Mediation and Other ADR in International Construction Disputes

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I. Introduction

Anytime we dare to approach the use of alternative dispute resolution (ADR) mechanisms in construction disputes, we confront the same dilemma: on the one hand, experiences differ regionally and are limited in number; on the other hand, the theoretical propositions one can read in books and articles about the advantages of ADR are far from reality. Accordingly, our remarks and observations cannot be too ambitious, but the reader will find a combination of an academic description of some ADR mechanisms that, in our view, could play a relevant role in the near future and other remarks based on our experience.[1]

Nevertheless, when examining the parties' perspectives and expectations, one would immediately notice that a public entity developing a project will be reluctant to negotiate or use ADR alien to its national practice, and the same goes for contractors travelling abroad with low exposure to international projects.

The parties resolve the vast majority of construction disputes through negotiation. When that is not possible, international arbitration is preferred to other ADR, and certainly preferred to litigation.[2] In international projects, litigation is uncommon, although we may find it in construction projects where the owner is a public entity and the project does not have any international financing.

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[1] Our opinions are mainly based on disputes related to projects in Latin America, Middle East, North Africa and Europe.

[2] Queen Mary University of London, White and Case and School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration",* 2015. According to this survey, '90 % of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%)'. http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

In general, time and costs are key concerns in any ADR. In 2016, the *Global Construction Report* of the consultancy group Arcadis concluded that 'with uncertainty reigning in markets around the world and projects more complicated than ever before, disputes are taking longer to resolve, which can have far-reaching consequences'.[3] Solving a dispute takes long, and given all difficulties and economic consequences attached, construction professionals are becoming increasingly involved in mediation, adjudication, dispute boards, expert determination and other ADR.

In this chapter, we will first identify the most common construction disputes (II) and provide a general overview of alternative dispute resolution methods (III). When describing the different methods, we will explore both service providers and trends. In Section IV, we will refer to dispute boards, as their use has increased in recent years and adjudication will be specifically considered as a statutory mechanism (V). Mediation's significance is discussed (VI) because in spite of its multiple advantages, contractors and counsel are not sufficiently aware of them. And lastly, we will provide basic advice and references from which to choose and draft dispute resolution clauses (VII). In sum, we will conclude that dispute avoidance is preferable to dispute resolution and that early involvement of neutrals benefits the final completion of the project (VIII).

II. Construction Disputes

The construction industry is intrinsically contentious. The sheer complexity of construction projects requires coordination and inter-dependence of numerous factors, making construction agreements propitious for disputes. Whether related to cost, design, materials, procurement, time, payment, differing site conditions, property damage or any other related issue, the potential of ADR mechanisms for preventing and resolving disputes is enormous.

We are aware that every dispute and every project have their own features and singularities. The vastness of the industry and the complexity of the supply chain do not allow for general

[3] Arcadis is a multinational company providing design and consultancy services worldwide, *Global Construction Disputes Report* (2016), www.arcadis.com/media/3/E/7/%7B3E7BDCDC-0434-4237-924F-739240965A90%7DGlobal%20Construction%20Disputes%20Report%202016.pdf.

principles or statements but, in spite of all disclaimers, cases over the last two decades present relevant similarities.

According to Joseph C. Levigne, the most common owner and designer-initiated changes that tend to result in dispute include 1) numerous last minute addenda during the bidding period; 2) delayed access to the site; 3) delay in submitting approved-for-construction design drawings or clarifications; 4) delay in submitting owner-furnished items; 5) defects in plans or specifications, including errors and omissions; 6) major design changes; 7) scope additions; 8) scope deletions; 9) schedule improvement directives; 10) acceleration directives; 11) suspension of work; 12) interference by owner or designated representative; and 13) non-performance by owner.[4]

On the contractor's side, the most common contractor-initiated changes that tend to result in disputes include failure to start work as planned; failure to supply sufficient work force; schedule delay and subcontractor schedule delay; financial failure; contractor performance failure; subcontractor performance failure; supplier performance failure; 8) technical inadequacy; defective works; poor workmanship; and poor quality of works.[5]

In 2014, Emre Cakmak and Pinar Cakmak concluded that delays in work progress, time extensions, inadequate or incomplete specifications, design error[6] and contract interpretation problems complete the list of the top-five most common disputes.[7] Their conclusions are consistent with our own experience.

In all types of construction projects (e.g., infrastructure, electric networks, process plants, and civil works), we usually encounter ambiguities in contract documents, different interpretations of the contract provisions, inconsistencies and contradictions among contractual documents, or, a key element, the wrong contract form. Owners underestimate the consequences of choosing a model form that is excessively burdensome on the

[4] Joseph C. Lavigne, *Construction contract claims and methods of avoiding contract litigation through dispute resolution alternatives* (Springfield, VA, National Technical Information Service 1993), 25-26.
[5] ibid 26.
[6] In design errors, we could also include inadequate or incomplete specifications, poor quality of design, and lack of available information.
[7] Emre Cakmak and Pinar Irlayici Cakmak, 'An Analysis of Causes of Disputes in the Construction Industry Using Analytical Network Process' (2014) 109 Procedia – Social and Behavioral Sciences 183-187.

contractors. However, a disproportionate allocation of risks can jeopardize the project and render completion of the contract impracticable.

Human behaviour can be a source of conflicts, and we are tempted to focus on the fact that disputes result from lack of communication, lack of team spirit or conflicting cultures. In our experience, however, well-prepared professionals work on international projects, so it is very rarely that a dispute results only from poor personal relationships. It is true that language and cultural differences may cause misunderstandings where the owner or developer may not be used to working with international contractors. But on most occasions, we find that culture-related conflicts are exaggerated with the aim of generating arguments that are not related to the substance of the dispute. It is easier to argue that 'you do not understand the local practices' than to recognize failure to fulfil a contractual obligation.

III. Alternative Dispute Resolution Methods

The range of ADR services aiming at preventing and resolving construction disputes has steadily increased over the last decades. Some ADR providers have echoed the possibilities of applying a variety of ADR techniques in construction projects and have tailored their rules to specific construction disputes. In this section, we describe ADR mechanisms that the parties usually discuss and agree on when executing the agreements or after the dispute has arisen.

Dispute resolution clauses increasingly combine arbitration with another ADR technique, either negotiation or mutual consultation, mediation or conciliation, expert determination or standing dispute boards, either in the form of adjudication boards or neutral evaluations issuing non-binding recommendations. Following international model contracts such as the International Federation of Consulting Engineers' (FIDIC), Engineering Advancement Association of Japan's (ENAA), or the New Engineering Contract (NEC), some construction agreements require that, before resorting to arbitration, disputes be submitted to expert determination or dispute boards, which are constituted at the start of the project or when the dispute arises. Most of them would require that the parties negotiate in good faith for a limited

time, and some may establish mandatory mediation[8] or conciliation before submitting the dispute to arbitration.

Statistically, we cannot demonstrate how successful each formula is. We submit, however, that any legal practitioner working in the construction industry should, at least, consider the possibility of including mutual consultation, mediation, dispute boards, expert evaluation (including any form of third-party neutral evaluation) or adjudication when drafting a dispute resolution clause. Of course, the parties must contractually agree on whether the mechanism of last resort to settle a dispute should be arbitration or litigation.

When it comes to construction, the project third-party neutral is available not only to mediate disputes as they arise, but also to identify and resolve other potential problems. The intervention of the neutral may be required before or after formalizing the dispute. When a dispute arises, practitioners should also master and understand the circumstances where it could be useful to apply one of the ADR techniques, even if these were not agreed upon and established in the terms and conditions of the agreement. The main disadvantage of not including ADR in the agreement is that, if ADR is not contractually required, seeking the intervention of a neutral after the dispute arises could be perceived as a sign of weakness.

In our experience, the use of dispute boards, either in the form of dispute review boards (DRBs), issuing non-binding recommendations) or dispute adjudication boards (DABs), issuing binding decisions has significantly increased, particularly in Latin America and Eastern Europe. The use of expert advisory opinions[9] or expert evaluation has also been

[8] The 2014 ICC Mediation Guidance Notes described mediation as follows: 'Mediation is a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The parties have control over both the decision to settle and the terms of any settlement agreement' (p 4). See International Chamber of Commerce (ICC), '2014 ICC Mediation Guidance Notes' (2014) cdn.iccwbo.org/content/uploads/sites/3/2014/12/2014-Mediation-Guidance-Notes-ENGLISH-version-1.pdf.

[9] Expert advisory opinion may be defined as a technique consisting of 'having an independent, neutral expert meet with the parties, both together aid separately, obtain information from both parties, and then render a non-binding decision, evaluation or prediction as to the ultimate outcome of the dispute'. It favours the resolution of disputes between partners of a joint venture as well as typical situations in which the foreign investor should operate the project after construction. The intervention of an expert contributes to showing a more accurate picture of each party's claims, as well as, usually, lower economic expectations. See James P. Groton 'Alternative Dispute Resolution in the Construction Industry' in Thomas E. Carbonneau and Philip J. Mcconnaughay (eds), *Handbook on Construction Arbitration and ADR* (American Arbitration Association 2007) 13.

proposed and accepted occasionally for projects in North Africa, and calling a third-party neutral to act as facilitator or mediator has also been considered and accepted in disputes with state entities. In long term projects, appointing a standing board of senior managers has been successfully implemented in a few projects in North Africa between Spanish investors and national entities.

Arbitration is seen as the last remedy, and the parties are tempted to think that they should go to arbitration only if there is no other possibility for solving the problem. Sometimes, arbitration is triggered with the purpose of formalizing a dispute and changing the dynamics of the project. It is interesting to note that the parties are not always aware that they are using ADR techniques. In practice, however, before a dispute is formalized, it has been escalated to higher management, presentations have been made in front a joint committee (very similar to a simplified mini-trial),[10] or a third-party expert has been jointly engaged by the parties to re-evaluate the claim 'without prejudice'. It seems that all these methodologies and techniques should also be considered ADR techniques even if the parties, due to their cultural backgrounds, do not shape them exactly as the books described.

One of the Gordian knots in the use of ADR techniques is the appointment of neutrals.[11] Currently, several institutions offer a roster of neutrals. Services for the appointment of mediators, adjudicators or experts are highly valuable for the parties, especially if they had not been able to include a 'project neutral contract clause'[12] in their agreements. If we review the set of rules that the main ADR providers have specifically drafted for the construction industry, we can see that US and UK providers have been particularly active in this area. We should mention the American Arbitration Association (AAA),[13] and its international division,

[10] The International Institute for Conflict Prevention & Resolution (CPS) defines mini-trials as '[a] hybrid process by which the parties present their legal and factual contentions to a panel of representatives selected by each party, or to a neutral third party, or both. The presentations are strictly limited and, at the end of the presentations, the party representatives and/or neutral meet and confer. The utility of the process is to provide senior party representatives with an opportunity to balance the strength of their client's claims against the contentions of their adversary, with an eye to resolving the matter on commercial rather than legal terms'. See International Institute for Conflict Prevention & Resolution (CPR), 'Services Offered' www.cpradr.org/dispute-resolution-services/services-offered.

[11] Editorial note: Internal cross-reference to Charles Brower's chapter in the same volume.

[12] For illustrative purposes, see Judicial Arbitration and Mediation Services, Inc. (JAMS), 'Sample Construction Project Neutral Contract Clause', www.jamsadr.com/construction-project-neutral-clause/.

[13] AAA, 'Construction Industry Arbitration Rules and Mediation Procedures including Procedures for Large Complex Construction Disputes' (2015) https://www.adr.org/sites/default/files/Construction%20Rules.pdf.

the International Centre for Dispute Resolution (ICDR), as well as Judicial Arbitration and Mediation Services, Inc. (JAMS)[14] and the Chartered Institute of Arbitrators (CIArb).[15]

In Asia, the China International and Economic Trade Arbitration Commission (CIETAC) approved the Construction Project Disputes Review Rules,[16] and the same set of rules is offered by the Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC).[17] The Hong Kong Construction Arbitration Centre (HKCAC) provides a set of construction mediation and arbitration rules,[18] and a very similar project has been established in the *Centro de Arbitraje de la Industria de la Construcción* in Mexico[19] or in India and Singapore at the Construction Industry Arbitration Council (CIAC), set up by the Construction Industry Development Council (CIDC) in India, in cooperation with the Singapore International Arbitration Centre (SIAC).[20]

The International Chamber of Commerce (ICC) published its Dispute Board Rules with the main purpose of satisfying the needs of the construction industry,[21] and other arbitration centres have very quickly understood that a set of rules for dispute boards and adjudication was necessary (e.g., Hong Kong International Arbitration Centre).[22]

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[14] JAMS, 'Engineering and Construction Arbitration Rules & Procedures' (2014) www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_construction_rules-2014.pdf. JAMS is a private ADR provider founded in 1979 in the United States by the Hon. H. Warren Knight.

[15] CIArb, 'Construction Adjudication Guidelines' (2013) www.ciarb.org/guidelines-and-ethics/guidelines/construction-adjudication-guidelines; 'CIArb Dispute Board Rules' (2014) http://www.ciarb.org/docs/default-source/ciarbdocuments/das/ciarb-dispute-board-rules-practice-amp-standards-committee-august-2014.pdf?sfvrsn=2; 'Dispute Board Rules Practice & Standards Committee' (2014) www.ciarb.org/docs/default-source/ciarbdocuments/das/ciarb-dispute-board-rules-practice-amp-standards-committee-august-2014.pdf?sfvrsn=2; 'Expert Determination' www.ciarb.org/dispute-appointment-service/expert-determination/what-is-expert-determination; and 'Adjudication' www.ciarb.org/dispute-appointment-service/adjudication.

[16] CIETAC, 'Construction Project Disputes Review Rules' (2014).

[17] Beijing Arbitration Commission, 'Construction Dispute Board Rules' (2009). Internal cross-reference to Julien Chaisse's chapter.

[18] HKCAC, 'HKCAC Construction Mediation Rules', and 'HKCAC Construction Arbitration Rules'.

[19] Centro de Arbitraje de la Industria de la Construcción (CAIC), 'Reglamento de Arbitraje de CAIC' 'Reglamento de Conciliación de CAIC; 'Reglamento de Paneles de Solución de Disputas de CAIC; and 'Reglamento de Peritaje de CAIC.

[20] CIAC, 'CIAC Arbitration Manual and Rules' (2013) www.ciac.in/download/ciac_manual.pdf; and 'CIAC Mediation & Conciliation' (2014) www.ciac.in/rules.html.

[21] ICC, 'ICC Dispute Board Rules' (2015).

[22] HKIAC, 'HKIAC Adjudication Rules' (2009).

More specifically, JAMS proposes 'Dispute Resolution Rules for Surety Bond Disputes' (effective since February 2015). Surety disputes are very frequent, and either contractor or owner usually requires advice to protect its position ahead of the execution or calling of a surety.[23] The 2015 JAMS Engineering and Construction Arbitration Rules and Procedures for Expedited Arbitration[24] also incorporate very interesting – but unknown – features in Rules 32 (Bracketed or High-Low arbitration option)[25] and 33 (Final Offer or Baseball Arbitration Option).[26]

Certainly, it is not our purpose to establish an exhaustive list of ADR for construction disputes. We would like to stress, however, that some ADR tools which originated in the

[23] JAMS, 'Dispute Resolution Rules for Surety Bond Disputes' (2015).

[24] JAMS, 'Engineering and Construction Arbitration Rules and Procedures for Expedited Arbitration' (2015) www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_construction_expedited_rules-2015.pdf. The JAMS Expedited Arbitration Procedures address such issues as control of discovery and document admissibility, use of hearing 'chess clock' procedures, expert witness examination, prompt rulings on motions, maintenance of hearing schedules with minimum delays and issuance of detailed reasoned awards to assure settlement of all issues.

[25] According to Rule 32 (Bracketed (or High-Low) Arbitration Option):

'(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon maximum and minimum amounts. (b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties. (c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount'.

[26] According to Rule 33 (Final Offer (or Baseball) Arbitration Option):

'(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24 (c). JAMS shall promptly provide a copy of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable'.

construction industry are especially suitable for this sector, mainly, dispute boards and adjudication. It is to these that we now turn.

IV. Dispute Boards

Excluding mutual consultation and negotiation between the parties and arbitration, dispute boards (DBs) are, in our experience, the preferred ADR mechanism in engineering and construction agreements. DBs are agreed in projects financed by multilateral investment banks, and they are used in Europe,[27] the Middle East and increasingly, but to a lesser extent, in some Latin American projects.

DBs may be set up when executing medium and long-term contracts as standing bodies that exist throughout the course of the project and periodically monitor its progress, irrespective of whether disputes arise. Alternatively, DBs may be established by the parties after a dispute arises to resolve that particular issue. If they are appointed at the beginning of the project, we would use the term 'standing dispute board'. If the DB is appointed after the dispute arises, we would call it an 'ad hoc dispute board'. Considering the type of decision DBs may issue, we can distinguish between DABs, whose decisions are immediately binding on the parties, and DRBs,[28] whose decisions (sometimes called 'recommendations') are not immediately binding but may become so, depending on the provisions set out in the applicable rules.

A combined formula has been proposed in the second edition of the Red, Yellow and Silver FIDIC books, which appeared in December 2017. In its Clause 21 of the General Conditions (*Avoidance of Disputes*), the International Federation of Consulting Engineers (FIDIC) provides for a *Dispute Avoidance / Adjudication Board (DAAB).* This DAAB is a standing

[27] The 2017 'Global Construction Disputes Report by Arcadis points out that expert determination ranked second after negotiation. See Arcadis, *Global Construction Disputes Report* (2017)images.arcadis.com/media/D/B/0/%7BDB0605C1-66EE-4648-A6F1-7451A34A881E%7DGlobal%20Construction%20Disputes2017-Online.pdf?_ga=2.42187173.1897240039.1515777404-1024009092.1515777404.

[28] These are envisioned in the AAA's 'Construction Industry's Guide to Dispute Avoidance and Resolution' (2009) www.adr.org/sites/default/files/document_repository/The%20Construction%20Industry%27s%20Guide%20to%20Dispute%20Avoidance%20and%20Resolution.pdf ('[T]he DRB's determination is generally presented as a recommendation or a non-binding decision. Although the recommendations are non-binding, they are generally admissible in future proceedings—such as arbitration or litigation—if the issue is not resolved at the DRB level', see p. 12).

dispute board which can either 1) provide assistance to the parties, and/or informally discuss and attempt to resolve any issue or disagreement if the parties make a joint request pursuant to Clause 21.3; or 2) render a binding decision acting as an adjudication board.[29] This is a DAAB, which FIDIC defines as 'the preferred option proposed in the FIDIC model contracts'.[30]

Most international sets of rules contain provisions for both DABs and DRBs, leaving the choice to the parties.[31] Terminology is confusing in some cases, so the practitioner should pay special attention to the parties' agreement.[32] Standing dispute boards are constituted at the beginning of the project with the purpose of either rendering mere recommendations (DRB) or binding decisions (DAB) if a dispute arises. In our experience, it is more common for the parties to agree on DABs.

The interim binding nature of the DAB's decision results from the parties contractually agreeing that they will implement and abide by the panel's decision until the dispute is finally resolved.[33] This means that even when the applicable rules explicitly provide for the DAB's decision to be binding on the contracting parties,[34] its enforceability depends on a contractual agreement. Unlike arbitral awards or court judgments, the DAB's decision is not compulsorily

[29] Pursuant to Clause 21.4.3, 'The decision shall be binding on the parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub Clause' (FIDIC, 2nd edn 2017).
[30] In its 1999 edition, dispute adjudication boards are recommended in Sub-Clause 20.2 to 20.8 of the Red, Yellow and Silver Books and in Sub-Clauses 20.3 to 20.11 of the Gold Book. In 2005, FIDIC and the World Bank (along with other development banks) published a special Multilateral Development Bank (MDB) harmonized edition of the Construction Contract for MDBs (the Pink Book), which supports the use of standing dispute adjudication boards. In its 2017 edition (2nd), Clause 21 of the Red, Yellow and Silver books provide for DAABs.
[31] Among others, the ICC Dispute Board Rules, the CIArb's Dispute Board Rules, the Mexican Construction Arbitration Center (CAIC)'s Reglamento de Paneles de Solución de Controversias, the CIETAC's Construction Project Disputes Review Rules or the Beijing Arbitration Commission (BIAC)'s Construction Dispute Board Rules.
[32] For instance, the ICC Dispute Board Rules have DBs appointed at the start of the project and remaining throughout it. They make a distinction between DRBs and DABs, depending on the type of conclusion they issue: under the ICC Dispute Board Rules, DRBs issue recommendations, which are not immediately binding on the parties but become so if no party objects within 30 days (Article 4), whereas DABs issue decisions that must be complied with immediately (Article 5). Article 6 of the ICC Dispute Board Rules also provides for the establishment of combined dispute boards (CDBs) that offer an intermediate solution between the DRBs and the DABs: they normally issue recommendations but may issue decisions if a party requests it and no other party objects, or the dispute board so decides on the basis of criteria set out in the Rules.
[33] Jane Jenkins, *'Chapter 3: Dispute Avoidance and Resolution'* in Jane Jenkins and Simon Stebbings (eds), *International Construction Arbitration Law* (2nd edn, Kluwer Law International 2014) 60.
[34] See e.g. Clause 20.4 of the FIDIC contracts of the 1999 1st edition or Clause 21.4.3 of the 2017 2nd edition.

enforceable. To be able to enforce the DAB's decision, the party benefitting from it must pursue a contractual claim against the non-fulfilling party.

In some ICC cases dealing with clause 20 of the FIDIC contracts, it has been successfully pleaded that the party's non-compliance with a binding DAB decision constitutes a contractual breach (i.e. breach of Clause 20.4), and the arbitrators are entitled to declare such a breach of contract in a final partial award. In such final partial award, the arbitrators are not granting any provisional measures but a final decision on that particular breach that does not prejudice the arbitrators' final decision on the merits.[35]

In its 2017 edition of the Red, Yellow and Silver books, FIDIC recommends standing dispute boards that could assist the parties in either the avoidance of the dispute or in the 'real-time' resolution of the disputes– if they arise – by way of binding decisions, and encourages parties to reach amicable settlements including the use of mediation.[36] ICC Arbitration remains the final resort to settle a dispute.

The main advantages of standing DBs are drawn from the fact that their members are familiar with the project's development and its technical and practical conditions from the very beginning. The common approach adopted by popular model rules in this matter foresees that standing DB members regularly conduct on-site visits and meet with stakeholders so as to closely monitor the project's progress and promptly address potential problems before these become full-on disputes.[37] Therefore, in the event that a dispute arises, standing DB members

[35] In 2017 ICC cases we have worked on, the arbitrators' decision follows a reasoning similar to the Singapore Court of Appeal's Decision of 2015 in the case of PT Persusahaan Gas Negara (Persero) TBK v. CRW Joint Operation SGCA 30 (Persero II) regarding the 'final' nature of the award as opposed to a provisional or interim measure. This approach has also been shared by the arbitrators in ICC Case No. 10619 of March 2001 published in the ICC International Court of Arbitration Bulletin Vol. 19, No. 2. C. Christopher R. Seppala supported the same interpretation in his article 'Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB Decision under the FIDIC Conditions' [2009] International Construction Law Review 414.

[36] See e.g. FIDIC, *Conditions of Contract for Plant & Design Build, Guidance* (2nd edn, 2017), 50-55.

[37] Although not exclusively intended for the construction industry, the AAA's 'Dispute Resolution Board Guide Specifications' provide for the board members to periodically visit the project site and meet with representatives of the contracting parties to discuss progress of the works and facilitate conversation among the parties in order to resolve any pending claims which may become disputes. The frequency and scheduling of these visits will be every three months or as agreed upon among the parties with the board (Section 1.3.C). The International Federation of Consulting Engineers (FIDIC, 1st edition) follows a similar line in its model contracts: the DAB envisioned in Clause 20 therein 'shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor […] The purpose of site visits

are best-suited to satisfy the need for timely action, insofar as they are extensively informed about and experienced in the project.

In addition, since standing DBs are closely interacting with the contracting parties throughout the project's progress, they may also play a dispute preventive role by easing tension, deescalating the dispute, encouraging the parties to overcome potential disagreements on their own or assisting them in coming to an agreed resolution,[38] without the need for the DB to issue a decision. In this regard, their role would be similar to that of a mediator or facilitator. This is especially true in view that this type of project is usually extended in time and thus requires the parties to maintain ongoing relations under the best possible atmosphere.

Conversely, since ad hoc DBs are only constituted once a dispute has arisen, their usefulness as dispute avoidance mechanisms from the above perspective is more limited, although they may also achieve the purpose of avoiding recourse to arbitration or litigation, provided that the parties consider the decision acceptable. Besides, while ad hoc DB members will not be as familiar with the project as standing DB members, the upside is that the parties will be able to appoint professionals especially experienced in the specific issue in dispute once it has developed, whereas standing DB members need to be able to deal with any and all aspects of the project at the expense of expertise in particular issues. And predictably, ad hoc DBs are significantly less costly than standing DBs, whose members are employed and paid regardless of whether there are any disputes.[39]

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is to enable the DAB to become acquainted with the progress of the Works and of any actual or potential problems or claims', Annex: Procedural Rules. See also Articles 10 to 12 of the CIArb's Dispute Board Rules.

[38] The Foreword to the ICC Dispute Board Rules sets out three basic functions of dispute boards: 'upon perceiving a potential disagreement, the dispute board may (1) encourage the parties to overcome it on their own. If this is impossible or the disagreement too entrenched, the dispute board can (2) intervene with informal assistance to help the parties resolve the matter by agreement or (3) determine a dispute through a recommendation or a decision issued after a procedure of formal referral. Each of these functions is of equal value in helping to reduce the risk and cost of disruption to the parties' contract'. These functions are developed in Articles 16 to 18.

[39] As an alternative to avoid the expense of a three-person standing DB without giving up the benefit of familiarity and first-hand knowledge of its members, the AAA's 'Construction Industry's Guide to Dispute Avoidance and Resolution' suggests appointing an individual as a 'single dispute resolver', who would perform all the functions of a traditional standing DB or an 'on-site neutral', whose role would be that of a mediator or facilitator not issuing a formal decision or recommendation.

V. Adjudication

Adjudication originated in the United Kingdom in the 1970s, primarily to resolve subcontractor payment disputes in the building sector.[40] Under the Housing Grants, Construction and Regeneration Act of 1996[41], which applies to most commercial contracts entered into after May 1998, a party is entitled to refer a dispute arising under the contract to adjudication. The adjudicator's decision is binding until the dispute is finally determined by judicial proceedings or arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitrate), similar to the DAB's decisions mentioned above.

The World Bank includes adjudication provisions in its Standard Bidding Documents – Procurement of Works (2015),[42] which is the standard contract form used in large-scale civil works projects funded by the World Bank; and so do other multilateral development banks and international financing institutions (e.g. the Asian Development Bank and the European Bank for Reconstruction and Development), which have prepared a Master Bidding Document for Procurement of Works and User's Guide (2005) including adjudication.

In international transactions, adjudication was recommended as a first step in the New Engineering Contract (NEC) model contracts.[43] Namely, the NEC3 Engineering and Construction Agreement, Option W1[44] foresees a tiered dispute resolution procedure, providing that disputes arising under or in connection with the contract must be settled by first, referral to an adjudicator, whose decision must be binding on the parties unless and until reviewed by courts or arbitral tribunals; and second, only if and after a party dissatisfied with

[40] See James P. Groton, Robert A. Rubin and Bettina Quintas, 'Comparing Dispute Review Boards and Adjudication' in Thomas E. Carbonneau and Philip J. Mcconnaughay (eds), *Handbook on Construction Arbitration and ADR* (American Arbitration Association 2007) 287-292.
[41] Please note that the adjudication section applies only to England, Scotland and Wales.
[42] World Bank, 'Standard Bidding Documents – Procurement of Works' (2015) www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-standard-documents-archive.
[43] Institution of Civil Engineers (ICE), *New Engineering and Construction Contract* (NEC3) (June 2005, amended as of June 2006).
[44] To be used unless the Housing Grants, Construction and Regeneration Act applies

the adjudicator's decision has notified the other party of its intent to refer to a tribunal, resort to arbitration or litigation.[45]

In 2017, however, a new suite of NEC contracts (NEC4) was published. The former Dispute Resolution section (Options W1 and W2 under NEC3) has been revised and is now entitled Resolving and Avoiding Disputes, which according to Matthew Garrat, reflects NEC's consensual dispute resolution approach towards improving the chances of reaching a negotiated solution and maintaining collaboration between the parties.[46]

In the new models, NEC4 has included an escalation and negotiation step which must be completed before referring the dispute to adjudication in transactions to which the Housing Grants, Construction and Regeneration Act of 1996 is not applicable (Option W1). In the negotiations, senior representatives have a four-week period to agree on a negotiated solution and this period must be completed before referring the dispute to adjudication (which thus becomes the second step to be completed prior to resorting to arbitration or litigation).[47]

In addition, NEC4 introduces a new Option W3 to be chosen instead of Option W1 which keeps a two-tier clause but replaces adjudication (the former first step under Option W1) by the appointment of a dispute avoidance board. Therefore, under Option W3, the dispute avoidance and resolution scheme provides 1) first, for the dispute to be referred to the dispute avoidance board, which shall assist the parties in the settlement of the dispute and may provide a non-binding recommendation; and 2) second, if either party is not satisfied with such recommendation, for a formal referral to arbitration or litigation within four weeks.[48]

Overall, the degree of satisfaction in the use of statutory adjudication in the United Kingdom is high. In Ireland, however, some have criticized the introduction of statutory adjudication in 2013 (effective since July 2016) and insisted on the advantages of conciliation as a non-

[45] Institution of Civil Engineers (ICE), *New Engineering and Construction Contract (NEC3)* (June 2005, amended as of June 2006), p. 27-32.
[46] Matthew Garrat, 'The next generation – an explanation of changes and benefits' (NEC4 Whitepaper 2017) 6-7.
[47] Practical Law Construction, 'NEC4: disputes under options W1, W2 and W3' Practice Note w-009-1492, (2018)
[48] Practical Law Construction, 'NEC4: disputes under options W1, W2 and W3' Practice Note w-009-1492 (2018).

binding mechanism, where the conciliator actually brought about a settlement.[49] It seems that the new standard international contracts support this view.

VI. Mediation and Conciliation

The advantages and suitability of using mediation for resolving construction disputes are irrefutable. Mediation and conciliation are used as synonymous in the majority of cases, but the role of the third-party neutral (i.e. mediator or conciliator) may be different and should require specific attention not to frustrate the parties' expectations.

According to different scholarly works, mediation is used in construction disputes as much as arbitration, dispute boards or adjudication.[50] In the United States, Ireland and the United Kingdom (at least, until implementing statutory adjudication in 1998), mediation has been fairly popular in settling commercial disputes. In our experience, however, this is not the case in other countries. Its predominance and use around the construction world is yet quite heterogeneous.

The European Union and its member states have introduced statues and legislative measures in support of mediation.[51] In Spain, for example, Act 5/2012 incorporated into Spanish Law Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.[52] The Spanish Act is applicable to cross-border and domestic cases. One of the key obstacles to mediation may lie with local counsel. Because some local lawyers do not know about the advantages of mediation, they may avoid advising clients about using it. Owners and contractors' lack of familiarity with

[49] See Brian L. Bond, 'Alternative Methods of Resolving Construction Disputes: Is statutory adjudication really the Best way?' (2016) 82 (3), International Journal of Arbitration, Mediation and Dispute Management 239-249.
[50] The 2017 *Global Construction Disputes Report* by Arcadis pointed out that mediation was the second ADR mechanism used in North America after negotiation and ahead of arbitration. In the United Kingdom, mediation ranks third after adjudication and negotiation. In Asia, mediation is third on the list, after arbitration and negotiation. In the Middle East, adjudication is preferred to mediation but stands behind negotiation and arbitration. See Arcadis, *Global Construction Disputes Report* (2017) images.arcadis.com/media/D/B/0/%7BDB0605C1-66EE-4648-A6F1-7451A34A881E%7DGlobal%20Construction%20Disputes2017-Online.pdf?_ga=2.42187173.1897240039.1515777404-1024009092.1515777404.
[51] Internal reference to Karen´s chapter
[52] Act 5/2012, of 6 July, of mediation in civil and commercial matters (BOE 162, 07/07/2012).

mediation may be an additional hurdle. On some occasions, selecting experts, dispute boards or arbitration is considered more effective.

We do not think that mediation should be immediately excluded. Quite the contrary, choosing an ADR requires a case-by-case analysis. In a construction project, the resolution of the dispute is key to completing the project. If the parties choose mediation early on, they may prevent the conflict from escalating beyond the original issue. Mediation allows relationships to be preserved, prevents excessive costs and saves management time. Moreover, mediation enables the parties to shape the process and control its outcome, leading to a degree of party autonomy and self-determination that is not present in adjudication processes such as arbitration and litigation.

Mediation has many advantages for the parties. Mediation provides a fast conflict resolution procedure at a low cost. Mediation is confidential and therefore, it does not prejudice the parties' position in case an agreement is not reached. The procedure is flexible and the mediator, who is and must remain impartial and neutral, hears of the parties' interests and positions, beyond legal issues. Even if mediation fails, preparing and conducting the mediation process provides clients with the perfect scenario to clarify their position and re-evaluate the consequences of the conflict. Mediation also helps to reduce the number of claims. It prevents further disputes and avoids the spiral effect of cumulative claims minimizing the impact of a dispute that could finally end up in arbitration or litigation.

In preparing the mediation, the client's team (either contractors, owners or designers) should be reassured that this is a voluntary process. Before going to mediation, the client's decision makers should be aware of their best alternative to a negotiated agreement (BATNA) and worst alternative to a negotiated agreement (WATNA). The client should be encouraged to have an open mind with regard to how the mediation process may develop and what the mediator or the other party may recommend. They should have a deep understanding of the distinction between the law, facts and interest defining their position and their arguments. The client should be assured that they will have time to speak with the mediator in private in caucus, and that this is a very flexible process. It is also important that they be encouraged to take responsibility for their own actions and act in good faith. While the clients should under

no circumstance be pressured or coaxed into settling, it is also important that they are made aware of the consequences of not settling, especially since, in some cases, this may lead to a long litigation process.

From the perspective of the client, especially in complex construction disputes, it is wise to request a litigation estimate from their counsel in case the dispute goes to court or arbitration. A semi-detailed estimate of the finances and time that may be dedicated to a legal battle may be valuable to the client to better understand and appreciate the advantages of the mediation process in itself.

The individual characteristics and experience of each mediator are among the most crucial factors that determine the relative success, coherence, productivity and effectiveness of the mediation process. The mediator's appointment process depends entirely on the individual characteristics of each case, largely on the relationship and approach of the parties, the nature of the dispute (if it is factual, legal or a combination of both) and the type of contract. It is important for the parties to do their research and discuss in good faith about the appointment of the mediator. However, in many situations, the parties will not be able to reach consensus, and, in such cases, it is necessary to designate an appointing authority that could be able to break the deadlock.

Parties also need to consider the type of mediation that may be best suited to their requirements. While facilitative mediators would aid in resolving the dispute, they would not make recommendations like evaluative mediators. In general, it is important that evaluative or facilitative mediators have specialized knowledge in the area of the dispute. Another element that is becoming increasingly important and relevant is that mediators should have extensive awareness of the individual cultural elements of doing business in different regions. This is particularly important because these cultural elements may have been a factor in the cause of the dispute or may be intrinsic to its resolution.

VII. Choosing and Drafting Dispute Resolution Clauses

The introduction of dispute resolution clauses in construction agreements requires specialized knowledge and expertise. Drafting dispute resolution clauses is not an easy task. Most

arbitration courts and ADR providers offer standard clauses for arbitration and mediation.[53] In addition, there are some model clauses specifically drafted for construction disputes that combine dispute boards and adjudication with negotiation and arbitration.

The dispute resolution clause should be negotiated and read systematically, consistently with the rest of the terms and conditions of the agreement. By way of example, it could be inconsistent to draft a clause X in which some disputes are referred to expert determination as well as a clause Y referring all disputes to arbitration preceded by negotiations or mediation. In the agreements, it is also important to identify whether the engineer or the owner's representative is competent to render binding determinations in relation to specific issues. If a claim is brought before the engineer, and the engineer does not resolve the claim right away, the parties should be able to skip that requirement and have an available mechanism within the dispute resolution clause.

To avoid unnecessary risks, it is advisable to either adapt standard dispute resolution clauses or implement model contracts. In case of drafting multi-tier clauses, we suggest that the drafter should establish time-limits, running from a clear and well-defined event, and should use unambiguous language as to its binding nature.[54] In *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd*[55], the High Court of England held that multi-tier clauses are binding, and the parties must comply with all agreed ADR. Further, it held that there was a public interest in favour of ADR clauses. In the rest of this section, we consider some dispute resolution clauses that users can find in ADR rules or in model contracts: 1) mediation-arbitration clauses; 2) consultation-expert determination and arbitration; 3) dispute boards-arbitration and 4) adjudication-arbitration.

A. **Mediation-Arbitration**

Mediation is becoming a requirement for dispute resolution in construction. In the United States, organizations such as the American Institute of Architects and the Design Build

[53] See Centre for Effective Dispute Resolution (CEDR)'s 'Model International ADR Contract Clauses' www.cedr.com/about_us/modeldocs/.
[54] See Soledad Marco, *La mediación en cláusulas escalonadas,* Revista de la Corte Aragonesa de Arbitraje y Mediación, www.cortearagonesadearbitraje.com/docs/Documentacion/Documentacion100.pdf.
[55] Emirates Trading Agency Llc v. Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm) (1 July 2014).

Institute of America have now prescribed mediation as a requirement before binding arbitration in their standard documentation.[56] Similarly, in Ireland, the Irish Construction Industry Federation (CIF) has introduced mediation clauses into their construction sub-contracts, and so has the Canadian Construction Documents Committee.[57] In Hong Kong, where the government has specific mediation rules aimed at the construction industry, if the parties do not come to an agreement as to who they would like to appoint, the Hong Kong International Arbitration Centre is given the responsibility under the government mediation rules to make the appointment as the mediation administering agency.

Including negotiations as a first tier, before mediation and arbitration, is common too. Remarkably, the multi-step dispute resolution clause that the Institute for Conflict Prevention & Resolution (CPR) proposes that executives at a higher level of management than the persons with direct responsibility for administration of the contract participate in the negotiations.[58] Two examples of mediation-arbitration (med-arb) clauses can be found in the ICDR and SIAC-Singapore International Mediation Centre (SIMC) proposals.

According to the ICDR Standard Mediation-Arbitration Step Clause:

> 'In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.'

[56] Sections 15.2, 15.3, and 15.4 of the model contract document 'A201 - General Conditions for the Contract of Construction' (2017), published by the American Institute of Architects, set forth a 'stepped' dispute resolution procedure whereby a claim must first be decided by an 'initial decision maker', whose determination is binding but subject to mediation and binding dispute resolution (i.e. arbitration or court litigation, depending on what the parties have agreed on).

[57] Canadian Construction Documents Committee, 'CCDC 40 – 2005 Rules for Mediation and Arbitration of Construction Disputes' (2005).

[58] CPR International Institute for Conflict Prevention & Resolution, *Model Clauses in International Administered Arbitration - II. Multi-Step Clause with Administered Arbitration*, https://www.cpradr.org/resource-center/model-clauses/international-model-clauses.

According to the SIAC-SIMC Arb-Med-Arb Model Clause:

> '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 parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.'

In the SIAC-SIMC example, it is interesting to note how the model clause proposes that mediation be attempted after commencing arbitration. SIAC-SIMC does also have a proposal for mediation prior to arbitration, which is more common in other jurisdictions such as in Spain, France, and Mexico. Proposing mediation after arbitration could be useful in situations where the conflict is too contentious as it requires that the parties to re-evaluate their respective claims without waiving any credibility or right to pursue their primary claim in the arbitration.[59]

B. **Consultation-Expert Determination-Arbitration**

Under the auspices of the Engineering Advancement Association of Japan, General Condition 6 of ENAA's Model Form International Contract for Process Plant Construction standardizes a multi-tiered approach for settlement of disputes arising in connection with or out of the contract. According to it, 1) the parties must seek to resolve any such disputes by mutual

[59] Internal cross-reference to Coe's chapter on arb-med?

consultation; 2) if this fails, after formal notice of dispute is given, a further consultation period of 30 days is established; and 3) once this 30-day period for further consultation has elapsed, the dispute must be referred to arbitration under the ICC Rules. As an alternative to the consultation prerequisite, the parties can resort to expert determination under the Rules for Expertise of the ICC, before referring the dispute to be finally settled by arbitration.[60]

C. **Standard Clauses for Dispute Boards**

In addition to model clauses combining mediation and arbitration, it is also common to find model clauses referring to dispute boards. Although not exclusively intended for the construction industry, the ICC publishes Standard ICC Dispute Board Clauses[61] for parties who wish to set up and operate a dispute board under the ICC Dispute Board Rules. [62] The ICC distinguishes between: 1) ICC Dispute Review Board followed by ICC arbitration, if required; 2) ICC Dispute Adjudication Board followed by ICC arbitration, if required; and 3) ICC Combined Dispute Board followed by ICC arbitration, if required.[63]

In August 2014, the CIARb published its Dispute Board Rules including a set of recommended Dispute Board Clauses.[64] The Rules envisage a Dispute Board Scheme with three key elements: 1) a dispute board clause inserted into the substantive commercial contract; 2) the rules themselves; and 3) a three-part agreement between the dispute board and the two parties to the substantive commercial contract.[65] The CIArb has distinguished

[60] Engineering Advancement Association of Japan (ENAA), 'Model Form International Contract for Process Plant Construction' (2010) 5-7.
[61] The Standard ICC Dispute Board Clauses (2015) are available at cdn.iccwbo.org/content/uploads/sites/3/2015/09/Standard-ICC-Dispute-Board-Clauses-in-English.pdf.
[62] The ICC Dispute Board Rules (2015) are available at cdn.iccwbo.org/content/uploads/sites/3/2015/09/icc-dispute-board-rules-english-version.pdf.
[63] See Standard ICC Dispute Board Clauses (2015).
[64] Article 2 of the CIArb Dispute Board Rules (2014).
[65] See Michael O'Reilly, 'The Chartered Institute of Arbitrators' Dispute Board Rules' (2015) 81 (2), International Journal of Arbitration, Mediation and Dispute Management 197-198.

between DRBs[66] and DABs.[67] The main difference is that if the parties have chosen to implement a DRB, they are not bound by the DRB's Recommendations (Article 3.1), whereas the decision of a DAB is binding on the parties (Article 4.3). Since 1999, the FIDIC contract provides the most typical combination of dispute boards and arbitration in Clause 20 (dispute resolution). [68]

D. **Standard Clauses for Adjudication**

The CIArb proposes a Construction Adjudication Clause that essentially adopts the requirement of the Housing Grants, Construction and Regeneration Act 1996. [69] In the Hong Kong Construction Arbitration Centre, there is also a standard Dispute Resolution Clause providing for three steps: 1) negotiation, 2) mediation or adjudication, and 3) arbitration.[70] The new FIDIC and NEC4 model contracts of 2017 insist on using ADR as a mechanism for avoiding disputes, keeping open the possibility of negotiations at the highest management level even after the adjudicator's decision. FIDIC refers to DAABs (FIDIC 2017) and NEC4 to 'Resolving and Avoiding Disputes'. Therefore, it seems obvious that the settlement of construction disputes will require a full command of ADR.

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[66] Article 2.3.a) of the CIArb Dispute Board Rules (2014) ('The Parties hereby agree to establish a Dispute Review Board in accordance with the Dispute Board Rules of the Chartered Institute of Arbitrators (the "Rules"). The DRB shall have [one/three] member[s] appointed in accordance with the Rules, which are incorporated herein by reference. Any disputes between the Parties arising out of or in connection with this Contract shall be submitted to the DRB pursuant to the Rules. If the DRB issues a Recommendation and one of the Parties rejects it, either Party may submit the dispute to arbitration, if the Parties have so agreed, or to the courts. Pending a ruling by the arbitral tribunal or the court, the Parties may voluntarily comply with the Recommendation.')

[67] Article 2.3.b) of the CIArb Dispute Board Rules (2014) ('The Parties hereby agree to establish a Dispute Adjudication Board in accordance with the Dispute Board Rules of the Chartered Institute of Arbitrators (the "Rules"). The DAB shall have [one/three] member[s] appointed in accordance with the Rules, which are incorporated herein by reference. Any disputes between the Parties arising out of or in connection with this Contract shall be submitted to the DAB pursuant to the Rules. If the DAB issues a Decision and one of the Parties rejects or fails to comply with it, either Party may submit the dispute to arbitration for summary or other expedited relief, if the Parties have so agreed, or to the courts without prejudice to any other rights it may have. Pending a ruling by the arbitral tribunal or the court, the Parties must comply with the DAB's Decision.')

[68] Dispute Boards are recommended in Sub-Clause 20.2 to 20.8 of the Red, Yellow and Silver Books and Sub-Clauses 20.3 to 20.11 of the Gold Book. Furthermore, in 2005 FIDIC and the World Bank (along with other development banks) published a special Multilateral Development Bank (MDB) harmonized edition of the Construction Contract for MDBs (the Pink Book) which provides for the use of standing dispute adjudication boards.

[69] The CIArb's Dispute Resolution Clauses are available at www.ciarb.org/docs/default-source/ciarbdocuments/das/recommended-clauses/contract-clause.pdf?sfvrsn=8.

[70] The HKCAC Standard Dispute Resolution Clause (2015) is available at 116.48.140.240/HKCACL/images/phocagallery/OfficialDoc/SDRC%202015%20Standard%20English.pdf.

VIII. Conclusion

Disputes are inherent in construction projects; it would be too optimistic to think that the use of ADR will prevent all disputes among owners, designers, contractors, subcontractors, and suppliers. However, the parties which are capable of resorting to suitable dispute resolution mechanisms such as mediation, expert determination or dispute avoidance/adjudication boards will save costs, foster a timely completion of the works, reduce the number of disputes, and prevent critical situations in which the accumulation of unresolved claims may jeopardize the financial viability of the entire project.

In 2017, both NEC and FIDIC sent a clear message to all users and practitioners: prevention of disputes starts at the negotiation stage. It is not enough that the project teams discuss and negotiate over potential claims. As soon as there is a conflict that could easily become a formal claim, the parties' higher management should be involved and both parties should attempt to settle the dispute in good faith. Reaching an amicable settlement should be the main goal for both parties at any time, even after obtaining a binding decision from the adjudicator or in the course of arbitration. Settling the dispute will be for their common benefit as well as for the benefit of the project.

In cases where this kind of partnering or collaborative attitude appears difficult, the early involvement of a third-party neutral will be key. He/She could adopt the role of mediator, expert or dispute board. If the third-party neutral is appointed at the commencement of the project and the contract defines its role, possibilities of settlement are higher. The use of neutral evaluation is growing steadily and so is mediation or conciliation. In our experience, however, dispute boards are more frequently used. The ADR services offered at an international level are ample and of great quality. Practitioners and clients can opt for many different choices. It is for the parties to agree on the most suitable combination of ADR but it is no longer acceptable to ignore their existence.