced by that party subsequently during the course of arbitration.

Notably, the Prague Rules do not even contemplate that parties would confirm if they will adduce expert evidence. The Prague Rules instead provide that even if an expert is appointed by the arbitral tribunal, a party can still submit an expert report by any expert appointed by that party,[12] further enshrining the consensus within international arbitration that a party has a general right to rely on expert evidence.

[9] *B2C2 v Quoine* [2018] 4 SLR 0067 (HC) at [45]
[10] *B2C2 v Quoine* [2018] 4 SLR 0067 (HC) at [47]
[11] CIArb Guideline on Party-appointed and Tribunal-appointed Experts, Commentary on Article 1
[12] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 6.5

Challenging the Appointment of an Expert

In factual disputes, the content of expert evidence can often have a far greater impact on the outcome of the dispute than the legal submissions made by parties' counsel. However, unlike counsel, who are subject to the respective legal professional conduct rules and regulations of the jurisdiction(s) they are admitted to, there is no such regulation for experts. Instead, the ethical duties observed by an expert witness are almost entirely controlled by the arbitral tribunal and parties themselves, in determining how an expert is to be appointed, and, after appointment, the subsequent challenging of the expert.

Both the IBA Rules and the *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (the "***CIArb Protocol***") provide that an expert's report will include a statement of the instructions received by the expert,[13] and a declaration of the expert's independence.[14] That said, neither of these guidelines provide for how such independence is to be assessed, beyond requiring experts to disclose past relationships with parties, counsel and the arbitral tribunal.[15]

Article 6.2 of the IBA Rules provides that the parties may object to the appointment of an expert by an arbitral tribunal on grounds of the expert's qualifications and independence. This is buttressed by Article 6.5 of the IBA Rules, which allows a party to request to inspect, *inter alia*, "*any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert*." However, the IBA Rules are silent on correspondence between parties and party appointed experts, and correspondence between parties and jointly appointed experts.

In contrast, the CIArb Protocol is silent on challenging experts. Article 5 of the CIArb Protocol states that the arbitral tribunal shall not "*order disclosure of the instructions or appointment [of an expert] or any document relating thereto; or permit any questioning of the expert about such instructions or appointment*", "*unless it is satisfied that there is good cause*." While not expressly set out in the CIArb Protocol, it is arguable that concerns about an expert's independence or impartiality would be sufficient to constitute "*good cause*" for the purpose of ordering disclosure of the instructions or appointment of an expert. In this respect, parties to a dispute should consider if there should be any agreement as to the grounds for inspecting an expert's instructions if the CIArb Protocol is adopted.

Notably, the guidelines referred to above do not consider the expert's remuneration as a reason to suspect lack of independence and impartiality. This is to be contrasted with the draft *Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration* (the "***SCL(S) Protocol***", which is not currently publicly available), which recommends that experts declare that "*there is no arrangement where the payment of the expert's fees are contingent on the outcome of the case*".[16] This reflects a jurisdiction specific consideration, given that Singapore does not allow contingency fees for legal counsel. Parties in the midst of arbitration should also consider if there are similar jurisdiction specific requirements that they may wish to include or exclude for their own or for the other party's experts.

[13] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5(2)(b); CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration , Article 4.4(c)

[14] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5(2)(c); CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 4.4(k) read with Article 8

[15] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5.2(a); CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 4.4(b)

[16] Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, (iv) in Principle 1 (not yet launched)

3 The Expert Report

The procedure by which parties interact or supply information to experts only becomes an issue when the expert is either a joint expert or a tribunal-appointed expert. When an expert is appointed solely by one party, there would not be any practical issue with that party supplying the expert with information. The said expert would also *de facto* not be able to retrieve or request for documents from the other party.

3.1 Providing Information to an Expert Witness

The IBA Rules are robust in setting out the procedure for supplying an expert witness with information, with Article 6.3 stating that:

> *"the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue."*

In contrast with the approach under the IBA Rules, the Prague Rules only state that an arbitral tribunal may "request the parties to provide the expert appointed by the arbitral tribunal with all the information and documents he or she may require to perform his or her duties in connection with the expert examination", without elaborating on whether the information and documents are to be provided to the other party, or the effects of non-compliance with the expert's requests or directions. It should be noted that in this procedure of providing a tribunal-appointed expert with information, it is best practice that parties should keep each other in copy,[17] as this would minimise any suspicion that parties are attempting to improperly influence the expert.

The CIArb Guideline has noted that "[a]rbitrators should also include clear provisions requiring each party to provide the tribunal-appointed expert with any information and/or to produce any documentation or material which the expert may require in order to prepare their report and/or to provide the expert with access to any relevant goods or other property for inspection or testing." However, if an expert's requests for information may be broad, along the lines of "all diagrams" or "all programme data", this may grant room for parties to conceal or avoid disclosure of information to the expert. The clear provisions which an arbitral tribunal should provide should extend to the mechanisms for dealing with any disagreement between the expert and the parties regarding particular information or documents.

Lawyers' Involvement in Expert Testimony

In general, parties' legal counsel's involvement in the expert's deliberations should be minimal. Lawyers should not be suggesting, intervening, or requesting that experts take a certain position. The TCC Guide provides that "*[w]hilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement*."[18] The Academy of Experts Form & Content of Joint Statements Guidance for Experts (the "***AE Guidance***") takes a stronger stance

[17] See, for example, Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 4

[18] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.6.3

and explicitly states that "*when the Experts meet to produce the Joint Statement or Report of Experts, they do so without lawyers being present*."[19] This is supplemented by the general practice behind expert evidence in the United Kingdom as set out in the United Kingdom *Practice Direction 35 – Experts and Assessors* ("***PD 35***"), that unless ordered by the court or agreed by all parties and the appointed experts, neither parties nor legal counsel are to attend experts' discussions.[20] If legal counsel do attend, "*they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law*",21 and experts can exclude legal counsel from part of the discussions.[22]

In a recent English case, *Glover v Fluid Structural Engineers and Technical Designers Ltd* [2024] EWHC 1257 (TCC), solicitors for Party A commented to their expert by way of track changes to change the wording in a draft expert report that had been agreed between that Party A's expert and the other party's expert. Unsurprisingly, the TCC revoked that the permission of Party A to rely on the expert. Legal counsel should consistently keep in mind that an expert witness is still a witness of fact, and that his or her credibility is likely to be adversely impacted by any over-involvement or over-instruction by legal counsel. The TCC Guide also stipulates that legal counsel should only invite experts to amend a joint draft statement in exceptional circumstances where there are serious concerns that the court may be misled, and such concerns should be raised with all experts, as opposed to only one party appointed expert.[23]

In Singapore, the upcoming SCL(S) Protocol has adopted a similar stance to the TCC Guide, that legal counsel may identify issues for the experts, but cannot be involved in negotiating or drafting experts' joint statement. Legal counsel may only invite experts to amend in exceptional circumstances where there is a serious concern that the arbitral tribunal may be misled, and these concerns are to be raised to all experts giving the joint statement.[24]

Nonetheless, legal counsel can and should assist experts by pinpointing the factual inquiries which would have a bearing on the issue. While experts are generally qualified to conduct their own investigations and prepare their own reports, not every question of fact which is raised in a case will be important. Legal counsel are best placed to identify which questions of fact will be important and determinative of a case, and highlighting these core inquiries of fact will minimise the overall costs of expert evidence.

Expert Conferencing Prior to Individual Expert Reports

Party-appointed experts should ideally meet and discuss the issues they have been instructed to address *prior* to producing their individual reports, in order to prevent a scenario where they work separately and eventually commit themselves to an inflexible position.[25] This avoids the problem of "*ships passing in the night*", where expert evidence is adduced to wholly different purposes in arbitration.[26]

[19] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 8
[20] United Kingdom Practice Direction 35 – Experts and Assessors, paragraph 9.4
[21] United Kingdom Practice Direction 35 – Experts and Assessors, paragraph 9.5(i)
[22] United Kingdom Practice Direction 35 – Experts and Assessors, paragraph 9.5(ii)
[23] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.6.3
[24] Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 3
[25] See for example, Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 6
[26] As an example, the second author was involved in an arbitration where the claimant submitted an expert report from an architect in relation to alleged non-conformities in construction, while the respondent submitted an expert report from a delay expert to substantiate their case on the lack of delay in the works. Neither party's expert had addressed any of the issues in the other party's expert report.

To address this predicament, both the IBA Rules and the Prague Rules prescribe that the arbitral tribunal has the discretion to order party-appointed expert witnesses to meet and attempt to reach an agreement on the issues within the scope of their expert reports.[27]

The IBA Rules contemplate that the expert reports would be released prior to the meeting between experts on the content of their expert reports, explicitly stating that "*[a]t such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues* ***within the scope of their Expert Reports****, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefor*."[28]

The Prague Rules are less explicit compared to the IBA Rules, with separate provisions for "party-appointed and/or the tribunal-appointed experts to establish a joint list of questions on the content of their reports, covering the issues that they consider necessary to be reviewed"[29] and for "party-appointed and the tribunal-appointed experts, (if any), to have a conference and to issue a joint report …"[30] Nonetheless, the structure of the Prague Rules still suggests that the experts would have issued reports prior to having a conference on whether any issues within the report should be reviewed.

These approaches contrast heavily with the approach under the CIArb Protocol, the AE Guidance and the up-coming SCL(S) Protocol, which all prescribe that the meeting of the experts should occur early, prior to experts drafting their expert reports.

The CIArb Protocol prescribes a comprehensive procedure for discussion and reply between respective parties' experts in the preparation of their written opinion evidence:

a. The experts are to hold a joint discussion on the issues which they will opine upon and the tests and analyses which they will conduct;[31]
b. The experts will then issue to parties and to the arbitral tribunal a statement of their agreements and disagreements on the issues which they agree, the tests and analyses which need to be conducted and the manner of conduct of the various tests and analyses;[32]
c. Any tests and analyses which experts cannot agree on will be conducted in the presence of the other expert;[33]
d. Experts simultaneously exchange written opinions[34] only on the issues where there is disagreement;[35] and
e. Experts are then entitled to simultaneously exchange further written opinions[36] only on the issues raised by the other expert.[37]

While not as prescriptive in terms of reply opinions on the various subjects of disagreement, both the AE Guidance and the SCL(S) Protocol mirror the CIArb Protocol in recommending that experts meet once prior to exchanging

[27] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5.4; Rules on the Efficient Conduct of Proceedings in International Arbitration, Articles 6.6 and 6.7
[28] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.4
[29] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 6.6
[30] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 6.7
[31] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(a)
[32] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(b)
[33] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(c)(ii) and 6.1(c)(iii)
[34] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(e)
[35] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(d)
[36] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(g)
[37] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(f)

reports to reach agreement as much as possible.[38] The AE Guidance and the SCL(S) Protocol additionally recommend that the joint statement of experts to be in the format of a Scott Schedule, where a table is presented with five columns for each issue, describing: the issue; whether there is agreement or disagreement (in terms of Yes or No); the agreement reached and the respective expert's positions in the case of disagreement.[39]

However, the recommendations in the guidelines should be nonetheless used with common sense and only insofar as they actually contribute to an efficient resolution of the dispute. As highlighted above, experts may not be in the best position to determine which issues of fact will be crucial in determining a dispute. In the authors' respectful opinion, the process of rendering an expert report should not be entirely left to the experts, and there should be some amount of input from parties and their legal counsel as to the factual issues which do not need to be investigated. Furthermore, where a case is less complex, it may be more useful to employ the traditional sequence where individual expert reports are exchanged prior to any conference of experts, in order to have a more focused discussion between experts.[40]

Additionally, a Scott Schedule may not be the most efficient method of recording experts' agreements and disagreements insofar as experts have a fundamental disagreement about applicable methodology. In construction cases, for example, delay experts are often called to establish the critical path for construction works, so as to identify which construction activities have delayed the progress of a particular project. Insofar as delay experts agree on the applicable methodology to establish a critical path, disagreements would be generally limited to whether particular individual activities fall within the critical path. However, in the case where the delay experts disagree on the applicable mechanism for determining the critical path for a project to begin with, there will be no agreement on the construction activities forming the critical path, and a Scott Schedule recording said disagreement may be redundant or not as helpful as the respective experts setting out their analysis in separate reports.

3.2 Whether the experts' agreement binds parties

A point that should be considered by parties to a dispute is whether they should agree to be bound by any agreement reached by their respectively appointed expert witnesses on any issue, or conversely, whether they should expressly agree not to be bound by any agreement reached by their experts in the course of meetings or issuing the report.[41]

Among the various protocols considered in this article, only the IBA Rules explicitly provide that parties have a right to submit expert reports in response to the opposing party's expert reports by submitting reports from persons who were not previously appointed as experts.[42] Parties also have the right to respond to the expert report of a tribunal-appointed expert by way of witness statements or expert reports by their own party-appointed expert.[43]

In terms of efficiency, the issues in dispute would be simplified if parties agree to be bound by any agreements or conclusions reached jointly by their party appointed experts. This would lead to reduced costs and the time taken for the arbitral process.

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[38] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 6; Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 5

[39] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 11; Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Form of Experts' Joint Statement / Experts' Supplementary Joint Statement

[40] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 7; Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 5

[41] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 18(b)

[42] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.3

[43] IBA Rules on the Taking of Evidence in International Arbitration, Article 6.5

However, at the same time, an expert is not a party representative. While an expert witness is a witness of fact, the generalised duty of independence imposed upon most expert witnesses across jurisdictions would mean that the expert witness has an overriding duty to the arbitral tribunal and not to the party appointing it. To allow an expert to bind the party who appointed them, would be to grant a form of agency upon party-appointed experts, with a result that is by no means legally clear. If a party-appointed expert's main duty is to the arbitral tribunal, then the party-appointed expert would have a conflict of interests if it were allowed to bind the party who appointed it. In the authors' respectful opinion, any stance adopted by party-appointed experts should not, as a matter of legal principle, be allowed to bind the party appointing said experts.

Practically speaking, it would be difficult for a party to substantiate a case that was at odds with the conclusions or methodologies that had been agreed between experts. Nonetheless, as a matter of procedural justice, because a party has the right to be heard and to present its case, it would not be procedurally fair for a party to lose the right to present a case which differs from the conclusions drawn by an independent third party such as an expert witness.

4 Examining Expert Witnesses

After expert reports are issued, parties and the arbitral tribunal are left with the question of how to test the expert evidence. With practical constraints on the duration of an evidentiary hearing and the realistic limits of information which would assist arbitral tribunals, parties will have to consider whether to call expert witnesses to testify in the first place. In addition, the various ways by which expert evidence can be presented at the evidentiary hearing include:[44]

a. One party calling all of its expert evidence, followed by the other party calling all of its expert evidence;
b. One party calling its experts in a particular discipline, followed by other parties calling their experts in that discipline, which is then repeated for experts of all disciplines;
c. One party calling its experts on a particular issue, followed by other parties calling their experts on that issue, which is then repeated for all the expert issues; and
d. All the experts of a particular discipline to be called to give concurrent evidence, colloquially called "*hot-tubbing*" of experts or witness conferencing.

4.1 Whether to Examine an Expert Witness

Some arbitration guidelines do not require that expert witnesses *must* testify before an arbitral tribunal. The Prague Rules are perhaps the most extreme in this regard, with a blanket recommendation that "*the arbitral tribunal and the parties should seek to resolve the dispute on a documents-only basis*"[45] without any express mention as to factors such as the quantum, complexity or issues in dispute, unless one of the parties requests a hearing or the arbitral tribunal finds it appropriate to hold a hearing.[46] The Prague Rules are otherwise silent as to how testimony should be adduced.

On the other extreme, the CIArb Protocol, states that unless the parties to a dispute have agreed otherwise and the arbitral tribunal confirms the said agreement, an expert who has rendered a written opinion is bound to give oral testimony, and if the said expert fails to appear to give testimony without a valid reason, their written opinion will be disregarded.[47]

The IBA Rules have similar provisos to the CIArb Protocol, stating that if a party-appointed expert's attendance has been requested at the evidentiary hearing, then the failure of that expert to appear for testimony will result in

[44] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.8.2
[45] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 8.1
[46] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 8.2
[47] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(h)

the arbitral tribunal disregarding that expert's expert report.[48] However, the IBA Rules have an additional stipulation that if the appearance of a party-appointed expert is *not* requested by the other parties to the dispute, that does not amount to an agreement as to the correctness of the contents of that expert's expert report.[49] This would seem to suggest that the IBA Rules allow for a party to dispute the contents of the opposing party's expert report with the opposing party's appointed expert *in absentia*. Such an explicit provision is not present in the CIArb Protocol.

Realistically, it may be difficult to mount a convincing case against the substantive contents of a party's expert report while the expert witness who made said report was not present to defend the content of the said report. However, it may be expedient and economical to not call an expert witness who is appointed by an opposing party, if the dispute against the said expert's report has to do with the relevance of the report, the reliability of the evidence relied upon in the report, or similar grounds which do not call into question the methodologies and analyses that were set out in said report.

4.2 Examining Expert Witnesses

The suitability of each method by which expert testimony is received by the arbitral tribunal will depend on the number of issues referred to expert evidence, the number of disciplines in which the experts are appointed, and the complexity of the testimony given by each expert. While there is no straightforward way to determine what method to adopt for a particular case, parties may wish to consider:

a. If expert opinions diverge wildly from each other, it might not be helpful to the arbitral tribunal to hot-tub or hear expert testimony on an issue by issue or discipline by discipline basis. It may be more helpful to have experts present their opinions as part of a party's entire cohesive case.
b. If the expert testimony relied upon by parties spans a multitude of divergent issues and / or disciplines, it may be of more assistance to the arbitral tribunal to hear the expert testimony on an issue by issue or discipline by discipline basis.
c. If there are particular issues or inquiries which will be determinative of a disproportionate fraction of a claim compared to other issues, it would likely be of more assistance to the arbitral tribunal to hear the issues separately eg bifurcation.
d. If expert witnesses can otherwise agree on methodology or particular discrete conclusions, it may be beneficial to have hot-tubbing between the experts to render it clear to the arbitral tribunal the source of the experts' disagreements.

5 Key Considerations for Expert Evidence

The reality of expert evidence is that if a case has complex, technical issues of which an independent third party's opinion would be of assistance to courts and arbitral tribunals, the said case will inevitably require expert evidence to be submitted by the parties. Parties should consider, at the outset of a dispute, whether expert evidence would be required, when to involve experts, how expert evidence should be adduced, and how it would be tested.

Even when parties are drafting their dispute resolution clauses, the eventual need for expert evidence or the methodologies to be utilised by the experts should be considered at that point in time. For example, in construction contracts there could be provisions setting out the specific methodology or protocol to be adopted in the analysis of delay. Parties may also wish to consider whether a clause requiring expert determination prior to the initiation of arbitration is appropriate if disputes are likely to be almost entirely factual.

While existing protocols, guidelines or rules relating to evidence guidelines may outline best practices for the use of expert evidence, it is important to remember that the key feature of arbitration is flexibility. Codes and

[48] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.5
[49] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.6

protocols are not meant to replace the oversight of the dispute by parties and the arbitral tribunal. It should be noted that all of the rules, procedural and otherwise, leave discretion, for parties to agree on or for the arbitral tribunal to order departures from the prescribed procedures. Ultimately, it is up to the parties and tribunal to handle expert evidence in a manner that suits the specific facts of the dispute to facilitate its resolution.

Lastly, while the arbitral rules, protocols, and guidelines may stipulate procedures for appointing experts, their meetings, report issuance and testimony, they fail to address the most fundamental practical question: *whom* to appoint as an expert? Parties involved in a dispute often single-minded seek an expert who aligns with their claims, with the risk of the said expert's evidence being disregarded due to perceived bias. There is a constant impetus to select an expert who can appear objective while being partisan. However, such a selection will only delay the resolution of the dispute and increase costs for all parties, especially if both parties appoint such experts.

At the end of the day, the just, efficient and cost-effective resolution of a dispute is best achieved when parties appoint experts (whether jointly or individually) who are not only technically proficient but also objective, honest and possess integrity. This should be the primary consideration for parties when selecting expert evidence, as it is entirely within their control.

Enhancing Expert Evidence in Construction Arbitrations

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OVERVIEW

1. Problems with Expert Evidence
2. Civil Law vs Common Law (Domestic Court Systems)
3. International Arbitration & Trends in Construction Arbitrations
4. Best Practice / Tips for Tribunal, Counsel & Experts

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PROBLEMS WITH EXPERT EVIDENCE

Problems with Expert Evidence

1) **Difficult to understand**
   - Lengthy, incoherent, hard to follow writing style
2) **Does not address critical issues**
   - Issues- with instructions
   - Experts at cross purposes (ships passing in the night)
3) **Lack of independence/ objectivity**
   - Advocate for a party
   - Does not address other side's/ alternative methodologies and assumptions
4) **Inefficient process in handling Expert Evidence**
   - Illogical sequence
   - Insufficient time for Experts

→

- Increased costs & time
- Unhelpful to Tribunal
- Reduced credibility in the Expert witness

CIVIL LAW vs COMMON LAW (DOMESTIC COURTS)

Civil Law vs Common Law

Civil Law : inquisitorial, single-appointed Expert by Court

Common Law : adversarial, party-appointed Experts

- Due to problems with expert evidence, common law Courts devised rules:
  - Singapore
  - UK
  - Hong Kong

Common Law - Singapore

Order 13 of the Rules of Court 2021 :

- Expert evidence may only be used with Court's approval.
- As far as possible, parties must agree on 1 common Expert.
- Except in a special case, parties cannot have more than 1 Expert for any issue.
- In a special case, instead of or in addition to 1 common Expert, the Court may appoint a court Expert.
- Court directs on appointment of Experts, including method of questioning (may be as a panel) and their remuneration.
- List of issues and agreed facts must be approved by Court.
- Re: Expert joint statement process, Court may order parties, solicitors and Experts to meet before, during or after Expert reports to agree (discussions at meeting are inadmissible).

Common Law - UK

Civil Procedure Rules Practice Directions to Part 35:

- Expert evidence is restricted to what is reasonably required to resolve proceedings.
- Court's permission needed to call an Expert.
- Court may direct that evidence on a particular issue be given by a single joint Expert.
- Re: Expert joint statement process, legal representatives' role is limited to agreeing on agenda of the joint discussion. May attend but must not intervene and may only answer questions on the law.
- Joint statement should be signed by Experts at conclusion of discussion or within 7 days of discussion.

Common Law - UK

Technology & Construction Court (TCC) Guide:

- Court's consideration of joint appointment may be long after parties' have engaged their respective experts.
- Single joint experts appropriate for:
  - Low value cases
  - Self-contained topics e.g. valuation of particular heads of claim
  - Issues which require a particular expertise
  - Testing / analysis
- Re: Expert joint statement process, legal advisers may assist but must not negotiate or draft joint statement.
- Legal advisors should only invite Experts to amend any draft joint statement in exceptional circumstances where there are serious concerns that Court may be misled. Such concerns should be raised with all Experts.

Common Law – UK

Glover v Fluid Structural Engineers and Technical Designers Ltd [2024] EWHC 1257 (TCC)

Facts:

- C's solicitors commented to their Expert on draft joint statement by way of track changes, including changes to wording which had been agreed between structural engineering Experts.
- D raised concerns that C's Expert had changed views between drafts due to C's solicitors' interference and applied to revoke C's permission to rely on their Expert evidence.
- C's solicitors admitted to non-compliance, apologised to Court and conceded to D's application.

TCC:

- Permission to rely on C's Expert was revoked.
- C's solicitors' conduct was "misguided" but not deliberate interference.
- C given permission to appoint a new Expert.
- C had to pay all costs thrown away.

Common Law – Hong Kong

Order 38 rule 4A of the Rules of the High Court:

- Court may order appointment of a single joint expert witness.
- Said order can be made even when one party disagrees.

Perpetual Wealth (HK) Ltd v Be Solutions Co Ltd [2022] HKCFI 2539 at [8]:

"*Single joint expert evidence is preferred and has been used as the starting point for expert directions by the Construction Court for some time.*"

INTERNATIONAL ARBITRATION

International Arbitration

Methods of adducing Expert evidence :

1) Each party appoints its own Expert (the most common).

2) Parties appoint a single joint Expert (more cost-effective, for simpler, smaller cases)

3) Tribunal appoints a single Expert.

4) Tribunal appoints a single Expert + party-appointed Experts (more costs + delay).

International Arbitration

Various Guidelines /Soft law instruments:

- International Bar Association Rules on Taking of Evidence in International Arbitration 2020 ("**IBA Rules**")
- Chartered Institute of Arbitrators' International Arbitration Practice Guideline on Party-Appointed and Tribunal-Appointed Experts ("**CIArb Guideline**")
- CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration 2007 ("**CIArb Protocol**")
- The Academy of Experts (UK) Guidance for Experts on Form & Content of Joint Statements
- *[UPCOMING]* Society of Construction Law (Singapore) ("**SCL(S)**") Protocol for the Use of Experts' Joint Statements in Arbitration

IBA Rules of Evidence

- Best practice for gathering and presenting evidence (not just Expert evidence) in international arbitration.
- Designed to be used in conjunction with other rules governing international arbitrations. Reflects procedures used in different legal systems.
- **Article 5 on Party-Appointed Experts**
  - Allows written reply to Expert Reports (including by persons not previously identified as Party-Appointed Experts).
  - Tribunal may order Experts to meet and confer on issues – meeting is normally after Expert Reports (traditional sequence) *cf. CIArb Guideline*.
- **Article 6 on Tribunal-Appointed Experts**
  - After consulting with parties, Tribunal may appoint Tribunal-Appointed Expert/s.
  - Tribunal-Appointed Expert may request party to provide info or access for inspection and parties have the right to receive such info and attend inspection.
  - Parties may examine any info, docs, property that Tribunal-Appointed Expert has examined and the correspondence between Tribunal and Tribunal-Appointed Expert.
  - Tribunal-Appointed Expert may be questioned by Tribunal, parties or Party-Appointed Experts.

CIArb Guideline on Party-Appointed & Tribunal-Appointed Experts

- To be read in conjunction with CIArb Protocol (Appendix I to CIArb Guideline).
- Guidance to arbitrators on:
  - **Article 1: appointment of Experts**
  - **Article 2: assessing the need for Expert evidence** (at outset of arbitration in consultation with parties)
  - **Article 3: methods of adducing Expert evidence** (party-appointed, single joint, Tribunal-appointed)
  - **Article 4: procedural directions for Experts** (set out procedure for collection, giving and testing of Expert evidence in PO)
  - **Article 5: testing of Experts' opinions** (after Experts' report submitted, direct Experts to meet followed by Joint report or Experts' replies to each other's reports, order attendance at hearing to present report and answer questions, witness-conferencing)
- In certain jurisdictions (eg England, HK), arbitrators may appoint assessor to assist with review and assessment of detailed data (eg QS, engineer/ programmer). Work of appointed assessor is not disclosable to the parties *cf. Tribunal- appointed Expert*.

CIArb Protocol for the Use of Party-Appointed Expert Witness in International Arbitration

- Structured along the lines of IBA Rules but more detailed on what should be in Expert's report and deals with independence and privilege.
- Experts' meeting to agree on issues, opinions, tests, analyses and produce agreed statement before Experts' Reports (*cf. IBA Rules)*.
- Drafts, working papers are privileged.
- Expert report only on issues where there is disagreement, to be exchanged simultaneously.
- Each Expert entitled to produce a further written opinion to be exchanged simultaneously.
- Tribunal may at any time hold preliminary meetings with Experts.
- Tribunal may at any time direct Experts to confer and provide further written reports either jointly or separately.
- Declaration too prescriptive?
  - *"Article 8 d) : I confirm that I have referred to **all** matters which I regard as relevant to the opinions I have expressed and have drawn to the attention of the arbitral tribunal **all** matters, of which I am aware, which **might** adversely affect my opinion."*

CIArb 2025 Global Survey on *Maximising the Effectiveness of Party-Appointed Expert Witness Evidence in ADR*

Open invitation to any member of the ADR community to share thoughts and experiences on:

- Communication between Experts, Tribunal & counsel;
- Timetables and timing of involvement of Experts;
- Ensuring the Tribunal understands the Expert input; and
- The hearing & post-hearing process.

Survey closes on 28 April 2025.

Report on findings will be out in summer.

Findings will help develop CIArb resources and training of arbitrators.

The Academy of Experts (UK)

1) **Guidance for Expert Witnesses in England & Wales** from 1 Dec 2014 (for Part 35 of PD)

2) **Guidance on Joint Statements**

- Intended primarily for adversarial Common Law Civil Litigation (Court-Ordered Meetings) but applicable to Tribunal-directed Meetings too.
- Desirable for Experts to meet without lawyers being present *cf. IBA Rules/ CIArb Guidelines*.
- Suggests a Scott Schedule format for Joint Statement with columns for:
  - Questions or issues to be answered
  - Areas of agreement
  - Parties' opinion on areas of disagreement
  - Judge/Tribunal's own notes.
- Tribunal to order, or parties to agree whether i) discussions during Experts' meeting is without prejudice, and ii) if Experts agree, agreement does not bind parties.

[Upcoming] SCL(S) Protocol for the Use of Experts' Joint Statements in Arbitration

- Initiative by SCL(S) following survey where an overwhelming 95% of participants supported having such a protocol.
- Status: still collecting feedback, not launched yet.
- In the context of Singapore domestic arbitrations and Singapore-seated international arbitrations.
- Structure:
  1) Core Principles (7)
  2) Guidance & Commentary on Core Principles
  3) Form of Experts' Joint Statement/ Experts' Supplementary Joint Statement (like a Scott Schedule) *[also other forms: orders within PO relating to Expert Joint Statement, Annexure for Instructions (from Tribunal & each appointing Party) to Experts]*

[Upcoming] SCL(S) Protocol for the Use of Experts' Joint Statements in Arbitration

CORE PRINCIPLES

1. Experts' declaration of competence & independence
2. Communication between Experts for preparation of Experts' Joint Statement
3. Communication between Parties, Counsel and Experts
4. Communication between Tribunal and Experts
5. Consultation of Experts / methodology of Experts' review
6. Content of Experts' Joint Statement
7. Post-hearing issues

SCL(S) Protocol – Core Principles

1. **Experts' declaration of competence & independence**
   - Includes declaration that there is no contingency arrangement for Expert's fees.

2. **Communication between Experts for preparation of Experts' Joint Statement**
   - Experts should be able to communicate freely without parties and counsel. If counsel attend discussion, they should not intervene and should only advise on the law.
   - Communications are confidential and not disclosable in arbitration.

3. **Communication between Parties, Counsel and Experts**
   - Parties and Counsel must not influence Experts on contents of Experts' Joint Statement.
   - Counsel may identify issues but cannot negotiate or draft Experts' Joint Statement.
   - Counsel may only invite Experts to amend in exceptional circumstances where there is a serious concern that Tribunal may be misled. Counsel to raise concerns to all Experts giving Joint Statement.

SCL(S) Protocol – Core Principles

4. Communication between Tribunal & Experts

- No unilateral communications between an Expert and Tribunal - must include all Experts.
- Tribunal at liberty to intervene to facilitate Experts' Joint Statement and Experts' Reports.
- Tribunal to consider having conferences with Experts, the stage of conferences (prior to hearing), whether "on the record" or "off the record", whether parties/ Counsel to attend.
- Matters to discuss include Tribunal's expectations of Experts and Joint Statement, info/ docs required from parties, agreed set of documents, agreed methodology to be used or if not agreed, alternative methodologies.

5. Consultation of the Experts / methodology of the Experts' review

- Not fixed to the traditional sequence of individual reports ⇨ conference ⇨ Joint Statement (eg IBA Rules). Sensible for Experts to meet before exchanging reports but for simpler cases, traditional sequence is useful.
- Experts may have "without prejudice" meetings before hearing.

7. Post-hearing issues

- Tribunal may pose further questions and ask Experts to confer further to reach an agreed outcome on issue yet to be determined.

TRENDS IN CONSTRUCTION ARBITRATIONS

Trends in Construction Arbitrations

- Expert witness conferencing/ hot-tubbing
- Single-jointly appointed Expert
- Early Joint Meeting and Joint Report before individual reports *[CIArb Protocol, SCL(S) Protocol]*
- Limiting/ excluding Counsel's role in Experts' Joint Meeting *[The Academy of Experts, UK]*
- Tribunal's conferences with Experts relating to Joint Report *[SCL(S) Protocol]*
- Post-hearing Joint Meeting and Joint Supplementary Report *[SCL(S) Protocol]*
- Post-hearing private meeting between Tribunal and Expert. *[Prof Doug Jones' article, Party Appointed Experts in International Arbitration – Asset or Liability? 2020]*

BEST PRACTICE / TIPS FOR TRIBUNAL, COUNSEL & EXPERTS

Best Practice / Practical Tips for Counsel

- ✓ Engage Experts early when technical dispute arises.
- ✓ Involve Experts in strategy decisions including analysing the other side's Expert evidence.
- ✓ For Memorial style, Experts have to be engaged very early as Expert reports are normally to be included in the Memorial.
- ✓ For Pleadings style, involve Experts when drafting pleadings (to avoid amendments later).
- ✓ Do not tell Experts what they can or cannot say. Send your instructions to Experts in draft form and have a round of discussion to amend wording of your instructions to match what Experts are going to say.
- ✓ Provide Experts with documents and factual witness statements relevant to their reports.
- ✓ Do not 'over-instruct' experts especially for joint meetings and joint report.
- ✓ Limit your input in Experts' report especially legal jargon/ language. Offer suggestions on

Best Practice / Practical Tips for Tribunal

- ✓ Settle experts issues early and schedule directions accordingly.
- ✓ Engage with Counsel and Experts early to establish common database and common questions/ issues to be answered.
- ✓ Include Experts in Case Management Conferences (can have a few) but avoid asking Experts technical questions at CMCs.
- ✓ Be mindful of imbalance between Expert evidence being heard. (eg *Lucy Letby* case)
- ✓ Give directions on reports, joint meetings, joint reports (on form/ format but not content).
- ✓ In scheduling timelines, ensure Experts are given sufficient time.
- ✓ Consider bifurcation especially for Quantum.
- ✓ Remind Experts of their duty from time to time: at the outset, at CMCs, at hearing.
- ✓ Before hearing/ hot-tubbing of Experts, allow each Expert to give a short presentation but impose rules eg time limit (30-45 mins), number of slides, presentation should not be a substitute for Executive Summary nor to adduce new evidence.

Best Practice / Practical Tips for Experts

- ✓Produce a balanced report: make concessions where appropriate, acknowledge position of other side, use other side's or alternative methodology or assumptions to analyse the same evidence and offer your opinion.
- ✓Report should be concise.
- ✓Report should contain an Executive Summary, cross-referencing, definition of technical terms, Declaration.
- ✓Report should be your own report, not your assistants.
- ✓Use visual aids eg bookmarks, graphics, photographs, drone footage, videos.
- ✓Be professional. Avoid exaggerated language and criticising other side's Expert.
- ✓Don't opine on areas outside your expertise/ scope eg interpretation of contract, responsibility of delay, entitlement and liability.
- ✓Be independent. Don't be (or appear to be) an advocate for the party who hired you.

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Ho Chi Minh City International Construction Arbitration Conference 2025 (HICAC2025)

Avoiding Ships Passing in the Night: Enhancing the Effectiveness of Expert Evidence in Arbitration

Johnny Tan Cheng Hye[1]

Abstract

In many arbitration cases, parties appoint experts to assist the tribunal in understanding and analysing specialist technical evidence. Experts are engaged for their subject-matter expertise and are instructed by their respective counsel to address specific issues in their reports and during hearings. Their objective is to provide independent expert opinions and analysis of factual evidence to aid the tribunal's decision-making.

However, experts are often instructed separately by opposing counsel, leading to reports that fail to engage with each other and instead support their appointing party's case theory. This phenomenon has been likened to "ships passing in the night"—experts starting from different assumptions and facts, taking different analytical routes, and arriving at disparate conclusions. Such an approach is unhelpful to tribunals.

This paper explores strategies to prevent experts from working in isolation and instead ensure meaningful engagement between them. It discusses procedural mechanisms that tribunals and counsel can employ to enhance expert evidence, facilitating a more effective and structured exchange of opinions that truly assists tribunals in their deliberations.

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1. Introduction

In Henry Wadsworth Longfellow's 1863 poem, *Tales of a Wayside Inn – The Theologian's Tale: Torquemada*,[2] he wrote:

> *"Ships that pass in the night, and speak each other in passing,*
> *Only a signal shown and a distant voice in the darkness;*
> *So on the ocean of life we pass and speak one another,*
> *Only a look and a voice, then darkness again and a silence."*

This metaphor aptly describes expert evidence in many arbitration cases. Experts, engaged to provide impartial technical analysis, are expected to assist the tribunal rather than advocate for the party that appointed them. The primary duty of an expert is to the tribunal, not the appointing party. However,

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[1] Johnny Tan Cheng Hye, Independent Arbitrator, Adjudicator, Mediator and Dispute Board Member, https://www.linkedin.com/in/johnny-tan-jp-bbm-pbm-baa6587

[2] Longfellow, Henry Wadsworth, *Tales of a Wayside Inn.* Boston: Ticknor and Fields, 1863

experts are frequently instructed in ways that align their opinions with the case theories of the appointing party, limiting engagement with opposing experts and reducing the effectiveness of their testimony. In extreme cases, they base their opinions on different sets of facts and assumptions, further exacerbating the disconnect.

Concerns have been raised that expert evidence is increasingly becoming a form of advocacy by credentialed witnesses rather than objective analysis.[3] The adversarial nature of arbitration often incentivises experts to meet their appointing lawyers' expectations to secure future engagements.[4] Furthermore, the legal teams control the examination process, sometimes avoiding or shaping expert testimony to fit their arguments rather than seeking an objective resolution of disputed technical issues.[5]

This paper suggests measures to ensure experts meaningfully engage with one another, challenge opposing views constructively, and provide independent analyses based on common facts and assumptions. Such steps will help arbitral tribunals derive greater value from expert evidence and reduce instances where expert reports merely pass by each other without real engagement.

2. Avoiding Ships Passing in the Night

To mitigate this issue, it is essential to focus on the key stages of expert involvement: identifying relevant issues, selecting experts, briefing them appropriately, and structuring their engagement. The adversarial nature of arbitration often leads to parties taking separate approaches to these steps, reinforcing the risk of experts working in silos. However, tribunals and counsel can implement the following strategies to foster constructive expert engagement.

2.1 Tribunal's Directions and Procedural Orders

a. Identify and Exchange List of Experts, Disciplines, and Topics

Counsel should assess the need for expert evidence early, preferably before the first procedural conference. As soon as case statements are exchanged and disputed issues crystallised, parties should confer and exchange a list of issues requiring expert evidence, along with the relevant disciplines and topics.

Early identification of expert evidence ensures that only relevant, reliable, and admissible testimony is presented. This approach prevents unnecessary expert investigations and controls costs, making the arbitration process more efficient. Most importantly, it enhances expert engagement, ensuring experts

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[3] Markoff, John, *A Boom in Expert-Witness Firms,* The New York times, August 12, 2005

[4] Kao, Frances P., Justin L. Heather, Ryan A. Horning, and Martin V. Sinclair Jr., *Into the Hot Tub: A Practical Guide to Alternative Expert Witness Procedures in International Arbitration,* The International Lawyer 44, no. 3 (2010): 1035–1044

[5] *Glen Wright v. Nationwide Building Society* [1998] C.L.C. 512 (UK); *Re RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch)

operate within the same framework and analyse common issues rather than working on isolated aspects of the case.

b. Joint Instructions and Agreed List of Issues

Once experts are identified, counsel should collaborate to draft joint instructions and an agreed list of issues for the experts to address. A joint list clarifies expectations, ensures both sides align on the scope of expert analysis, and prevents unnecessary duplication of effort. It also helps experts focus on critical disputed issues rather than producing overly broad reports.

In cases where parties cannot agree on joint instructions, tribunals can assist in drafting neutral instructions, minimizing the perception that experts are merely advocates for their appointing party.

c. Exchange of Common Set of Facts and Documents

Experts should be provided with a shared set of facts and documents to ensure their analyses are based on the same evidentiary foundation. Differences in expert opinions should stem from analytical reasoning rather than discrepancies in the facts considered. Where an expert requires additional information, it should be shared with the opposing expert to allow for a balanced assessment.

d. Meeting of Experts

Experts should meet early in the arbitration process—either with or without legal representatives—before commencing their analyses. These meetings should aim to:

- Define the scope of expert evidence.
- Identify agreed and disputed issues.
- Avoid procedural delays by planning information requests early.
- Establish a consistent format and structure for expert reports.
- Enhance professional and collaborative engagement between experts.

2.2 Joint Expert Statement Before Expert Reports

To encourage agreement where possible, experts should issue a Joint Expert Statement before submitting individual reports. This document should outline agreed and disputed issues, set out the reasons for disagreement, and define the methodology used.

Reaching consensus at this stage is more feasible than after individual reports are finalised, as experts may be reluctant to concede once they have committed to their written opinions. A Joint Expert Statement streamlines the subsequent reporting and rebuttal process, reducing the risk of experts working in isolation and presenting fundamentally incompatible analyses.

3. Hot Tubbing: Enhancing Expert Engagement

Many arbitral rules permit witness conferencing, commonly referred to as "hot tubbing," where experts engage in a structured dialogue rather than testifying separately.[6] Some rules like ICC Arbitration Rules, SIAC Arbitration Rules, and VIAC Rules, while they do not explicitly mention witness conferencing, they grant tribunals broad discretion in conducting proceedings. This process enables:

- Real-time engagement between experts, encouraging direct responses to opposing views.
- Tribunal-led questioning that focuses on key areas of disagreement.
- A more efficient and cost-effective resolution of technical disputes.

A well-structured hot tubbing session, guided by the Joint Expert Statement, helps tribunals assess expert credibility, test methodologies, and gain deeper insights into the contested issues. By fostering interactive discussions, this approach mitigates the adversarial nature of expert testimony and ensures a more balanced presentation of technical evidence.

4. Conclusion

The effectiveness of expert evidence in arbitration depends on meaningful engagement between experts rather than isolated, adversarial analyses. The current approach, where experts often work separately and fail to engage with each other's views, undermines their role in assisting tribunals.

To address this issue, tribunals and counsel must take proactive steps, including early identification of expert issues, joint instructions, common factual foundations, structured expert meetings, and the use of Joint Expert Statements. Additionally, mechanisms such as hot tubbing can facilitate real-time expert dialogue, ensuring that technical disagreements are fully explored and understood.

By implementing these strategies, arbitration can move away from the phenomenon of expert evidence resembling "ships passing in the night" and instead ensure that expert testimony genuinely aids tribunals in reaching well-informed and fair decisions.

[6] CIArb Guidelines for Witness Conferencing in International Arbitration and IBA Rules on Taking of Evidence in International Arbitration

EXPERT EVIDENCE IN ARBITRATION: AVOIDING SHIPS PASSING IN THE NIGHT

JOHNNY TAN CHENG HYE
Independent Arbitrator, Adjudicator, Mediator and Dispute Board Member

Introduction

"Ships that pass in the night, and speak each other in passing,
Only a signal shown and a distant voice in the darkness;
So on the ocean of life we pass and speak one another,
Only a look and a voice, then darkness again and a silence."

Tales of a Wayside Inn – The Theologian's Tale: Torquemada,
Henry Wadsworth Longfellow, 1863

Metaphorically describes brief & non-interactive encounters.

Primary Role of Experts in Arbitration

- Provide impartial technical analysis.
- Assist tribunals.

Unfortunately, expert evidence has increasingly become –

- A form of advocacy by credentialed witnesses instead of objective analysis.
- Likened to *"ships passing in the night"*.

What are causes -

- Adversarial nature of arbitration –
- Incentivises experts to meet appointing lawyer's/client's expectations; hoping to secure future engagements.
- Legal teams control the examination process enable them to shape expert testimony to fit their legal arguments rather than seek an objective resolution of disputed technical issues.

Measures to ensure meaningful and constructive engagement of experts and provide independent analyses based on common facts and assumptions -

- Active involvement by tribunal helps parties to focus on key stages of expert involvement and avoid experts working in silos –
  - Early Identification of relevant issues to be addressed by experts.
  - Joint briefings to experts.
  - Structuring their engagement.

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Early Identification of relevant issues to be addressed by experts.

- Identify and Exchange List of Experts, Disciplines and Topics
  - Counsel to assess need for expert evidence early; preferably before first procedural conference.
  - As soon as disputed issues are crystallised – parties should confer and exchange list of issues requiring expert evidence, their disciplines and topics to be addressed.

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Early Identification of Expert Evidence

- Ensures only relevant, reliable and admissible testimony is presented.
- Avoids unnecessary expert investigations and controls costs; making arbitration more efficient and cost effective.
- Enhances expert engagement; ensuring experts operate within the same framework and analyse common issues.
- Avoids experts working on isolated aspects of the case.

Joint Instructions and Agreed List of Issues

- Counsel to collaborate to draft joint instructions and an agreed list of issues for experts to address.
- Joint list clarifies expectations.
- Ensures both sides align on the scope of expert analysis.
- Prevents unnecessary duplication.
- Helps experts focus on critical disputed issues rather than producing overly broad reports.
- Tribunal to assist if parties unable to agree – minimises the perception that experts are mere advocates for their appointing party.

Exchange of Common Set of Facts and Documents

- Experts provided with shared set of facts and documents – ensures that analyses are based on the same evidentiary foundation.
- Differences in expert opinions should stem from analytical reasoning rather than discrepancies in the facts considered.
- Where experts require additional information, it should be shared with the opposing expert to allow for a balanced assessment.

Meeting of Experts

- Experts should meet early in the arbitration process (with or without counsel) before commencing their analyses.
- Aim -
- Define the scope of expert evidence.
- Identify agreed and disputed issues.
- Avoid procedural delays by planning information requests early.
- Establish a consistent format and structure for expert reports.
- Enhance professional and collaborative engagement between experts.

Joint Expert Statement

- Experts to issue Joint Expert Statement before Individual Reports; encourage agreement where possible.
- Joint Statement to outline agreed and disputed issues, set out reasons for disagreement and define methodology used and assumptions made in the analyses.
- Reaching consensus more feasible before filing Individual Reports. Reluctant to concede once committed to written opinions.
- Streamlines subsequent reporting and rebuttal process, reducing risk of experts working in isolation and presenting fundamentally incompatible analyses.

Hot Tubbing: Enhancing Expert Engagement

- Many arbitral rules permit witness conferencing (e.g. CIArb Guidelines for Witness Conferencing; IBA Rules on Taking Evidence in Int'l Arbitration; even when not expressly mentioned, most rules grant tribunal broad discretion).
- Process enables –
- Real-time engagement between experts, encouraging direct responses to opposing views.
- Tribunal-led questioning focuses on key areas of disagreement.
- More efficient and cost-effective resolution of technical disputes – avoiding ships passing in the night.

Hot Tubbing: Enhancing Expert Engagement

- Well-structured hot tubbing, guided by Joint Expert Statements, helps tribunals assess expert credibility, test methodologies and gain deeper insights into the contested issues.
- Fosters interactive discussions, mitigates adversarial nature of expert testimony and ensures balanced presentation of technical evidence.

Conclusion

- Effectiveness of expert evidence depends on meaningful engagement between experts rather than isolated adversarial analyses.
- Tribunal and counsel should take proactive steps – early identification of expert issues, joint instructions, common factual foundations, structured expert meeting and use of Joint Expert Statements.
- Hot Tubbing can facilitate real-time expert dialogue ensuring technical disagreements are fully explored and understood.
- Avoiding “ships passing in the night” and ensures expert testimony aids tribunals in reaching well-informed decision making.

HICAC 2025

Thank you for your attention!

Johnny Tan Cheng Hye

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VIAC
HICAC 2025
The Expert's Journey: From Fact-Finding to Decision-Making
VIVEK MALVIYA
Director, Masin


VIAC
MASIN
The Expert's Journey
From Fact-Finding to Decision-Making
Vivek Malviya
Masin

ISSUES/CONTENTS

1. Overview of Construction Arbitration
2. Importance of Expert roles in technical dispute resolution
3. Key phases: Fact-finding, analysis, ethical duties, strategic decision-making
4. Strategic Management of Expert Involvement

Why Experts Matter ?

- Clarifying & resolving technical complexities
- Objective and impartial advisory role
- Assisting arbitrators in comprehending intricate construction methodologies and contractual nuances
- Common issues addressed include delays, cost overruns, construction defects, scope changes, and other technical matters.

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Key Contributions of Experts in Construction Arbitration:

Technical Analysis: Experts evaluate project delays, cost overruns, design defects, and compliance with industry standards, offering objective assessments that form the foundation of the arbitration process.

Report Preparation: Experts compile comprehensive reports detailing their analyses, methodologies, and conclusions, serving as critical evidence in arbitration proceedings.

Expert Testimony: They present their findings during hearings, elucidating complex technical matters for the tribunal, which is essential for accurate fact-finding and resolution.

Assisting in Cross-Examination: Their presence allows for effective cross-examination, enabling the tribunal to gauge the reliability and credibility of the technical evidence presented.

Phase 1 - Selecting and Appointing the Right Expert

•Early engagement for delay experts

•Late engagement for technical experts after issue identification

•Advantages of early expert involvement:

- Enhanced case strategy
- Early issue resolution
- Objective assessment aiding settlement

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Phase 1 - Selecting and Appointing the Right Expert

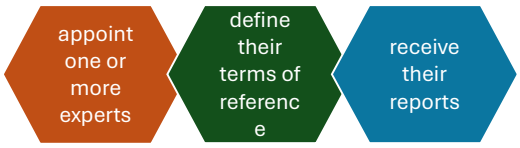
Key Considerations:

- Technical expertise: Essential for effective task execution.
- Communication skills: Simplifying complexities for tribunal comprehension.
- Confidence and resilience in cross-examinations.
- Team size and capabilities to meet tight deadlines.
- Reputation and prior testimony experience.
- Fees: Prioritize value and quality over lowest cost.

Engagement of Experts in Arbitration Proceedings

ICC Arbitration Rules, 2021:

The arbitral tribunal, after consulting the parties, may:



At the request of a party, the parties shall be given the opportunity to question any such expert at a hearing .

Apart from the ICC Arbitration Rules, reliance is placed upon:

- ICC Rules for Expertise;
- Article 5 of the Rules on the Taking of Evidence in International Arbitration by International Bar Association (IBA);
- Guidelines on Conflicts of Interest in International Arbitration by International Bar Association (IBA);
- Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration by the Chartered Institute of Arbitrators (CIArb); and
- Guideline 7 of International Arbitration Practice by the Chartered Institute of Arbitrators (CIArb).

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Evaluating Conflicts of Interest

- Personal, institutional, financial interest assessment
- Historical relationship reviews
- Adherence to IBA guidelines
- Implementation of ethical walls

Phase 2 - Comprehensive Fact-Finding

- Document Review: Contracts, correspondence, reports, site logs
- Site Inspections for firsthand assessments
- Stakeholder Interviews to capture insights

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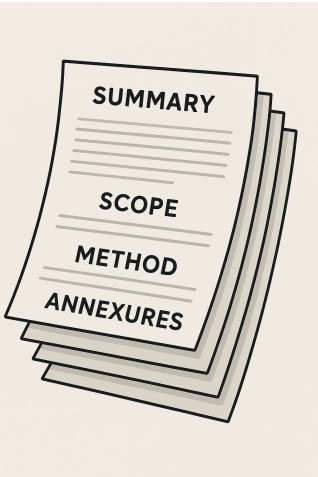
Efficient Management of Fact-Finding

- Define expert scope clearly
- Systematic indexing and early evidence disclosure
- Focused instructions and staged reporting
- Avoid last-minute data dumps; clear instructions and preparation

Phase 3 - Detailed Analysis and Reporting

Expert Report Best Practices

- Make the Technical Understandable
- Methodology justification
- Objective, impartial conclusions
- Use of visual aids: timelines, charts, diagrams
- As experts, we must speak the language of logic, not jargon



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The Expert Report – Crafting the Evidence

It must be logically structured, clearly written, and fully supported. Key ingredients include:

- A concise executive summary
- Transparent scope and assumptions
- Justified methodology
- Referenced analysis
- Appendices with clean calculations

If a tribunal member can follow your report without needing a glossary or a degree in engineering — you're doing it right.

Phase 4 - Decision-Making Influence

•Robust evidence provision
•Facilitation of tribunal deliberations
•Interpretation of technical data into understandable insights

Avoiding Advocacy Pitfalls

•Neutrality maintenance
•Objective evidence evaluation
•Flexible outcome consideration based on tribunal findings

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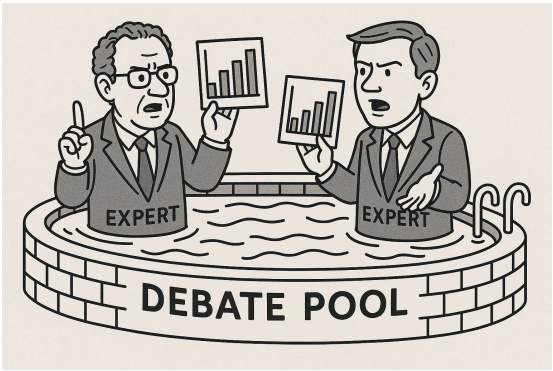
Bridging Gaps Between Expert Findings

- Joint expert instructions
- Structured joint statements and comparative Scotts Schedules
- Strategies tailored to common law jurisdictions
- Hot tubbing : Not as relaxing as it sounds



Ethical Duties and Responsibilities

- Upholding impartiality, competence, confidentiality, and effective communication
- Relevant International Guidelines (ICC, IBA, CIArb)
- Transparency to avoid bias and ensure independence

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Professional and ethical duties of an expert in arbitration proceedings

Disclosure of potential conflicts of interest

- The duty of an expert includes full disclosure in cases of uncertainty. Despite 'grey areas' where conflicts may be unclear, experts must disclose any potential conflicts. Once disclosed, unless objections arise, the expert's integrity is upheld.

- Factors that could compromise your independence or require disclosure include:
  - *A close personal relationship with one of the parties (e.g., being married to the CEO of a party or a company belonging to the same organization or group as a party, or current or former status as an employee or consultant of that party). Depending on their character and duration, even certain past relationships of this kind may continue to be relevant.*
  - *A material financial interest (e.g., owning a stake in one of the parties, or past or present contractual relationships with a party or a member of the group of companies to which a party belongs).*
  - *Prior and non-trivial services to a party or prior services related to the disputed subject matter.*
  - *A similarly close relationship with a third party that has an interest in the outcome of the dispute may also need to be taken into account.*

Independence and impartiality

- Experts need to disclose any circumstances that could compromise their independence in the eyes of the party or parties requesting the proposal; and should remain impartial which essentially conveys neutrality. They must assume that the standards applicable to their impartiality and independence are the same as those applied to arbitrators under the ICC Rules of Arbitration.

- As per the ICC Rules for Expertise:
  - ***Article 3(3)*** requires that experts who are being proposed by the Centre need to disclose any circumstances that could compromise their independence in the eyes of the party or parties requesting the proposal.
  - ***Article 7(3)*** *and* ***7(4)*** require that any expert appointed by the Centre must provide a written declaration confirming independence and disclosing relevant facts, and the expert must be and remain independent of the parties.
  - ***Article 11(1)*** requires that in administered proceedings, regardless of whether the expert was appointed or agreed by the parties, the expert must remain independent throughout these proceedings, although the parties may expressly waive this requirement.

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Experience to serve

An expert should obtain the information needed to understand the nature and scope of the issues for which its subject matter expertise is requested, and must ask questions regarding the purpose of the expertise proceedings.

This will allow the expert to evaluate whether it has the necessary 'procedural' skills to contribute to the proceedings.

Time to serve

The expert's duty includes promptly understanding the parties' schedules and the urgency of deadlines. The expert must gather all relevant information to accurately gauge the project's scope, including possible site visits or experiments.

This ensures setting a realistic completion timeline while considering unforeseen challenges.

POTENTIAL CONSEQUENCES OF NON-ADHERENCE TO SUCH DUTIES

- Full disclosure by an expert boosts their credibility and honesty. Failure to disclose can ***damage the expert's credibility*** and the authoritative nature of their work, breaching legal and ethical duties.
- Although there are no successful disqualifications of expert witnesses in the public record, tribunals have given particular attention to unusual circumstances and have:
  - given ***little weight to evidence*** given by an expert who was found to be lacking in independence; and
  - suggested to the party whose expert is requested to be ***removed to appoint a different one*** instead.
- Parties can apply to ***disqualify an opposing expert witness***:
  - applications for disqualification can be made via written communication to the tribunal or during a hearing; and
  - moving party may request the tribunal to remove or recuse the expert witness or ***strike (or exclude) the witness' evidence*** from the record.
- Decisions on disqualification can be part of a separate ruling or the final award, with the burden of proof on the party requesting dismissal.

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Closing Reflections – How to Make It Count

1. **Start Early** – The value of expert evidence multiplies when integrated early.
2. **Be Clear** – Your job is not to win, but to explain.
3. **Stay Independent** – Your integrity is your influence

Conclusion

- Expert contributions fundamentally shape arbitration outcomes
- Precise data collection, rigorous analysis, ethical adherence, strategic collaboration is important
- Alignment of international best practices with local arbitration standards for optimal outcomes

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Liquidated Damages: Do the Challenges to Their Application Justify Reform

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Keywords: Liquidated Damages, Construction, Dispute Resolution, Project Delay.

1 Introduction

Liquidated damages are ubiquitous in construction contracts. They are typically defined as pre-determined sums of money which are to be paid by one party to the other in the event of breach by the former. In the context of construction contracts, the relevant breach is most often delay to completion.[2] Liquidated damages clauses offer a number of advantages including party autonomy, certainty, and simplicity. This is evident when compared to general damages, which the parties have less control over and where there is less clarity as to what the amount of damages would be in case of a breach.

Fig. 1. The simple yet highly consequential liquidated damages formula.

The concept of liquidated damages has been the subject of scrutiny and criticism. Some of the debate revolves around the concept of penalty (i.e. when the pre-determined liquidated damages amount appears to be disproportionate when compared to the genuine estimate of the loss arising from the breach). This is the "penalty test" applied to liquidated damages clauses in common law jurisdictions, in which a penalty clause is unenforceable.[3]

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[2] It is noted that some construction contracts include provisions for liquidated damages associated with other types of breaches. For example, the failure to achieve a certain production capacity for an industrial facility. The focus of this paper is on liquidated damages that apply to delay to completion.

[3] For more information in relation to the penalty test, see *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1914] UKHL 1, and *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67.

In contrast, penalty clauses are generally enforceable in civil law jurisdictions, albeit still subject to review and potential adjustment if deemed unreasonably high.

Another area in which the effects of liquidated damages on the behavior of the parties was examined is "efficient breach" theory. This is the argument that certain liquidated damages clauses that are designed to be stringent "deterrents" may prevent a party from acting rationally. This is because they force the party to continue to perform in fear of being subjected to the application of liquidated damages (especially if they are perceived to be high), even if continued performance is otherwise not the commercially rational course of action. It is noted, however, that arguments relating to efficient breach have been made in favor and against such clauses.[4]

This paper presents a number scenarios based on real-life examples of projects in which the application of liquidated damages was fraught with challenges, sometimes resulting in them being completely disregarded and replaced with a general approach to the assessment of damages arising from delay to completion. The existence of such challenges raises the question of whether the conventional liquidated damages clause found in construction contracts is due for a change.

2 Common Challenges in Construction Contracts

2.1 The Dichotomy between Simple Liquidated Damages Clauses & Complex Construction Projects

Liquidated damages clauses in construction contracts are frequently simple, especially when compared to other clauses that relate, for example, to the valuation of changes. Whilst acknowledging that there are some variations to liquidated damages clauses, they generally remain a one-size-fits-all approach as shown in the example below:

> *"If the Contractor fails to achieve an LD Milestone by the relevant LD Milestone Date, the Contractor must pay liquidated damages to the Owner, calculated at the rate set out in Schedule 1 for every calendar day (or part thereof) after the LD Milestone Date up to and including the date that the LD Milestone is achieved."*

On the other hand, construction projects are rather complex endeavors. This dichotomy, between the simplicity of liquidated damages clauses and complexity of construction projects, is the root cause of many of the real-life challenges that are faced by practitioners.

2.2 Assessment of Causes of Delay

The first, and one of the most commonly encountered challenges, can be traced to the process of assessment of the causes of delays to construction projects. Liquidated damages apply to inexcusable delay (i.e. delay that is the contractor's liability under the contract). In other words, delay for which the contractor is not entitled to an extension of time. In order to identify the extent to which the contractor is responsible for the delay incurred, the parties engage in protracted back-and-forth submissions and responses to extension of time applications. This process of claim submission, reviews, rejections and resubmissions often continues well beyond the original or extended completion date of the project. This means that the owner is confronted with a situation where it is entitled to start to apply liquidated damages, whilst at the same time acknowledging that the contractor may potentially be entitled to an extension of time that, at the very least, would partially absolve the contractor from liability.

The challenge described above results in a situation where, driven by the desire to maintain some sort of cordial relationship, the owner decides to suspend the application of liquidated damages until further review of the contractor's claims. This state of affairs may continue for a long duration, with one potential additional complication

[4] See *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, Larry A. DiMatteo, University of Florida [2000], for arguments for and against justifications based on "efficient breach".

being that the extension of time review process starts to become part of an overall commercial settlement dialogue. By then, there may be many disagreements between the two sides. The often-unavoidable entanglement of the various sources of disagreement between the parties makes the resolution of the extension of time question more challenging the longer it is left unanswered. All of this may eventually come to a head, either with the owner deciding to abruptly demand a rather large sum of liquidated damages, or a line-in-the-sand type of interim settlement in which the parties agree on apportioning liability up to a certain point in time, only for the same to repeat itself once more down the road.

Even if the owner decides not to apply liquidated damages in a project that has overrun its contractual completion date pending an extension of time assessment, this does not mean that the contractor can continue to work business-as-usual. The threat of ever-increasing liquidated damages exposure day-by-day has consequences over the morale and level of cooperation. For example, tension may grow between the contractor and the engineer or architect, who is often tasked with assessing the contractor's extension of time submissions. Furthermore, borrowing money may become more difficult or expensive for a contractor who is perceived by lenders to be under a significant threat of liquidated damages being applied at any moment.

With contractor's extensions of time submissions sometimes being perceived as inflated, and with contracts sometimes allowing for increasing but not decreasing any extension of time awarded, the owners are faced with a situation that encourages a wait-and-see approach. Placed in the context of the complex and often time-consuming process of analyzing the causes of delay to construction projects, it is readily apparent why the situation described above is endemic in construction projects.

2.3 Partial Handing Over

Here is another scenario that should be familiar for many construction practitioners: An owner and a contractor enter into a construction contract with a planned completion date, or at best a few completion milestones to which liquidated damages for delay are applicable. As the project is nearing completion, certain parts of the project are more delayed than others, for one reasons or another, and the owner considers that it would be beneficial to take over parts of the project. The parts of the project being handed over to the owner do not align with the completion dates or milestones as originally envisaged in the contract. In this situation, the application of the liquidated damages clause will likely need to be amended, since the owner would acquire control and beneficial use of certain parts of the works.

On the face of it, a simple solution may be that the contractor's exposure to liquidated damages should be reduced in proportion (i.e. "pro-rata") to the amount of works being taken over by the owner. This can work effectively, but there are a number of challenges. First, dividing a project into many parts is no simple feat and requires diligent logistical planning which is then taken into consideration when demarcating the zones to be handed over. Therefore, the corresponding impact on the calculation of liquidated damages is not straightforward.

Second, it is not always simple to determine what the proportion being taken over amounts to in terms of reduction to the liquidated damages rate. In a simple residential development, this may be equal to the built-up area being taken over as a proportion of the overall built-up area of the project. Yet, the question of whether, and the extent to which, the area being taken over can be utilized as it would have been had the entire project been completed is debatable. In infrastructure or industrial projects, the calculus can be much more challenging given the potential interdependencies between the various parts of the project.

This bifurcation introduces yet another uncertainty which would also need to be taken into consideration in the extension of time assessment. Many projects face this challenge. Imagine an assessment that needs to ascertain what delayed each of these sperate areas in order to apportion delay liability between the parties.

2.4 Liquidated Damages Rate & Cap

Another challenge that may be faced in practice relates to the liquidated damages rate and whether there is a cap on liability. In some projects, the liquidated damages rate for each day of delay may be unusually high or low. Sometimes there is a good reason for what may be perceived prima facie to be an unusually high or low rate. For example, a minor facility may be crucial to the operation of a much larger oil and gas project, and hence any delay to the completion of this facility has considerable financial implications to the owner and this may be reflected in a high liquidated damages rate. However, the unusually high or low rate of liquidated damages may sometimes be difficult to explain.

Typically, liquidated damages clauses in construction contracts have a cap. A commonly used figure for the cap is 10% of the contract price, but the cap may be higher or lower. In some projects, the contract does not stipulate any cap on the liquidated damages the contractor may be exposed to.

The liquidated damages rate and cap can have a significant impact on the contractor's exposure. For example, if projects with no cap incur a very significant amount of delay, then the amounting liquidated damages may become untenable or difficult to justify (e.g. a liquidated damages sum amounting to most of the value of the entire project). This again brings into question the proportionality of the compensation the owner is entitled to given the contractor's breach of failing to complete on time. In this scenario, the owner may no longer be able to rely on the liquidated damages clause. This then requires the owner to undertake a much more complex and uncertain exercise of attempting to quantify its losses, and may require the owner to reluctantly expose financial data to support its claim of general damages.

Another potential consequence is when the effect of a liquidated damages clause is lost. Liquidated damages clauses are, arguably, tools to encourage performance and discourage breach (i.e. late completion). However, contractor faced with high risk with regards to liquidated damages (for example, where the maximum amount of liquidated damages is reached with minimal delay due to a very high rate, coupled with a very aggressive target completion date) may simply "price-in" the liquidated damages amount in their bid. A contractor may assume that it is highly likely that it would end up paying the maximum liquidated damages amount, and this undermines the owner's ability to put pressure on the contractor to achieve timely performance.

3 Conclusion

There are various issues that have been debated in relation to the enforceability and efficacy of liquidated damages clauses. These range from legal arguments (relating to principles of unconscionability, reasonableness, legitimate interests and just compensation), to socioeconomic arguments relating to the commercial pressures that liquidated damages exert on the contracting parties.

This article examined certain challenges faced in practice when enforcing liquidated damages clauses in construction projects. The scenarios and examples provided show how the contrast between the relative simplicity of liquidated damages clauses on the one hand, and the complexity of construction projects on the other, often result in considerable challenges. Said challenges may render the implementation or enforcement of a liquidated damages clause unnecessarily complex or outright not possible.

Acknowledging the existence of these challenges naturally raises the question of whether some sort of reform is called for, and if so, what form it should take. This reform is unlikely to be achieved by the abolition or replacement of liquidated damages clauses. There is no viable alternative that has been utilized and tested for as long as liquidated damages clauses. But a better balance may be possible to achieve, between maintaining as much of the certainty and simplicity that liquidated damages clauses offer, and adding the flexibility needed to meet the needs of complex construction projects.

Liquidated Damages: Do the Challenges to Their Application Justify Reform

YASIR G. KADHIM
Director, Secretariat

Secretariat

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1. Definition & Advantages
2. Background & Key Issues
3. Challenges in Construction Projects
4. Way Forward

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CONTENT

1. Definition & Advantages

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Liquidated Damages – Definition & Example

Liquidated damages are defined as:

- **a provision that specifies a predetermined amount of money that one party must pay if the terms of the contract are breached.**

In the context of construction contracts, the relevant breach is most often delay to completion.

For example:

"If the Contractor fails to achieve an LD Milestone by the relevant LD Milestone Date, the Contractor must pay liquidated damages to the Owner, calculated at the rate set out in Schedule 1 for every calendar day (or part thereof) after the LD Milestone Date up to and including the date that the LD Milestone is achieved".

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Liquidated Damages – Advantages

Liquidated damages offer certain advantages over the general damages approach:

- **Party autonomy: by offering the contracting parties the ability to pre-determine the consequences of a breach.**
- **Simplicity:** Delay to Completion (days) × LD Rate Per Day = Sum of Liquidated Damages
- **Certainty: the damages associated with the claimed breach are well-defined before entering into a dispute resolution process.**

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Liquidated Damages – The Penalty Test

Common law approach: If a liquidated damages clause is found to be a penalty, it is unenforceable by the party seeking to impose it.

What makes liquidated damages a penalty:

- **Disproportionate, not a genuine pre-estimate of loss, intended to punish or deter, extravagant or unreasonable, does not serve a legitimate commercial purpose. (Dunlop, Cavendish)**

Treatment of penalty clauses: Unenforcable (common law) vs. Adjustment (civil law).

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Liquidated Damages – Theory of Efficient Breach

A criticism of liquidated damages from a commercial/economic perspective.

This is the argument that certain liquidated damages clauses that are designed to be disproportionate "deterrents" would prevent a party from acting rationally.

This is because they force the party to continue to perform in fear of being subjected to the application of liquidated damages (especially if they are perceived to be particularly high), even if continued performance is not the commercially rational course of action.

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Liquidated Damages & Efficient Breach

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Project A	Project B
Low-value / Non-critical	High-value / Critical
High LDs	**Low LDs**

Faced with limited resources, the contractor prioritises Project A.

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1. Definition & Advantages
2. Background & Key Issues
3. Challenges in Construction Projects

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Construction – The EOT Process

The assessment of the causes of delays to construction projects is complex.

- **In order to identify the extent to which the contractor is responsible for the delay incurred, the parties engage in protracted back-and-forth submissions and responses to extension of time applications.**

A situation often arises where the owner is entitled to apply liquidated damages, whilst at the same time acknowledging that the contractor may potentially be entitled to an extension of time.

The owner may decide to suspend the application of liquidated damages until further review.

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Assessment of Causes of Delay & EOT Process

Project Start

Delay Starts to be Incurred

Contractor submits notice of delay or EOT claim.

EOT claim under review.

Partial or no EOT award.

Completion Date Passes

Additional notices of delay or EOT claims submitted.

Further review and responses to claims.

LDs can be applied.

Max LDs Reached

Ongoing negotiations.

Disagreements become multi-faceted.

Potential breakdown and dispute.

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Construction – Partial Handover

Partial handover scenario:

- **An owner and a contractor enter into a contract with a planned completion date, or at best a few LD milestones.**
- **Certain parts of the project are more delayed than others, and the owner is of the view that it would be beneficial to take over parts of the project.**
- **In this situation, the application of the liquidated damages clause may need to be amended, since the owner would acquire control and beneficial use of portions of the works.**

Logistically complex, makes the assessment of extension of time even more challenging, and the "pro-rata" approach is not always straightforward.

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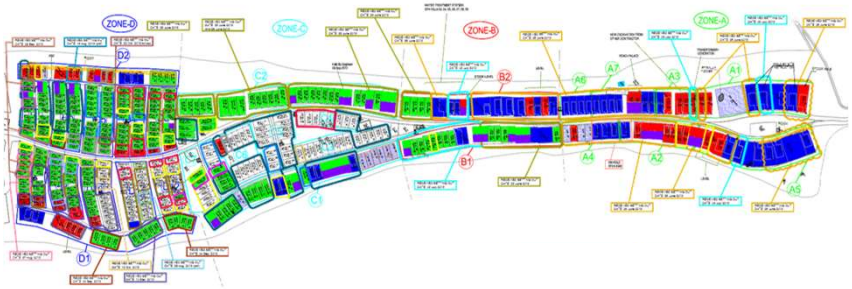
Construction – Partial Handover



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Construction – Rate & Cap

In some projects, the liquidated damages rate for each day of delay may be unusually high or low.

A commonly used figure for the liquidated damages cap is 10% of the contract price. Some projects have a lower cap (e.g. 3%) whilst others have no cap at all.

A high liquidated damages rate, coupled with an aggressive target completion date, may result in the liquidated damages amount simply being "priced-in" the bid.

In instances where there is no cap, the liquidated damages may be set aside.

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Balance – Certainty, Efficacy & Flexibility

Liquidated damages clauses in construction contracts are ubiquitously simple. On the other hand, many construction projects are complex.

This contrast is the root cause of many of the challenges encountered in practice.

There is no viable alternative that has been as widely adopted and tested for as long as liquidated damages.

A better balance may be possible to achieve, between ensuring the continuity of the certainty and efficacy that liquidated damages clauses offer, and introducing flexibility to meet the needs of complex construction projects.

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Thank you

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CONCURRENT DELAY IN THE CONSTRUCTION ARBITRATION

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Abstract: Concurrent delays are one of the contentious issues in the Construction Arbitration. This paper analyses how it is addressed in various contract forms and various jurisdictions. It also attempts to share drafting notes for the concurrent delays.

Keywords: Concurrent delay, SCL protocol, Malmaison

1. CONCURRENT DELAYS

1.1 What are Concurrent Delays?

Concurrent delays occur when two or more delays happen simultaneously, affecting the same project timeline. These delays can be caused by different parties, such as the contractor, the owner, or external factors like weather or regulatory changes. The complexity arises because it's often difficult to apportion responsibility and determine the impact of each delay on the project's completion date.

1.2 Types of Concurrent Delays

True Concurrent Delays: These occur when two delays happen at the same time and independently affect the project's critical path. For example, if a contractor's delay in procuring materials coincides with a design change delay by the owner, both affecting the critical path, they are considered true concurrent delays.

Concurrent Delays on Different Paths: These occur when delays impact different but concurrent paths in the project schedule. Although they don’t affect the same critical path, they happen simultaneously and can still complicate the delay analysis.

1.3 Handling Concurrent Delays in Delay Analysis

Managing concurrent delays requires a meticulous and methodical approach to ensure fair and accurate apportionment of responsibility and impact. Here are some key steps and methodologies used in delay analysis:

Identify the Critical Path: The first step is to establish the project's critical path using scheduling techniques like the Critical Path Method (CPM). Understanding which activities are critical helps in determining which delays have the most significant impact on the project completion date.

Document Each Delay: Detailed documentation of each delay, including its cause, duration, and impact on the schedule, is crucial. This involves maintaining accurate project records, daily reports, and communication logs.

Determine the Timing and Impact: Analyze the timing of each delay to understand if and how they overlap. Use scheduling software to simulate different scenarios and assess the impact of each delay on the critical path.

Apportion Responsibility: Apportioning responsibility for concurrent delays can be complex. It often requires expert judgment and may involve principles from FIDIC contracts. For example, under FIDIC contracts, the responsibility for delays is typically shared based on the cause and contractual terms.

2. LEGAL AND CONTRACTUAL CONSIDERATIONS UNDER FIDIC

Concurrent delays often lead to disputes between parties, making legal and contractual considerations critical. FIDIC contracts usually have provisions that address delays, such as liquidated damages, extension of time (EOT) clauses, and force majeure clauses. Here are some key points to consider:

2.1 Extension of Time (EOT): FIDIC contracts allow for an EOT if delays are beyond the contractor's control. In the case of concurrent delays, determining the entitlement to an EOT requires careful analysis of the delays' causes and impacts.

2.2 Liquidated Damages: If delays are the contractor's fault, they may be liable for liquidated damages. However, in concurrent delay scenarios, proving exclusive fault can be challenging.

2.3 Claims and Disputes: Concurrent delays often lead to claims and disputes. Effective documentation, clear communication, and expert testimony are essential in resolving these disputes. Dispute resolution methods such as arbitration or mediation can also play a role.

2.4 Real-Life Examples from Tower Projects

To illustrate the complexity of concurrent delays, consider the following examples from tower construction projects:

High-Rise Residential Tower: In a major high-rise residential project, the contractor experienced delays in the delivery of structural steel due to supplier issues (contractor-caused delay). Simultaneously, the owner requested changes to the building's facade design (owner-caused delay). Both delays affected the project's critical path. The delay analysis involved identifying the overlap period, assessing the impact of each delay, and apportioning responsibility based on FIDIC contractual terms.

Commercial Office Tower: A commercial office tower project faced concurrent delays due to unexpected regulatory changes (external delay) and a subcontractor's failure to complete electrical installations on time (contractor-caused delay). The delay analysis required a detailed examination of the project schedule to determine how each delay impacted the timeline and which party was responsible for the critical path delay.

3. MANAGING CONCURRENT DELAYS

• Effective management of concurrent delays involves proactive strategies and best practices, including:

• Robust Planning and Scheduling: Develop comprehensive project schedules with clear milestones and critical paths. Regularly update the schedule to reflect changes and potential delays.

• Effective Communication: Maintain open and transparent communication between all stakeholders. Document all decisions, changes, and delays promptly and accurately.

• Risk Management: Implement a risk management plan that identifies potential delays and develops mitigation strategies. Regularly review and update the risk register.

• Expert Analysis: Engage delay analysis experts to provide an objective assessment of concurrent delays. Their expertise can help in apportioning responsibility and resolving disputes.

4. COMMON LAW APPROACH ON CONCURRENT DELAYS:

Under common law several different approaches exist. Keating on Building Contracts outlines the following four approaches:

4.1. Devlin's approach

''If a breach of contract is one of two causes of a loss, both causes co-operating and both of approximately equal efficacy, the breach is sufficient to carry judgment for the loss.''9 Thus, for example, the employer's late handover of the site area to the contractor would entitle the contractor to an extension of time and compensation for overrun costs incurred. However, if one considers the obverse problem, one obtains an opposite solution: the contractor's late deployment of excavation equipment would entitle the employer to recover the additional costs incurred through the payment of liquidated damages by the contractor. This is an obvious contradiction as the two parties cannot both be an

outright winner at the same time. This obvious contradiction leads Keating to consider this approach as inadequate in solving concurrent delay problems.

Under common law there are only a few cases where this approach has been applied and many of them have been overturned at a later date by higher courts.

4.2. Burden of proof approach

‘‘If part of a damage is shown to be due to a breach of contract by the claimant, the claimant must show how much of the damage is caused otherwise than by his breach of contract, failing which he can recover nominal damages only.’’11 Thus, for example, the contractor would be entitled to compensation for the overrun costs incurred if, and only if, he is able to prove that the damages claimed result solely from the employer. However, if one considers the obverse problem, the employer would be entitled to claim liquidated damages if, and only if, he is able to prove that the delay (and the associated damages) results solely from the contractor. In the example in question (employer’s delay in site area handover and contractor’s delay in excavation equipment deployment) neither party would be in a position to prove that the delay incurred was caused solely by the counterparty. Thus, one reaches the contradiction that both parties fail at the same time. For this obvious contradiction, as before, Keating considers this approach inadequate in solving concurrent delay problems.12 Under common law there are only a few cases where this approach has been applied and many of then have been overturned at a later date by higher courts.

4.3. Dominant cause approach

‘‘If there are two causes, one the contractual responsibility of the defendant and the other the contractual responsibility of the claimant, the claimant succeeds if he establishes that the cause for which the defendant is responsible is the effective, dominant cause.’’ This approach is preferred by Keating, however, other authors disagree with this viewpoint. In reality, this approach has rarely been applied by common law courts.16

4.4. Tortious solution

The claimant would be entitled to recover damages if he proves that the defendant is responsible for causing or materially contributing to the damage incurred. The compensation would be reduced if the claimant is found to have also contributed to the damage (in Part VI it will be shown that this is the approach which applies under civil law).

However, it is worth noting that in several common law jurisdictions (e.g. in Canada and New Zealand) the apportionment of responsibilities between the parties in case of concurrent delays may be considered a well established practice.

Besides the four approaches outlined by Keating, two other approaches should be considered:

4.5. ‘‘But for’’ approach

This approach states that a series of consequences would not have taken place, were it not for certain events within the responsibility of the counterparty.20 The contractor often uses this reasoning (whether consciously or not) in situations where the employer requires modifications or additional works and the contractor, due to his own fault, completes the agreed modifications or additional works after the agreed date. In such a case, the contractor states that, were it not for the employer’s request for modifications or additional works, he would have completed the works on time (this is where the term ‘‘but for’’ originates). Despite this approach often being invoked by contractors, it does not seem to have found any support under common law.

4.6. Malmaison approach

This approach,21 which is in line with the principles and criteria stated by the Society of Construction Law Protocol, is named after the case Henry Boot Construction (UK) Ltd v. Malmaison Hotel. The Technology and Construction Court in London accepted that a delay, or a part of a delay, may be attributed to two or more concurrent causes, and stated that the non excusable delay does not prejudice the contractor’s entitlement to the extension of time caused by the excusable delay.

MALMAISON APPROACH:

In the context of an appeal against an interim arbitration award, the Technology and Construction Court (TCC), United Kingdom (UK) in Henry Boot case [1]adopted this approach. This approach holds that if there are two concurrent causes of delay, one of which is a relevant event beyond the control of the contractor (say extremely inclement weather), and the other is not (say the shortage of labour of the contractor), then the contractor is entitled to an extension of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event; but is not entitled to recover any time-related costs. According to Mr. Brynmore, this principle is also followed under Swiss law and is reflected in Article 44 of the Code of Obligations of the Swiss Civil Code.

The Malmaison Approach was adopted by HHJ Stephen Davies in
Steria v. Sigma, and it has been endorsed in the first instance decisions of
Motherwell Bridge Construction Ltd (t/a Motherwell Storage Tanks) v. Micafil Vakuumtechnik,
Royal Brompton Hospital,
Adyard,
De Beers,
Walter Lilly v. Mackay and, most recently, in
Thomas Barnes & Sons (another decision by HHJ Stephen Davies).

In the Walter Lilly decision, Mr Justice Akenhead explained the logic (in part) behind the Malmaison Approach:

> *I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time.*

[1] Henry Boot Construction Ltd. v. Malmaison Hotel, [1999] [70 Con LR 32]

8

Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question.

4.7 APPORTIONMENT APPROACH:

The Scottish Courts in City Inn [2] case declined to follow the Malmaison approach, and laid down the apportionment approach. Under this approach, where there are two competing causes of delay, neither of which is dominant, the delay should be apportioned between the contractor and the employer, based on the relative culpability of each of the factors in causing delays.

This approach is also followed in other jurisdictions, such as in Hong Kong and the United Arab Emirates ("UAE").

In Hong Kong, the High Court in Hing Construction [3] case expressly approved and followed the City Inn judgment of the Scottish Courts.

Similarly, Articles 287, 290 and 291 of the UAE Civil Code embody the principle that the liability for the delay ought to be apportioned between the parties in accordance with their respective degrees of fault.

5. SCL PROTOCOL

The Society of Construction Law's 'Delay and Disruption Protocol' advocates a definition of 'true concurrent delay' that is aligned with the HHJ Richard Seymour KC definition in Royal Brompton Hospital.

The Protocol [4]defines 'true concurrent delay' as follows:

[2] City Inn v. Shepherd Construction Ltd., [2010] [CSIH 68]
[3] Hing Construction Co Ltd v Boost Investments Ltd., [2009] BLR 339
[4] SCL Delay and Disruption Protocol 2nd Edition: February 2017, page 6

True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.

In contrast, a more common use of the term 'concurrent delay' concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time.
In both cases, concurrent delay does not become an issue unless both an employer risk event and a contractor risk event lead, or will lead, to delay to completion. Hence, for concurrent delay to exist, both the employer-risk event and the contractor-risk event must be an effective cause of delay to completion (not merely incidental to the delay to completion).

6. KEATING ON CONSTRUCTION CONTRACTS (11TH EDITION)

Ir stipulates that an 'effective cause of delay' is sufficient to establish concurrency. The relevant passage from Keating is quoted – and described as representing the 'settled' position - in His Honour Judge Stephen Davies' judgment in Thomas Barnes & Sons Plc (In Administration) v. Blackburn with Darwen BC:

In respect of claims under the contract:

depending upon the precise wording of the contract a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; and

depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the "but for" test.

Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible.

Now let us explore how various jurisdictions approach on the concurrent delays.

7. UNITED ARAB EMIRATES

If the contract is silent or ambiguous on the issue of concurrent delay, the position under United Arab Emirates (UAE) law is not clear, as the issue of competing causes of delay and concurrency are not expressly addressed in the UAE Civil Code.

It is generally understood, however, that various principles of UAE law favour an apportionment approach, where liability for delay is apportioned between the parties in accordance with their respective degrees of fault.

This approach is consistent with Articles 246, 290 and 291 of the UAE Civil Code, which emphasise 'good faith' and the principle that persons should take responsibility for any harm they have caused. Article 390 of the Code is also relevant because it allows a tribunal full discretion to ensure that compensation reflects the actual loss and could be argued to allow downwards adjustment of liquidated damages where there is concurrency.

8. FRANCE

Concurrent causation or delay is not well developed in French law. Apportionment appears to be favoured by the courts.[57] Put simply, apportionment is premised on the requirements of good faith in the performance of contracts, as set out in Article 1104 of the French Civil Code, and the principle of full compensation, as set out in Article 1231-2 of the French Civil Code, whereby a party is compensated for the loss 'he has suffered – or for the gain of which he has been deprived'

9. SWITZERLAND

Generally, where there are two (or more) independent causes of delay that at least partially overlap, and one is a contractor-related delay and one is an employer-related delay, the general rule is that the contractor is entitled to an extension of time, notwithstanding his or her own delay, but not to additional costs due to the employer's delay (i.e., the Malmaison 'time-not-money' Approach).

10. THE INDIAN SCENARIO.

Section 55 of the Indian Contract Act, 1872 (the Act) provides for law relating to the delay in performance of any obligation of parties to an Agreement.

The said Section is effectively divided into 3 (three) parts,

(i) when time is of the essence of the contract renders the contract voidable if a party fails to perform its obligation on or before stipulated;

(ii) in cases where time is not of the essence, then the party becomes entitle to compensation from the breaching party; and

(iii) when one party accepts performance of any obligation after the stipulated time, the party cannot claim compensation, unless, at the time of such acceptance the party gives notice to the breaching party of its intention to do so.

Vide aforesaid provision, it can be rightly inferred that under certain circumstances, the contractor can still be entitled to damages even though the contractor has agreed not to claim damages.

The Hon'ble Supreme Court of India in the matter of General Manager, Northern Railways vs. Sarvesh Chopra[5] case, while interpreting the provision of Section 55 of the Act had observed as follows:

"Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations:

(i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act,

(ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible,

(iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

[5] General Manager, Northern Railways vs. Sarvesh Chopra [Civil Appeal No. 1791 of 2002],

The Hon'ble High Court of Delhi in the matter of Rawla Construction [6] case, wherein the Hon'ble Court was deciding whether the contractor was entitled for compensation in a case where the delay in the execution of the contract was caused by the reason of default on the part of the employer, ultimately delaying the entire project.

The Hon'ble Court had observed that 'where the cause of delay is due to the breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of clearest possible language, deprive the contractor of his right to claim damages for the breach'.

Further, the Hon'ble Court was of the opinion that such provisions as attempt to deprive the contractor of the right to claim damages will be strictly construed against the employer. Because such a clause will have calamitous consequences for the Contractor. He will have not remedy anywhere, however outrageous the conduct or behavior of the employer maybe, however interminable the delay.

The Hon'ble High Court of Delhi has in the case of Simplex Concrete [7] case, was of the view that if an agreement contains any clause which takes away the right of the Contractor to claim damages under Section 73 or Section 55, the said clause would be in violation of public policy as envisaged under Section 23 of the Act.

However, in contradiction to its earlier view in Simplex case, the Hon'ble High Court in the matter of PWD vs. M/s Navayuga [8] case, had held clauses barring the contractors to claim damages to be in consonance with the public policy of the country. Further, the Hon'ble Court distinguished the Simplex case by pointing out, that the contractor in the Simplex case did not have the right to sue for breach, whereas in the instant case, the Contractor had an option to sue for damages by not agreeing to the time extension provided under the Agreement.

[6] Rawla Construction Co. vs. Union of India [ILR 1982 Delhi 44]
[7] Simplex Concrete Piles (India) Ltd. vs. Union of India [(2010) 115 DRJ 616]
[8] PWD vs. M/s Navayuga Engineering Co. Ltd. [(2014) SCC Online Del 1343]

11. CONCLUDING NOTES:

Absent any express definitions of concurrent delay to completion, tribunals are likely to treat the term ‘concurrent delay’ to mean the occurrence of delay to the completion of work caused by two or more delay events, one of which is the responsibility of the employer and the other the responsibility of the contractor.

Parties are free to define concurrent delay and address how concurrent delay ought to be evaluated (including apportionment if that is the agreed preferred option).

Parties ought to bear in mind that the prevention principle is not an absolute rule of law and can be circumvented by express wording; tribunals will not readily ignore the allocation of risk in the construction contract.

Given that it is entirely possible that an English court may depart from the Malmaison ‘time-not-money’ Approach, contracts are increasingly being drafted to include a provision to reflect the commercial deal in respect of concurrent delay.

This is sensible and to be commended, the EWCA - England and Wales Court of Appeal having made clear that such clauses are enforceable and do not offend against the prevention principle.

References

1. SCL Delay and Disruption Protocol 2nd Edition: February 2017
2. KEATING ON CONSTRUCTION CONTRACTS (11TH EDITION)
3. Manupatra – legal research portal www.manupatrafast.com
4. GAR Articles on concurrent delays.

CONCURRENT DELAYS IN THE CONSTRUCTION ARBITRATION AND JUDICIAL PURVIEW.

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Concurrency of delays

Concurrent delay is a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.

Concurrency of delays

..a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation, although there is a Relevant Event, "the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date."

- *Royal Brompton Hospital v. Hammond (No. 6) [2000] EWHC Technology, 39. His Honour Judge Richard Seymour KC*

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Concurrency of delays

Society of Construction Law's 'Delay and Disruption Protocol'

True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.

Concurrency of delays - USA

Concurrency in the occurrence of the delay events is not a prerequisite for concurrent delay.

When used in the context of construction delay, the term can refer to both delays occurring at the same time as well as delays that occur at different times provided there is a common effect on the critical path and a delay to completion.

Another category is 'offsetting delays' that may not occur simultaneously or even affect the same activities, but may interact over the project as a whole to affect the completion date

Concurrency of delays - USA

George Sollitt Construction Co v. United States *- The Court of Federal Claims*

The exact definition of concurrent delay is not readily apparent from its use in contract law, although it is a term which has both temporal and causation aspects. Concurrent delays affect the same 'delay period.' A concurrent delay is also independently sufficient to cause the delay days attributed to that source of delay.

COMPARATIVE APPROACHES TO CONCURRENT DELAY

If there is concurrent delay, then the question becomes how to allocate responsibility for the consequences.

'The headline position is that where there is concurrent delay, jurisdictions tend either to

(1) provide the contractor with an extension of time for the entire period of concurrent delay but no time-related costs, or

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COMPARATIVE APPROACHES TO CONCURRENT DELAY

If there is concurrent delay, then the question becomes how to allocate responsibility for the consequences.

2. apportion responsibility for the delay based on a culpability assessment, such that the contractor receives an extension of time and time-related costs for a portion of the period of concurrent delay and the employer obtains liquidated damages for the rest of the period, or

(3) take a hybrid approach, effectively a mixture of points (1) and (2).

COMPARATIVE APPROACHES- ENGLAND

The Malmaison Approach

It is agreed that if there are two concurrent causes of delay, one of which is a relevant event and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.

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COMPARATIVE APPROACHES- ENGLAND

The Malmaison Approach

Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the

contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour.

COMPARATIVE APPROACHES- ENGLAND

North Midland Building Ltd. vs. Cyden Homes Ltd. [(2017) EHC 2414 (TCC)], the TCC upheld a clause in the agreement which disallowed the contractor's claim fir extension of time. The Agreement executed and entered into between parties, provided that any delay caused by a relevant even (which is an employer's risk event) which is concurrent with another delay for which the contractor is responsible, shall not be taken into account while assessing the contractor's claim for extension of time.

The TCC was of the opinion that the Agreement unequivocally disallowed contractor's claim for extension of time, in case of any event of delay which can be attributable to the contractor.

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COMPARATIVE APPROACHES- ENGLAND

De Beers UK Ltd. (formerly Diamond Trading Co. Ltd.) vs. Atos Origin IT Services UK Ltd. [(2010) EWHC 3276 (TCC),

the TCC although allowed the contractor an extension of time due to occurring of concurrent delay, however, held that the contractor can not recover damages for delay in circumstances where is also responsible of any delaying event.

COMPARATIVE APPROACHES- ENGLAND

Walter Lilly v. Mackay , Mr Justice Akenhead explained the logic (in part) behind the Malmaison Approach:

I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time.

Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question

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COMPARATIVE APPROACHES- UAE

If the contract is silent or ambiguous on the issue of concurrent delay, the position under United Arab Emirates (UAE) law is not clear, as the issue of competing causes of delay and concurrency are not expressly addressed in the UAE Civil Code.

It is generally understood, however, that various principles of UAE law favour an apportionment approach, where liability for delay is apportioned between the parties in accordance with their respective degrees of fault.

This approach is consistent with Articles 246, 290 and 291 of the UAE Civil Code, which emphasise 'good faith' and the principle that persons should take responsibility for any harm they have caused. Article 390 of the Code is also relevant because it allows a tribunal full discretion to ensure that compensation reflects the actual loss and could be argued to allow downwards adjustment of liquidated damages where there is concurrency.

COMPARATIVE APPROACHES- FRANCE

Concurrent causation or delay is not well developed in French law. Apportionment appears to be favoured by the courts.[57] Put simply, apportionment is premised on the requirements of good faith in the performance of contracts, as set out in Article 1104 of the French Civil Code, and the principle of full compensation, as set out in Article 1231-2 of the French Civil Code, whereby a party is compensated for the loss 'he has suffered – or for the gain of which he has been deprived'

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COMPARATIVE APPROACHES- Switzerland

Generally, where there are two (or more) independent causes of delay that at least partially overlap, and one is a contractor-related delay and one is an employer-related delay, the general rule is that the contractor is entitled to an extension of time, notwithstanding his or her own delay, but not to additional costs due to the employer's delay (i.e., the Malmaison 'time-not-money' Approach).

COMPARATIVE APPROACHES- INDIA

Section 55 of the Indian Contract Act, 1872 (the Act) provides for law relating to the delay in performance of any obligation of parties to an Agreement. The said Section is effectively divided into 3 (three) parts,

(i) When time is of the essence of the contract, renders the contract voidable if a party fails to perform its obligation on or before stipulated;

(ii) in cases where time is not of the essence, then the party becomes entitled to compensation from the breaching party; and

(iii) when one party accepts performance of any obligation after the stipulated time, the party cannot claim compensation, unless, at the time of such acceptance the party gives notice to the breaching party of its intention to do so.

COMPARATIVE APPROACHES- INDIA

The Hon'ble Supreme Court of India in the matter of General Manager, Northern Railways vs. Sarvesh Chopra [Civil Appeal No. 1791 of 2002],

"Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act,

(ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible,

(iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

COMPARATIVE APPROACHES- INDIA

The Hon'ble High Court of Delhi in the matter of Rawla Construction Co. vs. Union of India [ILR 1982 Delhi 44],

whether the contractor was entitled for compensation in a case where the delay in the execution of the contract was caused by the reason of default on the part of the employer, ultimately delaying the entire project. The Hon'ble Court had observed that 'where the cause of delay is due to the breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of clearest possible language, deprive the contractor of his right to claim damages for the breach'. Further, the Hon'ble Court thought that such provisions as an attempt to deprive the contractor of the right to claim damages will be strictly construed against the employer.

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COMPARATIVE APPROACHES- INDIA

The Hon'ble High Court of Delhi has in the case of Simplex Concrete Piles (India) Ltd. vs. Union of India [(2010) 115 DRJ 616],
if an agreement contains any clause which takes away the right of the Contractor to claim damages under Section 73 or Section 55, the said clause would be in violation of public policy as envisaged under Section 23 of the Act. However, in contradiction to its earlier view in Simplex case, the Hon'ble High Court in the matter of PWD vs. M/s Navayuga Engineering Co. Ltd. [(2014) SCC Online Del 1343], had held clauses barring the contractors to claim damages to be in consonance with the public policy of the country.

Further, the Hon'ble Court distinguished the Simplex case by pointing out, that the contractor in the Simplex case did not have the right to sue for breach, whereas in the instant case, the Contractor had an option to sue for damages by not agreeing to the time extension provided under the Agreement.

COMPARATIVE APPROACHES- INDIA

The Hon'ble High Court of Delhi has in the case of **Delhi Metro Rail Corporation Ltd vs. Voestalpine Schienen GMBH, Austria (03.02.2025 -DELHC), MANU/DE/0576/2025**

When there is a concurrent delay, levying of liquidated damages is barred.

Citing Clause 26.1 of the GCC and SCC, Petitioner has argued that LD at 0.5% per week of the total contract value (capped at 10%) applies to any delay in delivery and should be imposed on the Respondent's overall performance, including timely delivery at DDP Delhi, without being divided between different stages of delivery.

However, this court is of the opinion that the objections raised by the Petitioner lack substance. Learned AT has returned a finding of the fact that delays were caused by shared inefficiencies. It has rightly been held that while the Respondent bore responsibility for certain logistical lapses, delays were also attributed to the Petitioner's administrative inefficiencies and force majeure conditions.

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COMPARATIVE APPROACHES- INDIA & UK

A distinction can be drawn between the judicial precedents prevailing in the United Kingdom and the judicial precedents relevant in India.

Notably, the Indian Courts have allowed and held the contractor to be entitled for compensation in case of breaches that are solely attributable to the employer along with the extension of time to complete the project.

Unlike the Indian Court, the Courts of the United Kingdom have only granted an extension of time to the contractor. However, there are certain cases as well where Indian Courts have not only granted an extension of time to the contractor and no damages thereof.

Concurrency of delays - Summary

The delay events (effective causes of delay) do not need to take place at the same time but the effect of each delay event must affect the critical path and cause delay to completion at the same time.

'True concurrent delay' is extremely rare as it requires the employer-delay event and the contractor-delay event to

(1) occur at the same time and

(2) cause delay to the completion of the work at the same time.

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INFERENCES FROM JUDICIAL PURVIEWS

- **Absent any express definitions of concurrent delay to completion, tribunals are likely to treat the term 'concurrent delay' to mean the occurrence of delay to the completion of work caused by two or more delay events, one of which is the responsibility of the employer and the other the responsibility of the contractor.**
- **Parties are free to define concurrent delay and address how concurrent delay ought to be evaluated (including apportionment if that is the agreed preferred option).**

INFERENCES FROM JUDICIAL PURVIEWS

- **Parties ought to bear in mind that the prevention principle is not an absolute rule of law and can be circumvented by express wording; tribunals will not readily ignore the allocation of risk in the construction contract.**
- **English court may depart from the Malmaison 'time-not-money' Approach, contracts are increasingly being drafted to include a provision to reflect the commercial deal in respect of concurrent delay.**
- **EWCA - England and Wales Court of Appeal having made clear that such clauses are enforceable and do not offend against the prevention principle**

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Thank you for your attention!

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Delay, Disruption and Pacing: What you need to be aware of

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ISSUES/CONTENTS

1. Delay and Disruption - Meaning
2. Assessing Delay and Disruption
3. Marshalling Your Evidence
4. Mitigating Losses v/s Mitigating Delays

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Delay and Disruption - Meaning

Delay and Disruption

Two sides of the same coin…but with a distinction…

- Keating on Construction Contracts:

  "…Claims for "delay and disruption" represent a common feature of construction disputes…"

Hudson's Building and Engineering Construction Contracts:

"…Delay is usually used to mean a delay to the completion date, which presupposes that the activity which was delayed was on the critical path. Disruption to progress may or may not cause a delay to overall completion… but will result in additional cost where labour or plant is under-utilised as a consequence of the event."

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Delay and Disruption

... often involve complex claim assessment...

- Keating on Construction Contracts:

  "...Claims based on either delay or disruption are often difficult for a party to present and for contract administrators and tribunals to assess given the factual complexity of major construction projects. ..."

... to right different wrongs..

- **Delay Claims** relate to **indirect** resources, those which are required for the extended project period. In addition, the contractor will generally be entitled to an Extension of Time (EOT) to complete the project.
- **Disruption Claims** deals with **direct** resources which worked in a disrupted manner. Effectively, disrupted works relate to sub-critical delays which are not part of a critical path analysis (i.e., not part of critical delay)
- ***Therefore,*** Delay claims and Disruption claims *complement* each other by seeking to compensate the Contractor for wrongs of different natures (prolonged deployment vs inefficient working). However, ***both*** need to be specifically claimed.

Delay and Disruption

What is the difference?

Delay Event:	Disruption event:
*An event or cause of **delay**, which may be either an Employer Risk Event or a Contractor Risk Event.*	*The Contractor's actual **productivity** in carrying out work activities is lower than reasonably expected or planned.*
Non-Critical Delay and/ or Critical Delay	Productivity = Production Output/Resource Input Productivity Ratio = Actual / Planned Productivity
A delay event could also cause disruption	A disruption event may or may not cause delay

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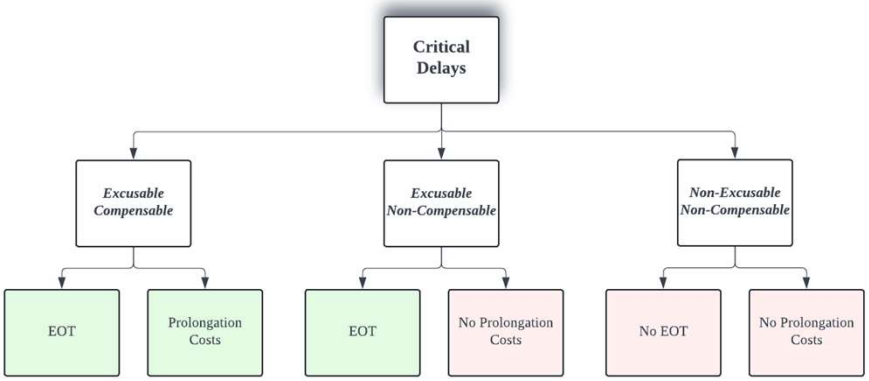
Delay and Disruption

Concepts in delay analysis: categories of critical delays



Assessing Delay and Disruption

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Assessing Delay – Prolongation Costs

- The recovery of additional time related costs that have been incurred due to compensable critical delay(s) to the completion of the works.
- Different types of delay:
  - **Excusable delay** – Events that give rise to an EOT entitlement to the project completion date (and therefore relief to liquidated damages) but not necessarily an entitlement to the recovery of prolongation costs.
  - **Compensable delay –** Events that give rise to an EOT entitlement to the project completion date and an entitlement to recovery of prolongation costs.

Assessing Delay – Prolongation Costs

1. Establish a **cost profile** for indirect, time-related resources over the full project duration .
   - Identify and review the **cost pool** (detailed analysis of account records, cost reports, payroll, invoices etc.)
   - **Strip out all the direct costs** and any other one-off costs / fixed charges that are not time-related
   - **Identify indirect time-related costs** that should be **linked to the activities and project duration**;
   - To add a % profit mark-up, as profit is not a "cost" incurred by the contractor as a direct consequence of a compensable delay. Whether the Contractor is entitled to profit depends on the Contract.
   - Avoid double-dipping. Where applicable, calculate the **adjustments and/or abatements for any indirect time-related costs** that have already been recovered elsewhere (e.g., under dayworks, variations or other claims).
2. Calculate the cost when it is felt:
   average daily cost (or rate) per month/window ***x*** *days of critical delay in that period.*
3. **Demonstrate that the costs being claimed could not have been mitigated** *(e.g, lowering of resources or redeployment of resources to unaffected activities)*

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Assessing Delay

Essentially, assessing disruption is an exercise of comparison.

Contractor to demonstrate that:

- an event occurred that gave rise to an entitlement to claim;
- the event identified has caused disruption; and
- the disruption has actually resulted in the increased costs being claimed.

Contractor to demonstrate entitlement and to consider the following in respect of the relevant contract:

- the event causing disruption is compensable (either under the contract or at law);
- the event gives rise to an increase in actual cost; and
- compliance with the contract's requirements relating to notices and timings has occurred.

Contractor to demonstrate Loss Productivity:

- how the event causing disruption resulted in a loss of productivity – that is, demonstrating 'cause-and-effect'; and
- how the loss of productivity has been measured, including the method and basis of calculation.

Methodologies for assessment

The construction industry has developed and employed a few methodologies for estimating lost labour productivity.

- Project practice based;
- Industry based; and
- Cost based methods.

Data availability typically determines the most appropriate method of analysis to adopt.

- the availability/quality of project documentation;
- the result/outcome uncertainty; and
- the effort required to prepare the claim.

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Disruption Analysis

- Measured Mile (MM) analysis is widely-accepted and reliable method to calculate lost productivity.
  - Comparing identical activities on **impacted** and **non-impacted** section of the project to ascertain loss of productivity resulting from the impact.
- Heavily relies upon accurate contemporaneous records.
  - Quality and provenance of records will often dictate the methodology adopted. Progress and Manpower records should have similar level of detail.
  - Progress and Manpower records could be used to identify idleness which is easier to demonstrate.

Challenges in establishing Claims

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Challenges with Construction Claims

To prevail in a construction claim, the Contractor must establish:

1. **Breach and/or entitlement to a claim;**
2. **Causation; and**
3. **Actual loss.**

Challenges with Construction Claims

1. Establishing breach / entitlement to a claim

- The Contractor has to establish (a) fault of the Employer (b) in context and by reference to the contractual terms.
  - "**Employer Fault**": i.e., that the delay / disruption is due to the Employer's acts/omissions and not merely due to the Contractor's own poor project management.
  - "**In context and by reference to the contractual terms**":
    - "*access to and possession of the site... in proper time for the execution of the work'"*
    - *"Neither Party shall be liable to the other Party ... for any indirect or consequential loss..."* (FIDIC Yellow Book, Clause 17.6)
    - Are there any conditions precedents (e.g., notification requirements)? Those must be strictly complied with (*Diamond Glass Enterprise v Zhong Kai Construction Co and another appeal* [2023] 1 SLR 1451)

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Challenges with Construction Claims

1. Establishing breach / entitlement to a claim (cont'd)

Claims notification under Clause 20.2 of the FIDIC Yellow Book 2017

1. **Step 1: Submit Notice of Claim to Engineer**
   a. Submit within 28 days of becoming aware, or should have become aware, of event
   b. Notice of Claim must describe the event
   c. Keep contemporaneous records as may be necessary to substantiate the claim
2. **Step 2: Submit Fully Detailed Claim to Engineer**
   a. Submit within 84 days of becoming aware, or should have become aware, of event
   b. Must include: (i) detailed description of the claim; (ii) **statement of contractual / legal basis (claim will be time-barred if this is not provided)**; (iii) all contemporaneous supporting documents; (iv) detailed supporting particulars of the amount / EOT claimed
   c. If Notice of Claim was not submitted timely, then must also explain why late submission is justified

Challenges with Construction Claims

2. Establishing loss

- The Contractor needs to prove that it has suffered monetary loss.
- Contractor must place before the Engineer/ DAB/ Court / Tribunal sufficient evidence of the loss that it has suffered.
- However, the ***law does not demand complete certainty*** as to the exact amount of loss suffered. Where precise evidence was obtainable, the court naturally expected to have it, but where it was not, the court must do the best it can.The law recognizes that where it is shown that some substantial loss has occurred, the fact that an assessment of loss is difficult because of its nature is not a justification for refusing to award damages or only awarding a nominal sum (*Robertson Quay Investment v Steen Consultants and another* [2008] 2 SLR(R) 623)

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Challenges with Construction Claims

3. Establishing causation

- The Contractor has to prove a ***causal link*** between entitlement and the loss suffered.
- ***Robertson Quay Investment v Steen Consultants and another*** [2008] 2 SLR(R) 623
  - **Facts**: RQI entered into loan agreements with its shareholders and UOB. RQI argued that if the project had been completed on time, it would have generated income which would then permit RQI to pay off the loans.
  - **Holding**:
    - UOB loan: RQI needed to *go further* and prove that had the project been completed on time, the loan would have been repaid using income generated from the project. Such proof would establish the necessary link between the breach of contract and the loss alleged.
    - Shareholder loans: Court not satisfied that the shareholder loans were for the project

Challenges with Construction Claims

3. Establishing causation (cont'd)

- The surest way to obtain relief is to adopt an itemised approach of proving the causal nexus between each head of loss to each delay event. But difficult where there are multiple concurrent delay / disruption events, and it is difficult to disentangle the combined effect attributable to each event – a "**global" claim or "total loss" claim** seeks to allay this difficulty.
- But caution must be exercised: *ICOP Construction (SG) v Tiong Seng Civil Engineering* [2022] SGHC 257

  *"Advancing a claim for loss and expense in global form is therefore a **risky enterprise**. ... **proof that an event played a material part in causing the global loss, combined with failure to prove that that event was one for which the defender was responsible, will undermine the logic of the global claim**. **Moreover, the defender may set out to prove** that, in addition to the factors for which he is liable founded on by the pursuer, **a material contribution to the causation of the global loss has been made by another factor or other factors for which he has no liability**. If he succeeds in proving that, again the global claim will be undermined."*

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PACING WHEN FACED WITH DELAYS

PACING WHEN FACED WITH DELAYS

What is Pacing?

- Pacing occurs when the slow down of an activity or a series of activities is the result of a **conscious**, **voluntary** and **contemporaneous decision** to pace progress against the critical delay.
- Work can be:
  - slowed down;
  - temporarily deferred to commence later; or
  - performed on an intermittent basis.

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PACING WHEN FACED WITH DELAYS

Components of Pacing

- In practice, a pacing delay need to comprise the following components:

1. **Pacing cannot exist by itself.**
2. **The Employer's critical delay occurs chronologically earlier than the pacing delay.**
3. **Notice has been given to the Employer on both the Employer's critical delay and the pacing delay.**
4. The Employer's critical delay has the effect of creating free float.
5. The pacing delay does not by itself cause further delay to the progress.
6. The Contractor has available resources and could have been able to complete the paced activity on time.

PACING WHEN FACED WITH DELAYS

What are the risks of pacing?

- Improper assessment of the impact of the parent delay, leading to unrealistic pacing.
- In complex projects, it is unclear who is pacing whom.
- Employer-caused delay resolved ahead of time and the contractor cannot recover in time. For e.g.,
- Unable to re-mobilise manpower and/or equipment promptly.
- Unable to speed up material deliveries for work to resume on site.
- A pacing delay may then become a critical path delay, if the Contractor is unable to recover the planned progress when the parent delay has ceased.

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PACING WHEN FACED WITH DELAYS

Practical problems in pacing

- **Lack of timely notice**.
  - Since pacing is not recognised in contracts, contractors may mistakenly believe that no notice is required.
- **Lack of Contractual Definition.**
  - Contracts do not include a definition of "pacing". Likewise, contracts rarely define "concurrent delay."
  - When pacing delay asserted, Employers construe it to be a defense against concurrent delay
- **No contractual mechanism.**
  - Notice requirement? Format of notice?
  - How will the activities be paced?
  - What kind of activities can be paced?
  - What is the estimated cost of pacing?

MARSHALLING YOUR EVIDENCE

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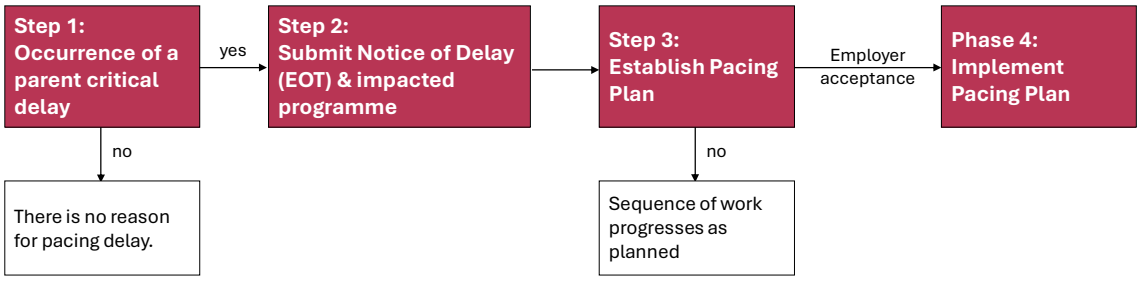
MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Does the Contractor have the right to claim for pacing delay?

- Provided that pacing is not precluded by contract or local law, **the contractor's right to pace its work in reaction to a critical path delay is a generally accepted concept**.
- Therefore, the contractor should not be penalised for pacing its work.
- This is consistent with the majority view that **float, a shared commodity, is available for consumption on a "first come, first served" basis**

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Flowchart



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MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 1 & 2: Extension of Time Claim

- As pacing delay is a response to the effects of a parent delay, it is necessary that the Contractor provides a written notice under the Contract, notifying the Employer of the parent delay and its right to entitlement.
- Components to include in the first instance notice:
  - Notice requirement
  - Basis of Entitlement.
  - Details of the incident that caused the delay.
  - **Impact caused by the Employer's delay event**.
  - **Intention to pace,** stating that because of the parent delay to progress, the Contractor intends to reallocate its resources and slow productivity in mitigation of its losses.
  - Is it a continuing delay event? If yes, send regular updates until the delay event has ceased.

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 3: Establish Pacing Plan

- The Contractor should prepare and submit a detailed pacing plan. It is necessary to ensure that the discussion and acceptance of the pacing plan is done in a timely manner.
- Prepare pacing plan
- Identify activities delayed by Employer.
- Identify activities that the contractor plans to pace.
- Identify the revised construction sequence and updated programme.
- Estimate the pacing cost
- Estimate delay cost i.e., cost to Employer if contractor maintains original schedule.
- Plan must demonstrate pacing will mitigate Employer damages: Employer-caused Delay vs Pacing.
- Establish contingencies i.e., time required to remobilise manpower and resources.

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MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 3: Establish Pacing Plan

- Documentation to be submitted includes:
- **Analysis of the Employer delay to determine whether pacing is logical and cost effective.**
- **An updated schedule showing the paced activities.**
- **Comparative analysis of the estimated pacing costs versus the delay costs.**
- The pacing plan should also demonstrate the work the contractor plans to pace was, until the advent of the Employer delay, being performed as planned in the current schedule.
- Contingencies required by the Contractor, i.e., time required to remobilise manpower and resources.
- How the risks are managed in the pacing plan.
- **In this case, it is recommended that the Employer's written acceptance of the pacing plan and estimated costs be obtained before the Contractor commences pacing.**

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 4: Implement Pacing Plan

- When the pacing plan is implemented, carefully track which activities were slowed down, how they were slowed, and what cost impacts were incurred.
- Monitor the progress of the parent delay event (i.e., services diversion) and the estimated date of completion.
- Communicate the progress of the works.
- Once the parent delay event ceased, communicate the resumption of the works according to the pacing plan. If there is an agreed buffer time to resume works, provide an updated working schedule.
- Submit an updated revised programme, if needed.

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MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Damages Recovery

- In general, Contractors assert pacing delay to seek recovery of cost incurred (if any) arising from pacing.

Preparing a comparative cost analysis. Effectively, the cost of pacing delay must be less than the parent delay.

- Estimate pacing cost - The cost to the owner depends on the pacing option adopted.
- Estimate parent delay cost – cost to the owner if the contractor maintains the original schedule
- Plan must demonstrate that the pacing will reduce the damages incurred by the Employer.
- May be able to negotiate compensation for impact costs.
- Examples of costs which may be recoverable:
  - Idling costs for manpower, machineries, plants
  - Idling cost for management and supervision of the works
  - Demobilisation and re-mobilisation of machineries and plants
  - Typical extended project overhead costs

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Records for cost claims

Good records are critical for contractors and subcontractors to justify cost claims:

- Ledger and accounting data
- Timesheets
- Plant allocation sheets
- Salary and employee cost records
- Payment records to suppliers and subcontractors
- Subcontract agreements
- Supplier agreements
- Cost statements
- Purchase orders
- Invoices

Claims preparation should not start only after the delay / disruption event occurs – it should start *before*! Contemporaneous records that are both detailed and accurate are therefore of utmost importance.

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MITIGATING LOSSES v/s MITIGATING DELAYS

MITIGATING LOSSES v/s MITIGATING DELAYS

The Duty to Mitigate

Mitigate what?

- A Contractor has a duty to mitigate its **losses** – it does not have a *general common law* duty to mitigate the **delay**
- Thus, and subject to the express terms of the contract, there is no requirement to add extra resources or work outside of planned hours (See SCL Delay and Disruption Protocol, 2nd Ed)

How to mitigate?

- A Contractor must:
  - take reasonable steps to **minimise** its losses (e.g., redeploy to some other profitable activity unaffected by the delay or to some other project)
  - **NOT** take unreasonable steps to **increase** its losses (e.g., unreasonably increase idle resources on site)

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MITIGATING LOSSES v/s MITIGATING DELAYS

The Duty to Mitigate – Contractor's perspective

Scenario A: Employer delay event

- Employer causes delay to the contractor's works
- Contractor submits EOT application
- Employer unreasonably refuses to grant EOT
- **Question**: Can the Contractor claim that this is a "constructive" instruction to accelerate?
- **Answer**: It depends on the governing law
  - USA
  - UK and Singapore
  - Australia

MITIGATING LOSSES v/s MITIGATING DELAYS

The Duty to Mitigate – Employer's perspective

Scenario B: Contractor delay event

Question: Is Employer obliged to mitigate the *extent* of the delay caused by Contractor?

- **Answer**: No. In fact, Employer might be able to claim on the LD clause

Question: What if the "Employer" is actually the Main Contractor and there is an even larger LD provision in the Main Contract? One can readily see that it would be in the Main Contractor's interest to mitigate the *extent* of the delay caused by the Subcontractor. Can the Main Contractor recover for mitigation measures it implements?

- **Answer**: Yes. *Cleveland Bridge UK Limited v Severfield-Rowen Structures Limited*
  - **Facts**: Sub-subcontractor's (CB's) works were delayed (anticipated 6 wks). Subcontractor' (SRS') contract with Main Contractor had an LD clause of GBP 500,000 p/w. Fearing LDs under the Main Contract, SRS implemented extensive acceleration measures (extended working hours etc). Mitigation measures were ultimately **not** successful in recovering any delays.
  - **Holding**: "*sensible and reasonable for SRS to institute its recovery programme … because SRS was faced with a very substantial liquidated damages liability*"
    - Not sufficient for breaching party to say that there were other measures less burdensome / more effective that could have been taken – the breaching party must establish that the mitigatory action was not reasonable in the circumstances

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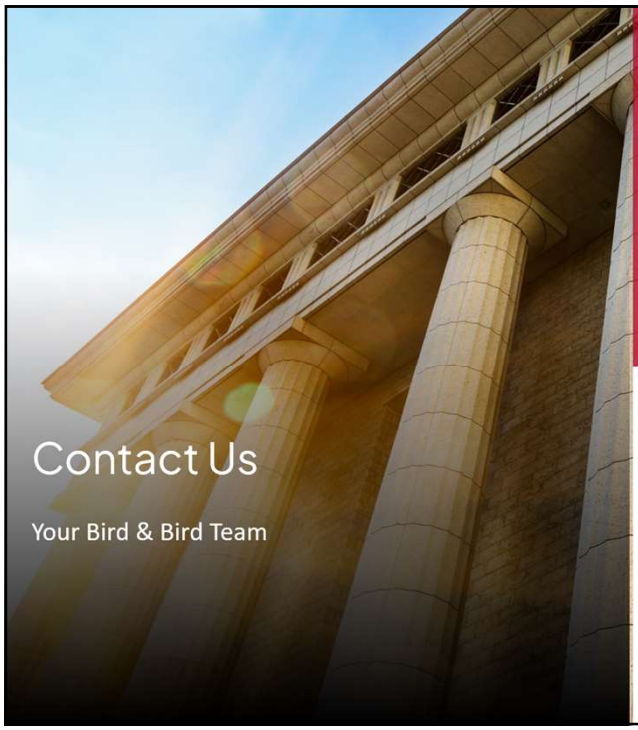

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Akshay is a Partner in Bird & Bird's Singapore office, focussing on international commercial arbitration, adjudication, and mediation, work. Akshay is dual qualified in UK and India, and he brings over 15 years of experience in the ADR and Dispute Management/ Resolution space.
Akshay has been involved in multiple disputes across India, ASEAN, China, Japan, Korea, and the Middle East, including arbitrations relating to construction and infrastructure projects, traditional and renewable energy, oil & gas projects and pipelines, development of mining concessions, commodity trade, shipping, life-sciences and technology. Akshay often acts as the lead and arguing counsel in arbitration, adjudication and mediation matters and has the experience in advising on arbitration matters under many international arbitration rules.
***"Akshay Kishore**, you have been our go-to disputes lawyer in Singapore for more than three years now. We are very pleased with your commercial approach to resolving our disputes and your astute ability to comprehend and tackle technical engineering issues."*
– Legal 500 Asia Pacific 2024

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Mark is a senior associate in our Dispute Resolution Group in Singapore, and have represented clients in various high-value, cross-border, commercial litigation and international arbitrations.
He has advised and acted for local, foreign and multinational clients on multiple cross-border contentious matters. With his background in aeronautical engineering, he has advised and acted for a reputable Asian airline in an arbitration under the SIAC Rules against one of the largest Maintenance, Repair and Overhaul (MRO) organisations in the world, involving claims and counterclaims in excess of S$90 million. He has also represented clients in relation to their disputes on various infrastructure projects including the construction of a 5-star resort in the Maldives, public utilities pipelines in Singapore, tunnel ventilation systems in Singapore, and oil pipelines in the UAE. These matters range from simple non-payment to multi-million-dollar disputes involving complex technical issues with hundreds of thousands of pages of evidence.
Mark has been recommended for Dispute Resolution by Legal 500 Asia Pacific 2023, 2024

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Thank you!

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