IBA International Construction Projects Committee

ADR in Construction

Peru

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Date: **July, 2015**

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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?

The dispute resolution method most often used in construction matters in Peru is *arbitration*; *Litigation* is not commonly used as it takes too long to resolve controversies and construction works need to be completed with minimum delay. Furthermore, judges are not specialized in construction law and frequently lack the skills necessary to resolve construction disputes satisfactorily. In contrast, *arbitration* is a relatively quick method and arbitrators have more appropriate skills and training.

Neither *conciliation* (an ADR method established in Peruvian law, in which a third person duly trained and authorized by the Peruvian Ministry of Justice acts as a facilitator to help parties come to an agreement) nor *mediation* (a mechanism not regulated by law but similar to conciliation) are often used in construction disputes.

Contracts in Peru usually have multi-tiered clauses. These multi-tiered clauses normally establish negotiation and conciliation as the first steps and litigation or arbitration as the final methods of resolving controversies between the parties. In most cases, however, when a dispute arises, parties do not resolve controversies through the methods mentioned above; they almost invariably resolve them through *arbitration*, as there is a clear preference for arbitration over litigation.

Dispute boards, another type of dispute resolution method, are beginning to be used in construction projects. A modification to the Framework Law on Public-Private Partnership has recently been approved by which parties will be allowed to resolve controversies through the participation of an *amiable compositeur,* a neutral facilitator involved in negotiations to help achieve a negotiated solution, or a dispute board. A new Public Procurement Law has also been approved recently, in which the dispute adjudication board (DAB) is included as one of the dispute resolution methods to be applied for work execution contractual matters, excluding the tendering phase. The DAB is now a step towards reaching the mandatory public arbitration in this kind of public contract. Only time will tell whether this method is effective, and if parties will prefer it to arbitration.

Despite the above, arbitration has become the most frequently employed dispute resolution method in Peru in recent years. The Peruvian Arbitration Act (Law Nº 26572, approved in 1996 and then, with the current Arbitration Act Legislative Decree 1071, approved in 2008) has established specific rules for arbitration. In cases where an arbitration clause exists or in cases where parties have agreed to go to arbitration even where this agreement is not part of an arbitration clause, parties are obliged to resolve

controversies through arbitration with restricted possibilities of deviating from this method,.

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

Yes. There are some specific rules to be applied to settle controversies involving public projects. Among other provisions, the Public Procurement Law establishes conciliation and arbitration as the only mechanisms to be used for resolving disputes. However, the new Public Procurement Law (recently approved, which will be in force in the coming months) has included the DAB as a dispute resolution method. This Public Procurement Law mandatorily applies in Private-Public contracts. However, for private contracts, there is no special law that must apply.

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).

Non-statutory dispute adjudicators are not regulated under Peruvian legislation (which does not mean that they cannot be used if parties agree to them). The Civil Procedure Code contains rules applicable to civil proceedings, including those related to judicial awards and their *"res judicata"* characteristic. The Arbitration Act, on the other hand, establishes rules for arbitral awards and also applies *res judicata* .

As previously mentioned, it is common practice to use arbitration in construction disputes (with the arbitral award as the binding decision), although parties may opt for the judicial process as the mechanism for resolving disputes. For public construction contracts, arbitration is mandatory. Legally, the only binding decisions are those made in judicial or arbitral awards. However, Dispute Boards have recently been included in the Framework Law on Public-Private Partnership and in the new Public Procurement Law. With this regulation, decisions made by Dispute Adjudication Boards are binding on the parties, but they are not final decisions. The parties could discuss the decisions in arbitration (including the merits) and also make them enforceable as contractual obligations.

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

As mentioned before, we do not have adjudication in our jurisdiction. We do have Dispute Adjudication Boards. Decisions made by DABs are binding and, unlike arbitral awards, are not final as under the new Public Procurement Law, parties have recourse to an

arbitration process if they disagree with the decision. The Framework Law on Public-Private Partnership does not preclude discussion in arbitration. In the private contract context, DABs decisions would be enforceable as contractual obligations.

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?

There are several arbitral institutions that conduct arbitrations in Peru, and some of these deal with construction disputes. However, there is no single institution created exclusively to deal with construction disputes. The Arbitration Center of the Lima Chamber of Commerce and The Conflicts Resolution and Analysis Centre of the Pontificia Universidad Catolica del Peru (PUCP) work to manage arbitration procedures in an ethical, effective, impartial and independent way. Similarly, the Conflicts Resolution and Analysis Centre of the PUCP has developed a Dispute Boards Regulation to be used in resolving construction disputes. Both institutions may be involved in arbitrator appointments as well, in accordance with their respective rules.

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 earlier, although mediation may be employed for settling construction disputes (for private projects only), it is not used in Peru. In private projects, parties can resolve controversies through negotiation, conciliation, arbitration or multi-tiered proceedings. In public projects governed by the Public Procurement Law, only conciliation or arbitration are permitted, in a similar manner as described in clause 20 from the 1999 FIDIC Red Book for Construction form. For concessions or PPP projects, only arbitration and DABs may be used to settle disputes.

The methods referenced above are employed for construction disputes; however, arbitration is the method most commonly used in both private and public projects. Sometimes parties agree on a multi-tiered clause where negotiation is the first tier, conciliation the second and arbitration the last tier. In projects executed under specific procedures of international organizations or cooperation agreements there are special dispute resolution methods that are used as determined by the specific contractual rules involved (FIDIC form of contract, for example).

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 currently no legislation related to Dispute Boards being applied, although it has recently been included in the new Public Procurement Law (in force in the coming months). Dispute Boards are used only in those projects that involve investment from international organizations and this is a consequence of the use of FIDIC contracts. FIDIC DAB are also used in private projects that decide to employ these model forms of contracts.

DAB decisions can always be taken to arbitration within the time period specified in the contract. Arbitrators or judges are not obliged to back up any decision made by the Dispute Board. In other words, a DAB decision does not limit the competence of an arbitrator or a judge. A DAB decision helps to understand the entire controversy better, but it does not affect the impartiality or independence of an arbitrator or a judge. While laws governing the DAB do not indicate whether the decisions may be submitted as evidence, Article 43 of the Peruvian Arbitration Act allows the evidence to be determined and evaluated by the arbitral tribunal when deemed necessary and appropriate. Since the decision of the DAB is technical and specialized, an arbitrator would have no legal grounds to reject it.

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

Lawyers driving the arbitration, and who are reluctant with regard to Dispute Board, wrongly consider arbitration as a cost effective dispute resolution method for construction projects. In comparison with other ADR methods, arbitration is supposed to settle disputes in a shorter time than litigation. However, in practice, due to the duration of the proceedings, the costs of expert appraisals and the lack of arbitrators specialized in construction law, costs increase significantly. Other mechanisms for construction disputes such as mediation or conciliation are possible, though parties rarely opt for these. On the other hand, the Dispute Board is increasingly seen as a cost effective dispute resolution method.

Theoretically, as these procedures will not be used for public procurement until the new law comes into force, a Dispute Board is recognized as an effective and quick method for preventing and resolving construction disputes, owing to the DAB's specialization in construction law and the opportunity for timely evaluation in situ of issues arising. There is not yet empirical evidence of this because there is no further information with regard to private DABs.

We should consider the following costs:

Arbitration: attorney's fees (usually specialized staff); institutional fees (if parties agreed to institutional arbitration); period of time (from 6 months to 3 years); and arbitrators' fees (supposedly specialists in their fields).

Litigation: attorneys' fees, period of time (2 to 8 years, possibly longer) and court fees.

In consideration of the above, parties prefer to use arbitration because they know controversies will be resolved faster than with litigation. In addition, there is no specialized construction court in Peru, so parties look to arbitration to obtain a resolution from professionals with experience in the engineering and construction sectors.

The most common approach to cost allocation in Arbitration (attorneys, arbitral tribunal and institutional fees) is an agreement between the parties. In the absence of agreement, Article 73 of the Peruvian Arbitration Act provides that the costs of arbitration shall be borne by the losing party. However, that same article also provides that the arbitral tribunal may apportion and distribute these costs between the parties if it considers that apportionment is reasonable, taking into account the circumstances of the case. There is no information available on cost allocation for DABs. In the case of court litigation, the parties generally assume their own fees, unless a Party requests a claim to the other party for the payment of such costs, in which case the judge will decide the merits of the claim.

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?

The Arbitration Act states that a valid arbitration agreement must consider only the following requirements:

- Both parties must agree on it (in the case of a multi-party arbitration agreement, all parties involved must agree on it).
- It must be a written agreement.

Clause 20.6 of the FIDIC Red Book is considered to be a valid arbitration clause for Peru.

If the arbitration is governed by Peruvian law, parties can seek interim measures (such as interim injunctions) as set out in article 47 of the Arbitration Act, through which the arbitrators are empowered to order interim measures and guarantees to ensure compensation for damages that may result from the implementation of the measure. Before the establishment of the arbitration tribunal, the parties may resort to the courts to seek such measures.

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 forms of contracts such as FIDIC contracts. It is the same for other forms of ADR.

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?

Standard forms are not the normal approach used for construction contracts. Ad-hoc contracts are mostly employed. It is common to agree on arbitration clauses, but there are no special arbitration clauses for construction controversies. Parties agree on an arbitration clause that can be used for any industry sector, not only for construction, as arbitration clauses are the same as those used for other areas of the law. When parties establish an arbitration clause, they usually agree on an arbitral institution and its rules (usually the Centro de Análisis y Resolución de Conflictos de la Pontificia Universidad Católica del Perú or the Arbitration Centre of the Lima Chamber of Commerce).

Arbitration is the most common dispute resolution method applied in both public and private construction projects. As mentioned previously, neither conciliation nor mediation is often used in construction matters as there is no culture of negotiation and because conciliators and mediators are not specialized in construction law.

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

The Arbitration Act regulates third party intervention in the arbitration and the participation of non-signatories to the arbitration agreement. As such, these non-signatories may be, depending on the type of arbitration, the State or the individuals (Corporations and other legal entities). Consequently, non-signatories will be bound by arbitration agreements if:

- They have participated actively and decisively in the negotiation, conclusion, execution or termination of the contract.
- They wish to derive rights or benefits from the contract.

The same is true for other forms of ADR when non-signatories are involved in any part of the contract. For example, an EPCM contractor that negotiated a construction contract

on behalf of the owner becomes bound by a DAB or arbitration clause in a contract the EPCM did not sign or is not a party to.

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

Expert determination as a dispute resolution mechanism is not regulated in Peru. The final decision issued by the expert would be binding only if parties agree this in the contract conditions. The process and the effects of obtaining a final expert determination should be included in the contract to make them useful in resolving disputes. If the process and the effects are included, they are binding upon the parties as contractual obligations.

If one of the parties does not comply voluntarily with the expert determination, the other party is entitled to utilize arbitration (if an arbitration clause was included in the contract) or a trial (if the contract does not include an arbitration clause) and claim a contract breach (not to comply with the expert determination). The arbitration award may order compliance with the expert determination.

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?

Unless the parties specify in the arbitration agreement that skipping is possible, they are not allowed to skip tiers of the dispute resolution process (though it hardly ever occurs because this denaturalizes the essence of a multi-tiered clause). It is a common practice in construction contracts to agree on a multi-tiered dispute resolution with at least two tiers. The first tier is *conciliation* and *arbitration* the last. There is, generally, a time limit for parties to settle the controversies in the first tier; if not, in some cases there must be an agreement to finish the first tier, and in other cases any Party may unilaterally start the second tier.

Parties understand that before going into *conciliation*, the controversy has necessarily passed through a failed *negotiation* phase.

Sometimes, however, parties establish a multi-tiered clause specifying *negotiation* as the first tier (it is written as the *amicable settlement* of sub-clause 20.5 of the FIDIC Red

Book); *conciliation* as the second and *arbitration* the last tier. In these cases, there are also time limits for settling disputes in the first and second tiers.

In recent years, there have been some problems with the application of multi-tiered clauses which contains time limits that one party can invoke as a defense against the possibility of taking more time to settle a dispute when the time limit has already been reached.

In this respect, the Peruvian Civil Code states that only the law may establish time-bars. Because of that, some professionals have argued that parties should not be allowed to establish time-bar clauses within multi-tiered clauses.

In contrast with other jurisdictions, such as Brazil or Chile, in Peru there is express reference to the way time-bars must be applied. Some countries do not prohibit parties from agreeing on this type of clause and others expressly allow them to agree on time-bar clauses if parties so wish.

Notwithstanding the above, multi-tiered clauses are established as a common practice and few professionals question what is stated in the Peruvian Civil Code, because the restriction for time-bars apply when a loss of rights is involved. For this reason, it is not a common practice to argue that the FIDIC dispute resolution clause is void or partly void, because the clause does not imply a loss of rights. On the contrary, the party shall have the right once the requirements of the clause are satisfied. There is a preference for allowing this time bar scheme and the different multi-tiered clauses, mainly based on the existence of a good faith obligation arising out of the agreement between the parties.

3. ADR and jurisdiction

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

Disputes in private projects can be taken to the resolution method agreed upon by parties. If they established arbitration as the dispute resolution method, then the dispute will be decided by an arbitrator. If parties do not establish an arbitration agreement then they can always take disputes to a judicial process or any ADR mechanism.

Disputes in public projects under the Concession Law for Public Infrastructure Works and the Framework Law on Public-Private Partnership are always decided by arbitrators. This is the only method available to parties (however, there is the possibility of using conciliation in projects under the first of the two laws mentioned above).

At the present time, disputes in public projects under the Public Procurement Law related to work execution contractual matters, excluding the tendering phase, are always solved consensually with the intervention of conciliators or decided by arbitrators depending on the agreement made by the parties in the contract. There is no other dispute resolution method permitted under this law, which also excludes judicial courts.

Fundamental rights or disputes excluded from arbitration or conciliation by law cannot be decided by arbitrators or through conciliation, including the following:

- Controversies related to the decision of the party/entity or The Office of the Comptroller General of the Republic regarding approval of additional work orders.
- Controversies related to the execution of additional work orders for works and supervision services that require previous approval by The Office of the General Comptroller of the Republic.

The above controversies cannot be decided by an arbitrator or in conciliation. They are excluded by law, so they are neither arbitrable nor conciliable. In consequence, those controversies may only be resolved through a judicial process.

In that sense, parties can take issues related to extensions of time, guarantees or contract termination process into arbitration disputes. Matters related to the decision of approval of additional works will be taken into a judicial process. This means that, sometimes, some arbitral decisions (extensions of time for additional works, for example) depend on the judicial judgement. Parties tend to structure and design the claims considering the above when they decide to begin arbitration or a judicial process.

Meanwhile, the works are executed (if not yet finished) and parties have uncertainty about the results of the arbitration or judicial judgment, which creates a cautious relationship among them.

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?

The restriction on matters established for arbitration may also be applied for expert determination or any other binding third party decision. If those matters are not allowed to be taken to arbitration, they may not be taken to a third party decision process. The matters that cannot be the subject of an arbitration process are matters excluded by law. Parties can only arbitrate unrestricted rights (“derechos de libre disposición”).

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

There are no such restrictions for binding decisions (DAB). In these cases, it will depend on the content of the contract. In relation to arbitral awards, the Arbitration Act states that these must be based on the law and may only be made in equity if parties have agreed that the arbitral tribunal will decide ex aequo et bono.

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

As mentioned previously, public entities may only settle disputes related to public projects under the Public Procurement Law through arbitration or conciliation. No other mechanism is permitted at this time. All other methods are barred in the general regime (the Public Procurement Law). Outside of this regime, projects are allowed to use DABs, DRBs or another method. However, the new Public Procurement Law (which will come into force in the coming months) has included the use of DAB.

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

State parties do not enjoy immunities. The Arbitration Act expressly establishes that in cases of international arbitration, state parties may not use prerogatives of their home jurisdiction in order to avoid obligations deriving from the arbitral agreement.

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 Public Procurement disputes related to the bid process, only administrative justice is allowed; the Arbitration Act does not apply. Decisions made by the Public Procurement Agency (OSCE) may be challenged before the Judiciary system.

On the other hand, disputes arising during the course of the contract must be decided only through arbitration or conciliation depending on the provisions included in the contract. Nowadays, no other ADR is allowed. However, the new Public Procurement Law (approved on July 11th, 2014 but not in force yet) includes the DAB as an ADR. Although the Regulation has not been approved yet (its approval will generate the application of the new Public Procurement Law), the past July 3rd, 2015 the Final Regulation Draft has been issued in order to submit comments or observations in a period of 15 days. Among others, this draft includes the following special requirements to use DABs:

- In the case of contract termination, DABs can be used until the entity receives the work.
- The disputes that are not allowed to be decided by arbitration or conciliation (see 3.1) are not allowed to be decided by the DAB either.
- Parties cannot submit compensation claims unrecognized in the Public Procurement Law.

- Parties are not allowed to agree and establish a DAB clause once the work execution begins.
- DABs will be allowed only for public work contracts whose amounts are greater than S/. 20 000 000.00 (US$ 6, 290, 000.00 approximately).
- The same requirements regulated in the New Public Procurement Law to be an arbitrator are applied to be a DAB member.

According to the New Regulation, there is no administrative, arbitral or judicial authority that can prevent the compliance of DAB decisions. Parties are bound to comply with the decision without delay even if one of them disagrees with it or wants to submit the dispute to arbitration. In addition, the compliance of the DAB decision is considered (according the Final Regulation Draft) to be an essential obligation, which means one party can terminate the contract in case of breach of the other.

The New Regulation is expected to be approved in a few weeks once the period for submission of comments and observations is over.

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

The DAB will not be allowed to decide on issues outside the contract, unless parties expressly agree to it in a clause. Therefore, if a decision has been made on issues outside the contract – and parties did not include a provision empowering the DAB to decide upon its own jurisdiction – the decision will not be considered as enforceable and binding.

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?

There are no special rules on arbitrator appointment for construction disputes. Parties may appoint the arbitrator they consider best qualified to resolve the dispute.

As there is no regulation related to Dispute Boards, there are no special rules on adjudicator appointment. However, parties know that adjudicators must have expert knowledge in the areas of construction and engineering. Therefore, they tend to appoint such professionals as adjudicators.

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?

There is no special arbitral institution for construction arbitrations in Peru, nor is there a specific list of arbitrators.

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 Peru, there are two types of arbitration: arbitration of law and arbitration *ex aequo et bono*. If parties do not specify which of these should be employed, arbitration of law applies. In such cases, the Arbitration Act states that the arbitrators must be lawyers. However, if there is an explicit agreement between the parties, the arbitrators need not necessarily be lawyers, but may be professionals in other fields (engineers with experience in construction projects, for example). For international arbitrations, there is no requirement for lawyers to be the arbitrators.

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?

Only a few arbitrators come from an engineering or construction background. Sometimes panels are composed of both lawyers and engineers. There is no difference with other forms of ADR; mediators and experts may include 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?

Parties usually appoint arbitrators based on the legal and/or technical expertise they may apply in deciding a case. Notwithstanding, the arbitrators must duly motivate the award with the legal and factual considerations used to generate the decision , including their own expertise.

In some cases, during the arbitration hearings, parties usually know about the arbitrators' expertise regarding specific issues of the dispute. In these cases, parties may validly refute the results of such expertise themselves or through experts who are taken to these hearings.

It is also true that some arbitrators issue an arbitral award based on their expertise which is not necessarily correct. As parties know about the arbitral award once it is issued, they cannot comment on or observe the criteria used by arbitrators, unless they decide to take the arbitration award into a judicial process alleging annulment of the award (if applicable according to the Arbitration Act).

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?

There are no specific rules for construction arbitrations. The Arbitration Act establishes that arbitrators must make decisions by applying rules of law and in *equity* only if parties have expressly agreed to it.

5. ADR procedure

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

Arbitrators are required to follow the process rules applied by the arbitral institutions. If parties take the dispute to *ad-hoc* arbitration and there are no specific rules established in the arbitration agreement, the Arbitration Act is applied.

The Arbitration Act establishes process rules that are applied if no specific or institutional regulations are applicable. As for legal representation, parties always have a right to this.

There are some specific rules when parties use conciliation to settle disputes such as a maximum period of three months or a flexible and informal process. The Conciliation Act is applied in these cases.

There are no process rules related to other ADR. However, in other ADR mechanisms, due process should always be present but there is no regulation in this regard.

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

Parties are allowed to present written submissions or oral presentations in the arbitral procedures. It depends on the particular tribunal whether the arbitration is mostly oral or written, but generally it is mostly oral. Nonetheless, both elements are important during the arbitral procedures. However, parties tend to put special emphasis on oral presentations because, in this way, the case may have a greater impact on the arbitrator or the tribunal.

Once oral presentations have been completed, arbitrators or tribunals evaluate all the written information received in order to issue the arbitral award.

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?

There are rules on evidence regulated in the Arbitration Act; however, arbitral tribunals are allowed to establish specific rules if parties agree to it and in so far as they do not infringe constitutional rules.

5.4 Is a hearing mandatory for all forms of ADR?

The Arbitration Act and the Conciliation Act stipulate that at least one hearing is mandatory for parties. The other forms of ADR are not regulated in a specific law; therefore, a hearing will depend on the parties or specific rules applied by an institution.

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?

The DAB can conduct –but is not bound to- any hearing as it deems fit according to rules of natural justice. However, it must comply with general due process rules such as:

- If one party puts forward any new document or evidence, the other(s) should be given the opportunity to consider and reply to this new document or evidence.
- Both parties should attend the hearing.

- The DAB must not receive confidential information from either party that is not disclosed to the other side(s).
- Any information or document that is disclosed by one party to the tribunal should be disclosed to the other party.
- Each party should be given a chance to respond to any query or questions raised by the DAB.

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?

Until a few years ago, the standard of proof did not consider the participation of technical experts for matters related to delay and disruption. Today, the standard has increased due to the participation of consulting engineering companies specialized in these subjects such as Navigant, FTI and Hill International. The number of Peruvian technicians with knowledge and participation in issues of delay and disruption has also increased.

As construction disputes almost never go to litigation, the use of experts is not very common in this resolution method.

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?

It is a common practice for experts to be appointed by parties. However, sometimes they are appointed by the tribunal. There is no difference in evidential value. Each party pays the costs of its appointed experts. If the tribunal appoints the experts, parties will pay equally.

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

Yes. Experts are supposed to be independent and impartial.

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

Normally, experts give both written and oral evidence in order to support their statements.

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?

Yes, the tribunal can ignore the expert statements as they are not appointed in order to make a decision on arbitration. The tribunal does not need to give reasons for following or not following the statement of an expert. The experts are used to assist the arbitral tribunal only. No part of the decision can be delegated to the 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?

Yes. In our jurisdiction, "hot tubbing" is a common practice for construction arbitrations and procedures of tribunals issuing binding decisions.

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?

No, site visits are not regulated. They are always allowed if the arbitral tribunal so determines.

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?

The site visit is not a common practice. As mentioned above, site visits are not regulated. However, if the tribunal decides to perform a site visit, all parties should be present as it would be part of their right to a constitutionally recognized defence.

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?

It is very common for witness testimonies to be considered relevant and necessary by the tribunal or the DAB to clarify the controversies submitted to arbitration or dispute boards. There are no restrictions on admitting testimony if rules on evidence are complied with. The use of witness testimonies depends on the request of the parties and the decision of the tribunal or DAB. In conciliation, however, it is not common for witness testimonies to be used, as this ADR method depends mostly on a consensual solution between the parties.

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?

Arbitrators have total discretion in weighing evidence. There are no rules on valuation of evidence. Natural justice should be applied, however.

6. Interim measures and interim awards

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

Yes, the measures mentioned above are allowed in Peru. These interim measures are decided by the arbitral tribunal in an arbitration process or by a judge in a judicial process. Cases could also allow parties to seek injunctive measures from judges before engaging in arbitration. When parties seek interim measures from judges and there is an ongoing arbitration, the judge usually resolves the *injunction order* stating that there is a competent tribunal (in this case: an arbitral tribunal).

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?

Although the Law of the Public Sector Budget for 2014 has been recently approved- allowing the use of DABs in PPP projects, there are problems related to how a tribunal created by an agreement can decide on provisional relief if, by law, only arbitral tribunals and judges are allowed to decide on it. Evidently, the lack of explicit provisions for DAB decisions that have a provisional nature would lead to problems in Peru.

There is nothing to ensure that the DAB decisions might be followed by provisional arbitral awards and then be enforced, but equally important is the fact that there is no reason to believe it could not be possible.

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)?

The new Public Procurement Law, which will soon be in force, has regulated the DAB as a dispute resolution method that parties can use to settle disputes. According to this law, the members of the DAB can issue binding decisions and parties may be obliged to comply if they do not submit those decisions to arbitration within a period of 30 working days. For any DAB, private or regulated under the Public Procurement Law, if a party does not comply with the decision, the affected party can submit the matter to arbitration to make the decision enforceable. Furthermore, if a party does not comply with the arbitration award, the aggrieved party may apply to the judiciary so as to oblige the other party to comply.

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

Yes. Awards or binding decisions always have to be reasoned. The Peruvian Constitution also establishes the requirement for reasoned and substantiated decisions.

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 always allowed in arbitral awards. They can be added as a separate opinion to the award. In other forms of ADR, it is not necessary to add a separate opinion because of their structure.

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?

Awards can always be corrected (minor mistakes or miscalculations, for example) or clarified. This can be done by the tribunal on its own accord or at parties' request. The awards cannot be reconsidered.

8. Enforcement of and challenges to awards and decisions

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

No decision issued by a DAB or a DRB can be directly enforced, as this resolution method is not regulated in Peru; it should be enforced as a consequence of the *pacta sunt*

servanda characteristics of contracts. However, parties can always go to arbitration claiming breach of contractual obligations as the other party has not complied with the decision issued by the DAB or DRB.

The Arbitration Act has established the effects of an arbitral award. The arbitral award is not only the final decision, but also obligates the parties to comply with it; it is also considered to be a "*res judicata*". Indeed, the arbitral tribunal is empowered to execute the arbitral awards on behalf of the winning party if this was agreed by parties or is established in the applicable regulation, except when *police force* is required. In this case, the parties must enter a judicial process (which is usually short) for the award to be executed.

If the party losing the case does not comply with the terms of the award, the other party may initiate judicial proceedings for the award to be enforced. In this case, a judge will allow five (5) days to comply with the terms of the award under penalty of forced execution.

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

The New York Convention allows recognition and enforcement of arbitral awards only. There is no way of considering DAB-type awards as arbitral awards, although they have similar characteristics. Even if parties agree to it through a contractual agreement and the losing party does not comply with DAB-type award, the scope of the New York Convention is limited to arbitral awards.

It is possible to say that, in order for a DAB award to be enforced as an arbitral award, arbitration needs to be carried out based on that DAB award; however, in that case, what is enforced is not the DAB award, but the arbitral award.

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

As a DAB-type award is the consequence of an agreement among parties, if they have established that DAB decisions oblige them to comply and one of them does not, it could be considered to be a breach of contract which, according to Peruvian legislation, could be discussed in arbitration. In this case, the enforceability of a foreign arbitration would be allowed in Peru, except in situations regulated by the New York Convention (article V).

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)?

There are no specific remedies to challenge it in Peru. However, parties can use the general remedies applied for judiciary or arbitration decisions. Remedies will need to be heard by the arbitrator or judge, as DAB decisions are not directly enforceable. Indeed, the Peruvian Constitutional Court has established some remedies that parties may apply only when they believe that fundamental rights have been violated.

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

As said before, the expert determination is not recognized as an ADR in Peru. However, it would be possible for parties to agree that the expert determination will be binding for them when a dispute arises. If so, and one of them does not comply with the decision, the other party is entitled to go into arbitration (if it was agreed) or judicial process (if there is not an arbitral clause) to resolve the dispute. In these cases, the expert determination will not necessarily be considered as binding for arbitrators or judges. They can review the expert determination, order another one, take another decision or use the same conclusions of the expert.

9. Trends and developments

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

As already mentioned, there is no specific regulation about ADR in the construction industry and only a few infrastructure works consider ADR in their contracts (mainly because they are FIDIC forms of contracts). However, there is a growing trend towards the study and discussion of Dispute Boards. Constructors, owners, supervisors, designers and even public entities know the problems concerning arbitration when applied in construction disputes. They are aware that this resolution method is not functioning as well as it should be.

The Pontificia Universidad Catolica del Peru and the Peruvian Society of Construction Law are making a concerted effort to encourage the construction sector in the use of Dispute Boards. As an example, in May of 2013 these institutions organized an international conference which, among other construction project issues, dealt with the use and implementation of Dispute Boards for both the private and public sectors. Many experts from countries around the world were invited to share their own experience in the use of this mechanism.

Moreover, the Conflicts Resolution and Analysis Centre of the Pontificia Universidad Catolica del Peru has developed a Dispute Board Agreement Model and its Dispute Board Regulation. Both these documents have been duly approved and are now available for use in construction contracts. This is the very first institutional regulation related to dispute boards in Peru.

On December 1st, 2013, the Public Sector Budget Law for 2014 was passed. This law has modified some articles in the Framework Law on Public-Private Partnership (PPP). One of these modifications regulates the possibility of resolving PPP contract controversies through the participation of an *amiable compositeur* or by the use of a *dispute adjudication board*. Although modifications to this law have recently been published, including regulation of the *amiable compositeur*, it has not included further regulation on DABs. This is expected to take place in the coming months.

On July 11th, 2014, the new Public Procurement Law was approved, in which the DAB is included as an ADR. The past July 3rd, 2015 the Final Regulation Draft has been issued in order for comments or observations to be submitted within a period of 15 days. Once the necessary regulation for this law is published, the law and the Regulation will come into effect and we will then have DABs for public projects in Peru.