IBA International Construction Projects Committee

ADR in Construction

India

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1. Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

In India DABs are called Dispute Review Boards (DRBs). In this Chapter the latter expression is thus used throughout. The differences between DRBs, FIDIC Red Book & DABs is explained in Section 1.3.

DRBs and arbitrations are most commonly used in construction disputes. Invariably every construction contract has an arbitration clause. DRBs have also become common especially after the World Bank made it mandatory in all high value contracts funded by them. Arbitrations are considered essential in India due to the inordinate time taken in normal civil litigation (anything from 20-25 years) for ordinary civil matters to reach resolution (through various stages of appeals etc). Arbitrations got a boost when India adopted a modern pro arbitration statute in January, 1996 based on the Model Law.

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

Statutory adjudication has not yet been introduced in India and there are no special statutes for resolving construction disputes. Please however see response to Section 10 below.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators? What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

The law does not recognize any non-statutory dispute resolution mechanism as binding and the same is capable of being challenged in a court of law just as a concluded contract can be challenged.

The policy of the law (as contained in Section 28 of the Indian Contract Act) is that any agreement by which a party is restricted absolutely from enforcing his rights by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may enforce his rights or which extinguishes the rights of any party thereto or discharges any party thereto from any liability under or in respect of any contract on the expiry of a specified period (so as to restrict any party from enforcing his rights) is void to that extent. It may be stated that this provision has been made more stringent and explicit by an amendment to the said section with effect from 8th January, 1997 (Section 28 as paraphrased above, states the post amendment

position). Hence there cannot be any restraint on legal proceedings or a mechanism which shuts off judicial review.

The only stated exception to this is arbitration (where judicial review is as per the Model Law or New York Convention grounds) and settlements arrived at through the mediation / conciliation procedures set out under the Arbitration & Conciliation Act, 1996 (Act). The latter has the same legal effect as an arbitral award on agreed terms would. (Section 74 of the Act). However mediation / conciliation is rarely used in India in construction disputes (see 1.6 below).

The dispute resolution methods so far used in construction disputes in India are: Engineer; DRBs and Arbitration. Salient features of the same are briefly set forth below:

Engineer:
Largely India follows the FIDIC Red Book and FIDIC Silver Book for construction contracts. This is for historical reasons prompted by international lending institutions (chiefly the World Bank and Asian Development Bank). Though the FIDIC Red Book assigns a significant role to the Engineer in dispute resolution, in practice this rarely carries the confidence of the Contractor as the Engineer is perceived as the Employer's agent. Hence the Engineer has a rather limited role in dispute resolution in India.

Dispute Review Boards:
Indian Construction contracts have modeled DRB provisions on FIDIC. Unlike the ICC Dispute Board Rules (2004) we have not bifurcated DRBs into 3 types.

As per standard contracts in India, used in relation to road construction each member of the Board is required to be and remain throughout the appointment independent of the parties. The Board is required to act impartially and in accordance with the contract. The Members have a contractual agreement that they would not be held liable for any act or omission in the course of discharge of their functions (unless vitiated by bad faith). The Members are remunerated equally by both parties. In the event of failure to agree upon a sole member or to appoint a party nominated member, the appointment shall be made by the appointing body defined in the contract or the official named in the contract in this regard. When a dispute is referred to the DRB, a copy thereof shall be sent to the Engineer for his information.

The Board shall have full power to (i) establish the procedure to be applied in deciding the reference (ii) decide upon its own jurisdiction and as to the scope of any dispute referred to it (iii) take initiative in ascertaining the facts and matters required to take the decision (iv) make use of its own personal knowledge or expertise (v) decide on the issue of provisional relief including interim or conservatory measures (vi) decide the issue of payment of interest in accordance with the contract and (vii) open up, review and revise any opinion, instruction, determination, certification or valuation of the Engineer related to the dispute. The Board is expected to give its recommendation

within 56 days of receiving the reference. However in practice this time limit is often exceeded upon parties mutual agreement in this regard.

Any party dissatisfied with the Board's recommendation shall notify the other party and the Engineer of its dissatisfaction within 14 days of the receipt of the same by giving a notice of intention to commence arbitration in relation to such disputes. The DRB agreement provides that if notice of dissatisfaction is not given then the Board's recommendation will become final and binding on the Employer and the Contractor.

The Planning Commission of the Government of India vide a Report dated February 2010 has recommended that the time limit for the DRB to issue its recommendations be raised from 56 to 84 days and the time limit to protest the DRB recommendation be raised from 14 days to 60 days to enable the Government to take a considered decision as to acceptance / challenge of the DRB recommendation.

The main differences between the FIDIC Read Book and Indian Contracts are: (i) FIDIC refers to "decisions" not "recommendations"; (ii) A FIDIC DBA decision is "binding" (unless revised in a settlement or an arbitral award) and (iii) the time lines are more extensive than currently under the Indian model.

Arbitrations:
Considering the shortcomings of regular courts in dealing with commercial disputes, India has been focused on giving arbitrations a boost. The Central Government came out with a new Act in January 1996 (by way of an Ordinance) titled the Arbitration & Conciliation Act, 1996 (Act).

Scheme of the Act:
The Act is a composite piece of legislation. It provides for domestic arbitration; international commercial arbitration; enforcement of foreign awards and conciliation (the latter based on the UNCITRAL Conciliation Rules of 1980).

The more significant provisions of the Act are to be found in Part I and Part II thereof. Part I contains the provisions for domestic and international commercial arbitration. Any arbitration to be conducted in India would be governed by Part I, irrespective of the nationality of the parties. Part II essentially provides for enforcement of foreign awards.

Part I is more comprehensive and contains extensive provisions based on the Model Law and the UNCITRAL Rules of 1976. It provides inter alia for arbitrability of disputes; non-intervention by courts; composition of the arbitral tribunal; jurisdiction of arbitral tribunal; conduct of the arbitration proceedings; recourse against arbitral awards and enforcement. Part II on the other hand, is largely restricted to enforcement of foreign awards governed by the New York Convention 1958.

Recourse against awards*:*
A domestic award i.e. a Part I award can be challenged and set aside only as per the grounds specified under Article 34 of the Model Law and this does not permit a

challenge on merits. However the courts have created a more interventionist role for themselves than envisaged under the Act. This was in the case of *ONGC v. Saw Pipes* (2003 (5) SCC 705). In this case the Supreme Court held that an award can be challenged on merits also if the court finds it to be contrary to the substantive law governing the parties or to be against the terms of the contract. This judgment applies only to domestic awards as foreign awards continue to be governed by an earlier decision of the Supreme Court which narrowly construed the "public policy" ground under the New York Convention to exclude any challenge on merits *(Renu Sagar II* (1994) (1) SCC 644).

In so far as enforcement of foreign awards is concerned, it is governed by Part II of the Act (i.e. subject to the New York Convention grounds) and the same cannot be challenged on merits.

1.4 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

India does not have any form of binding decisions other than arbitration. DRB decisions are to become contractually binding if not protested within the time specified but it remains to be legally tested in India if recourse to arbitration can be shut out merely on account of delay in protesting the DRB decision. On first principles, it would seem that delay cannot prevent a party from seeking recourse to challenge a DRB decision. (See Section 1.3 hereinabove).

The basic difference between arbitrations and other ADR mechanisms is that the obligation to act judicially applies with greater vigour to the former. Moreover arbitrations are subject to the statutory rules and regulations specified under the Act whereas the other ADR mechanism are either subject to no (or very scanty) statutory provisions. Decisions by Experts and / or DRBs can be challenged and are not *ipso facto* binding.

There is no statutory or other recognized mechanism for "expert determination" in India.
The Indian Supreme Court in the case of *K.K. Modi v. K.N. Modi,* (1998 (3) SCC 573) had occasion to consider the distinction between an expert determination and arbitration. The court concluded that by and large, there were no conclusive tests, one could follow to determine whether the agreement was to refer an issue to an expert or whether the parties had in fact agreed to resolve disputes through arbitration. It held:

> "therefore our courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is

intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and purport of the agreement."

1.5 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

In 2006, a special arbitral institution – the Construction Industry Arbitration Council (CIAC) was established. It was co-promoted by the Singapore International Arbitration Centre and the Construction Industry Development Council (an India Government body). This specialised arbitral institution is headquartered in New Delhi. However, it has not yet caught on and its services are rarely used. The institution has a full suite of services. Its Rules are available at http://www.ciac.in/.

1.6 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

As stated above, the various ADR mechanisms used in India are: Engineer, DRBs, Arbitrations.

Mediation (though often mentioned in construction contracts) is hardly of practical use. This is essentially as there is no incentive for the defendant to agree to a reasonable settlement. The litigation process is slow and costs awarded are nowhere near compensatory in nature. Government entities are reluctant to agree to any settlement for fear of watchdog bodies and the decision makers being questioned later. Thus, by and large mediation is not considered to be a fruitful mechanism.

DRBs working has already been discussed above and it has been stated that its recommendations would not be binding (in the sense of shutting out recourse to arbitrations or judicial review).

1.7 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

There is nothing in Indian law which would prevent DRB decisions or the evidence tendered therein to be produced as evidence in a subsequent arbitration or court proceeding. However the findings would not be binding or conclusive and will be open to judicial review and challenge. The weightage to be given to any piece of evidence is at the judicial discretion of the court or the tribunal.

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

Indian courts as a matter of practice do not award real costs in favour of the prevailing party. In arbitrations however substantial costs can be awarded. The general principle is that costs follow the event. (Section 31 (8) of the Act.)

As per the Act, "costs" mean:

- Reasonable costs relating to the fees and expense of the arbitrators and witnesses.
- Legal fees and expenses.
- Any administrative fees of the institution supervising the arbitration.
- Other expenses incurred in connection with the arbitral proceedings and the arbitral award.

2. Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

An arbitration agreement has to be in writing but may be contained in an exchange of letters or any other means of telecommunication which provide a record of the agreement. The agreement need not be signed and an unsigned agreement affirmed by the parties conduct would be valid as an arbitration agreement. An arbitration agreement would also be considered to be in writing if there is an exchange of a statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

The India Arbitration Act does not deal with multi party agreement. However a recent case of the Supreme Court in *Chloro Controls India Pvt. Ltd. V. Severn Trent Water Purification Inc.* - (2013) 1 SCC 641 laid down seminal law on the subject. Here, the court was faced with a situation where parties to a joint venture had entered into several related agreements - some with different entities from amongst their group. These agreements had diverse dispute resolution clauses: some with ICC arbitration in London; some with no arbitration clause; and one agreement with an AAA arbitration clause with Pennsylvania, (USA) as its seat. The Supreme Court strongly came out with a pro-arbitration leaning stating that the legislative intent is in favour of arbitration and the Act "would have to be construed liberally to achieve that object". The Court held that non-signatory parties could be subjected to arbitration provided the transactions were within the group of companies and there was a clear intention of the parties to bind non-signatories as well. It held that subjecting non-signatories to arbitration would be in exceptional cases. This would be examined on the touchstone of direct relation of the non-signatory to the signatories, commonality

of the subject matter and whether multiple agreements presented a composite transaction or not. The situation should be so composite that performance of the "mother agreement" would not be feasible without the aid, execution and performance of the supplemental or ancillary agreements.

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

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

There are no restrictions on enforceability or validity of arbitration clauses regarding standard form contracts including consumer protection laws, provided the requirements of arbitrability are met under Indian law. Not all forms of ADR would be specifically enforceable. For instance, a bare stipulation to attempt mediation / conciliation may not be specifically enforceable. This is on the principle that an obligation simply to negotiate would not be legally binding. Much would depend on a construction of the clause concerned to determine if it is mandatory in nature.

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

Arbitration clauses are very common in construction contracts and indeed necessary as the regular civil courts are chocked with delays and inadequate to deal with large commercial disputes. Most arbitrations in India are ad hoc (sometimes referring to UNCITRAL Rules). In international arbitrations, public sector undertakings usually incorporate the ICC Rules in their contracts. Public Sector Undertakings generally insist that the arbitration be seated in India and that the governing law be Indian. As stated above, construction contracts also refer to the mechanism of Engineer and Dispute Review Boards.

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

Please see 2.1 above: *Chloro Controls India Pvt. Ltd.,* which states the circumstances under which non-signatories may also be bound. It is possible that this interpretation is stretched to other forms of ADR and indeed to subcontractors as well. An expert determination will be binding but subject to judicial review (which cannot be shut out). In law, expert determination is considered to be distinct from arbitration. This distinction was considered by the Supreme Court in *K.K. Modi v. K.N. Modi* (1998) 3 SCC 573 (see 1.4 above).

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

Whether the process to submit disputes to an expert is mandatory or not depends upon the language used in the contract and its construction by a competent court. As to the binding nature of an expert determination please see Section 1.4 above.

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

Much would depend on the language used. If the language is mandatory and a pre-condition to the subsequent step, a party would not be allowed to skip it. Multi-tiered dispute resolution clauses are common in India. The requirement to go through the Engineer or DRB have been held to be mandatory.

3. ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

It is a requirement of the Act that the disputes must be arbitrable. Broadly, the court has sanctified two types of approach to determine arbitrability. The first is to is to see whether the parties can make the settlement thereof a subject matter of a private contract. (*Olympus Superstructures v. Meena Khetan* - (1999) 5 SCC 651). The court here relied on Halsbury's Laws of England stating that the differences or disputes which may be referred must consist of "…a justiciable issue, triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction".

The second approach the court has adopted is – "Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals." *(Booz Allen & Hamilton Inc. v. SEBI Home Finance Ltd.* - (2011) 5 SCC 532).

Examples of non-arbitrable disputes are: disputes relating to criminal offence; matrimonial disputes; child custody; guardianship; insolvency; winding up; testamentary matters; or where serious fraud is alleged.

Subject to the above, construction disputes can be subject to arbitration or other ADR mechanisms including decennial liability.

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

Please see above. The same restrictions which apply to arbitrability would apply to other ADR mechanisms as well. Indeed the Act makes this clear in so far as conciliation and mediation is concerned (Section 61 (2) of the Act).

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued(For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

The arbitrators are masters of their own procedure and subject to requirements of natural justice, may issue an interim award (on an issue of law or fact). Similarly unless the parties have agreed otherwise DRBs can rule separately on issues of facts and law.

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

Public entities sometimes incorporate mutual settlement efforts as part of their dispute resolution clause but it is rare for them to settle any substantial disputes through mediation or conciliation. This is from a practical view point as these entities are subject to scrutiny within and outside their organisation and their decisions are open to questioning by a multitude of watchdog bodies. Hence from a practical point of view it is rare for public entities to settle or compromise.

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

The doctrine of sovereign immunity is all but dead in India. An old 1965 decision of the Supreme Court does apply the principle. Here a tort (embezzlement of private property) was committed by a police officer. The court held that if a tortuous act is committed in discharge of statutory functions based on a civil powers of the State, the State will not be vicariously liable. However the principle and the maxim (the 'king can do no wrong') has not been applied by the courts since and indeed the courts regularly hold the State liable in tort or in contract.

3.6 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

In State procurement matters arbitration would not be appropriate as third party and public rights are involved. Such disputes would be settled by the High Court in exercise of its writ jurisdiction. Under this jurisdiction the court can strike down any administrative act of the State entity which it finds to be grossly unreasonable or irrational or illegal or violative of the tender conditions. This is a far more efficient remedy than recourse to arbitration or any other ADR mechanism.

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

The issue is not free from doubt. Please see the Supreme Court decision in *Chloro Controls India Pvt. Ltd. V. Severn Trent Water Purification Inc.* - (2013) 1 SCC 641 (Section 2.1 above). Here the court held that non-signatories could be referred to arbitration in certain situations. This would be in exceptional cases where there was a commonality of the subject matter and the multiple agreements presented a composite transaction. The court held that the situation should be so composite that the performance of the mother agreement would not be feasible without the aid, execution and performance of the supplemental or ancillary agreements. This dicta of the court can be stretched and made applicable to DRBs also. However it would be for the arbitral tribunal (and if need be for the court) to finally rule if the DRB was justified in taking on jurisdiction on matters not otherwise referred to it or which fall outside the contract. The DRBs decision on its own jurisdiction would not be conclusive and it would be for the arbitral tribunal / court to finally rule on it.

4. Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

Other than in relation to arbitration there are no statutory rules or regulations relating to entities like DRBs. There is no concept of statutory adjudicators in India. An arbitrator need not have any special qualification unless the parties have agreed otherwise. Qualifications of DRBs members would be as per their contract.

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

The Construction Industry Development Council (CIDC) is an apex body in the construction industry set up by the Planning Commission. The CIDC and the Singapore International Arbitration Centre have set up an arbitration centre in India called the Construction Industry Arbitration Council (CIAC). The CIAC works under the aegis of the CIDC. The CIAC has a list of arbitrators who are on its panel (see, http://www.ciac.in/arbitrators.html). As per the CIAC Arbitration Rules, it shall act as the appointing authority. CIAC will provide to the parties a list of 3 or 5 arbitrators from its panel and the parties can choose only from that list, indicating their order of preference and return the list within 30 days of receipt . CIAC shall then make the appointment (taking into account the parties preference) within a period of 30 days.

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer? Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

In India, members of the arbitral tribunal are usually former Judges of the High Court or the Supreme Court or technically qualified persons. There is no requirement or practice that the tribunal has a lawyer secretary and the position would not change even if a non legal background tribunal is required to rule on issues of law.

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and construction professionals possible/common? Is there a difference with other forms of ADR?

In road construction matters (specially those governed by the State owned National Highway Authority) the arbitrators are construction professionals. In ad hoc arbitrations generally we see the tribunal comprising of former Judges. Integrated panels of lawyers / construction professionals are somewhat rare. DRBs invariably comprise of construction professionals.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

If a tribunal (or any other body acting in a judicial manner) intends to use its own technical expertise, it should first inform the parties of its tentative conclusions and

the basis for the same and further allow them an opportunity to respond to the tentative findings before issuing the binding decision. If it does not do so it runs a grave risk of having the decision overruled being violative of principles of natural justice. This general rule however may not apply to DRBs with the same vigour as DRBs are expected and empowered to use their own expertise.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

An arbitrator can decide *"ex æquo et bono", or as "amiable compositeur", or in "equity"* only if the parties have expressly authorised him to do so. In all other cases he is required to proceed in a judicial manner on law and merits. The same would apply to any other form of ADR mechanism.

5. ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

Any quasi judicial body in India must follow minimum due process, which includes equality of treatment and an adequate opportunity to parties to present their case. Further a right of personal hearing is also a part of minimum due process unless waived or provided otherwise in the parties agreement. A party would normally have a right to legal representation and if it is denied, the award may become vulnerable to a challenge based on denial of due process. (Following the Model Law one of the grounds on which an award can be challenged is if the party – “was otherwise unable to present his case”). It is however rare for parties to be represented before DRBs through a lawyer.

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

In India there is a great tradition of oral arguments and if the tribunal has a majority Indian composition it is likely to be more focussed on oral than written presentation.

5.3 Are there rules on evidence in the laws or your country and/or the arbitration rules and / or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

The Act expressly states that the arbitral tribunal shall not be bound by the Code of Civil Procedure or the Indian Evidence Act. Nevertheless as a matter of practice domestic arbitral tribunals usually do refer to and rely upon the principles of these statutes, unless the same are very technical in nature.

5.4 Is a hearing mandatory for all forms of ADR?

Right to oral hearing is considered to be mandatory unless the parties agreements or the rules adopted by them state otherwise.

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,". Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

In India any person or body involved with dispute resolution would be bound by the principles of natural justice, which at the minimum would include equality of treatment; adequate opportunity to present their case and an opportunity for oral arguments. The rules of natural justice would override general powers as referred to in this question.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

In Indian arbitrations experts are rarely used, other than where technical issues may be involved. Issues as to delay, disruption etc. are generally addressed by employees / consultants as witnesses of fact.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

Generally the tribunal does not appoint its own expert and leaves it to the parties to appoint experts if they so wish. A tribunal would normally appoint an expert only if its identity and terms of reference are agreed upon by the parties, in which event its findings would have greater evidentiary value. The costs of the experts are left to the parties appointing them and if appointed by the tribunal are borne equally.

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

An expert is supposed to be independent of the parties / counsel but there are no rules governing this. If an expert is not demonstrably independent it would impact his evidentiary value but may not go to the root of his evidence.

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

In most cases it would be written evidence followed by oral cross-examination.

5.10 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for following or not following the statement of an expert? Can part of the decision by the tribunal be "delegated" to the expert?

Tribunal can ignore the findings of an expert appointed by itself or otherwise but must give reasons for the same. This flows from the legal obligation that the award must be reasoned. A tribunal cannot "delegate" any issue to an expert.

5.11 Is "hot tubbing" (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

"Hot tubbing" is not used in India.

5.12 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

An arbitral tribunal may visit the site but usually appoints commissioners (technical experts) to do so. The commissioner would be expected to act in accordance with the principles of natural justice including giving adequate notice; clear description of issues and outlining in advance the procedure he or she is going to follow. Parties may object to any findings by the commissioner and indeed request for an opportunity to examine the commissioner as it would any witness.

5.13 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

All parties need to be given sufficient notice to be present during the site visit. Any "finding" by the tribunal must be tentative (with an opportunity to the parties to comment on the same in due course).

5.14 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

Witness testimony is necessary as pleadings are not considered "proof" under Indian law. There is no restriction on an employee or a consultant or otherwise related

person to appear as witness (though the proximity of the relationship may impact its evidentiary value).

5.15 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

The arbitrators are the sole judge for weighing and balancing the evidence and unless their findings are perverse the court will not interfere with the same. If need be arbitrators may take guidance from the principles contained in the Indian Evidence Act.

6. Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

The Act has two provisions for interim measures. Section 9 of the Act enables a party to approach a court, and Section 17 to approach the arbitral tribunal. Section 9 is based on Article 9 of the Model Law but it takes it further. The Model Law enables a party to approach a court for an interim measure of protection before or during the arbitral proceedings. The Indian Act enables an approach to court before, during or even *after* the arbitral award is delivered (but before it is enforced by court). If there is a recourse to court before commencement of arbitration, the applicant must satisfy the court that it intends to initiate arbitration proceedings within a short period of time and can be put to terms in this regard by the court.

The other departure the Indian Act makes from the Model Law is that it extensively sets out the types of interim measures of protection the court may pass. These include:

- The preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
- Securing the amount in dispute in the arbitration;
- The detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration;
- Authorising any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;
- Appointment of a Receiver; and

- The residuary power to pass "such other interim measure of protection as may appear to the court to be just and convenient".

Section 9 then goes on to clarify that the court shall have the same power to pass an interim order as it has in relation to in any other proceeding before it.

The other provision a party can take recourse is to approach the arbitral tribunal under Section 17 (corresponding to Article 17 of the Model Law). India has not adopted the 2006 Model Law amendments in relation to interim measures. The draw back in approaching the arbitral tribunal is that there is no provision to enforce an order. Interestingly there is a provision to appeal an adverse order of the arbitral tribunal in this regard. This creates a grey area. A party is technically obliged to appeal if it feels aggrieved by the interim order but it is not stated as to what will be the consequence if it simply chooses to disobey it. At the same time if the succeeding party wishes to enforce the arbitrator's interim order, there is no enabling mechanism for it to do so.

A party seeking interim relief has thus to take an important decision of whether to approach a court of law under Section 9 or the arbitral tribunal under Section 17.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (g) decide upon any provisional relief such as interim or conservatory measures (...) The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

DRB provisions have only contractual backing. If it's order is disobeyed / disregarded the only remedy is to approach a court of law under Section 9 of the Act (discussed above). It is possible that the court accepts the DRB finding as a valid basis for it to order interim relief but there is nothing which obliges the court to do so.

7. Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

A DRB decision is capable of being challenged in arbitration / court. Even if it is not challenged in time, recourse to arbitration cannot be shut out. A party wishing to enforce the DAB decision would have to go through an arbitration to convert the same into a binding decision. An enforcing party cannot directly to go court skipping the arbitration.

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

An award must be reasoned (though the extent of reasoning is not usually gone into by the court). Other ADR decisions do not necessarily have to be reasoned. A settlement converted into an award or a decision of a mediator or a conciliator is not required to be reasoned but any quasi-judicial decision on merits would need to be reasoned.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

Dissenting opinions are allowed in India and the same may be in a separate opinion (though usually they form part of the same award or decision).

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

The arbitral tribunal is empowered to make typographical or clerical corrections to the award either on its own initiative or on an application of a party. Any such application must be made within 30 days of receipt of the arbitral tribunal's award, unless agreed otherwise by the parties. Other than that an arbitral tribunal has no power to reconsider the matter on merits.

8. Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

There are three situations which can be discussed below:

- (i) An India seated (domestic arbitral award);
- (ii) A foreign arbitral award;
- (iii) A non-arbitration ADR mechanism.

An India seated (domestic arbitral award):
Departing from the Model Law a domestic (i.e. India seated) award does not have to go through any application for enforcement. In other words if there is no challenge to an award or the time for challenge is over and no set aside application is made or the challenge if made is rejected an award will be enforceable in the same manner as if it were a decree of the court.

A foreign arbitral award:
In so far as a foreign award is concerned, an application for enforcement would have to be brought which can be resisted on the New York Convention grounds. If the

challenge to enforcement is rejected there is no provision for an appeal therefrom other than a discretionary appeal which may be entertained by the Supreme Court of India. Once the challenge is rejected the foreign award is enforceable as a decree of the court.

A non-arbitration ADR mechanism:
If a settlement has been arrived at in the manner stipulated under the Act it shall have the same status and effect as if it was an arbitral award on agreed terms (Section 74 of the Act). Thus it can be proceeded to be enforced as an arbitral award would.

Other ADR mechanisms do not have statutory recognition and are merely contractually binding. Thus if a DRB decision is neither challenged nor set aside then an arbitration proceeding would have to be initiated for a declaratory relief that the decision be converted into an arbitral award. In other cases (in the absence of an arbitration clause) civil proceedings would have to be brought for a decree in terms of the decision sought to be enforced.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

A DRB decision would not be equivalent to an arbitral award and hence not be~~en~~ enforceable under the New York Convention.

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

The foreign award must be result of a quasi judicial process and duly supported by due process. It should be on merits and not a default award. Hence an award which mechanically endorses a DAB decision without any independent application of mind is not likely to be enforced.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

As stated in Section 8.1 a DRB decision cannot be enforced on its own and it would have to first go through arbitration. It would be open to a party to plead, fraud, bias, failure to follow minimum due process or any other irregularity or illegality (under certain circumstances these defenses can be waived or the doctrine of estoppel may get triggered).

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

As stated in Section 8.1 an expert determination cannot be enforced on its own. It must first go through an arbitral process (if the parties have stipulated one) or otherwise be converted into a decree by recourse to the court process. It is difficult in India to shut out a review on merits (even arbitral awards can be reviewed on merits). Certainly a party would be entitled to plead fraud, failure, lack of due process or any other serious irregularity or illegality in challenge to the same.

9. Trends and developments

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

According to a press report dated 17th May 2013, the Prime Minister has asked the Planning Commission of India to draft a new legislation to establish an institutional mechanism to resolve disputes in public contracts. This is specifically in relation to infrastructure disputes where foreign investment is getting hampered due to lack of proper dispute resolution mechanism. Essentially the proposal is to have a fast-track mechanism with timelines for the entire process. As per a Government report, the money stuck in construction disputes has increased over three times from US$ 10 billion in 2001-02 to US$ 25 billion in 2009-10. The draft legislation would aim to provide quicker and more amicable solution compared to the present regime. However, further details are not yet available in the public domain.

10. Other Important Issues

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

Please see above.