IBA International Construction Projects Committee

ADR in Construction

Spain

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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 Spain, almost all disputes arising in the construction sector are resolved through court or arbitration proceedings. Civil courts are empowered to hear the disputes arising from construction contracts subject to civil law when the parties to these are private parties, both individuals and/or legal entities[1]. This general rule is provided by Section 9 of the Spanish Judicial Power Act 1985, according to which Civil Courts have the powers to hear *"all matters under the scope of their powers, as well as any matters not under the scope of the powers of the courts of another jurisdiction"*[2].

The contentious-administrative courts have the powers to hear disputes arising *"in relation to actions of the public administrations subject to administrative law"*[3]. The mere fact that a public administration be one of the parties to a contract does not automatically mean that all the disputes arising in relation to the interpretation and performance of the contract will be resolved by the Contentious-Administrative Courts. In addition, the action being challenged must have been carried out under administrative law.

Therefore, the Contentious-Administrative Courts have the powers to hear the following:

- Disputes relating to preparing, awarding, the effects of, compliance with and termination of administrative contracts[4].

- Disputes relating to preparing and awarding the private contracts of the public administrations and contracts subject to harmonized regulation[5].

On the other hand, the Civil Courts have the powers to hear the following:

- Disputes relating to the effects, compliance and termination of private contracts entered into by a public administration or any other public sector entity.

- Disputes relating to preparing and awarding private contracts not subject to harmonized regulation, which were entered into by public sector entities not considered public administrations in the strict sense of the term.

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[1] Therefore, Civil Courts will be empowered to hear this type of disputes unless the power has been granted by law to the Courts of another Jurisdiction. This is the case of the Contentious-Administrative Courts, which have jurisdiction to hear disputes arising from construction contracts if the dispute arises in relation to actions of the public administrations that are subject to administrative law.
[2] Judicial Power Act 6/1985, of July 1.
[3] Section 1.1 of Act 29/1998, of July 13, regulating the contentious administrative jurisdiction.
[4] Section 21 of the LCSP.
[5] This is in line with the doctrine of the "separable acts," under which the acts of preparing and awarding private contracts could be considered separate from the content of the contracts, forming a kind of "untouchable public nucleus," and subject to the review of the judicial review courts.

In the recent years, construction disputes submitted to arbitration proceedings have notably increased. This tendency is due to the enhancement of the legal framework of the arbitration proceedings by means of the Arbitration Act 2003[6] and the development of the arbitral institutions that manage arbitration proceedings in Spain.

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

There is a special substantive law on construction in the Spanish legal framework. In particular, in addition to the Spanish Civil Code, the construction disputes are mainly governed by the Construction Act 1999[7]. There are no special procedural laws regarding construction disputes, and there is no statutory adjudication under Spanish Law.

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).

There are no provisions in Spanish law concerning "binding decisions of non-statutory dispute adjudicators". Notwithstanding, this kind of decisions can be issued and will be binding upon the parties, although they will not be directly enforceable.

Only court judgments ("sentencias"[8]) and arbitration awards ("laudos arbitrales") are binding upon the parties and enforceable. In particular: (i) court judgments that put an end to the proceeding before the court of first instance ("Juzgado de Primera Instancia") are subject to appeal before the provincial court ("Audiencia Provincial") but can be provisionally executed; and (ii) arbitration awards can be directly enforced and executed by the winning party.

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?

The Spanish Civil Code regulates three examples of the parties' agreement to resort to a third party to make determinations that resolve disputes and/or fulfill the parties' will: (i.e., approval of works, determination of the price and determination of the distribution among the shareholders of the results of the company). Following the principles stemming

[6] The Arbitration Act 60/2003, of 23 December, is based on the UNCITRAL Model Law.
[7] Construction Act 38/1999, of November 5.
[8] As to the binding nature of judgments upon other courts, only the rulings by the Spanish Supreme Court considered "Jurisprudencia" can be considered binding upon lower courts. The "Jurisprudencia" or binding precedent upon lower courts exists when there are two or more rulings by the Supreme Court on the interpretation and application of the law regarding identical cases (Judgment by the Spanish Supreme Court of 28 February 2002).

from these examples, the parties to a construction contract may agree to submit similar determinations to a third party that could be named an "adjudicator".

The decision adopted by an adjudicator will differ from arbitral awards in terms of enforceability. Whereas arbitral awards are duly enforceable by the wining party as court judgments, adjudicators' decisions are not directly enforceable but can be enforced as contractual obligations. Therefore, upon non-observance of the adjudicator's decision by the defeated party, the winning party must start legal proceedings and request an order for specific performance, apart from damages.

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?

Spain does not have any special institution created for the purposes of dealing with construction disputes. If a construction dispute is submitted to arbitration, any of the Spanish Arbitration Courts would be entitled to manage and administrate the arbitration proceeding. Spanish arbitration courts usually assist with the procedural aspects of the arbitration. Furthermore, arbitration courts are usually entitled to appoint arbitrators failing an agreement by the parties.

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).

Construction industry players have traditionally rarely turned to mediation to resolve their disputes due to the absence of a legal framework until very recently. It was only on July 27, 2012, that the Act on Mediation in Civil and Commercial Matters (the so-called Mediation Act[9]) came into force. One year after its enactment, mediation is still trying to take a position in the dispute resolution field, but we can already perceive an interest in mediation in Spain. Other forms of ADR methods (i.e. partnering, dispute boards or other) have been seldom used in Spain traditionally. However, Spanish law firms turn to them – i.e. including their use when designing international contracts- when they get involved in international operations that require them, such as projects financed by the World Bank.

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?

Any decision taken by a DAB would probably be treated in Spain as an adjudicator's decision not directly enforceable according to Spanish Law.

However, the DAB decisions would be considered valid and very relevant evidence in subsequent arbitration or court proceedings. Although it would probably be against

[9] Mediation Act 5/2012, of 6 July.

Spanish law to completely exclude the competent court's or arbitral tribunal's review of a DAB decision, the scope of review would greatly vary depending on whether the parties established the criteria that the DAB had to follow when addressing disputes. In the absence of these criteria, it is our opinion that the DAB decision should only be reviewed based on evidence that he/she acted in bad faith. If these criteria were set out, the review could also focus on whether they were followed or whether the parties' consent to submit to adjudication was defective.

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.

In the Spanish jurisdiction, arbitration proceedings seem to be the most cost effective method to resolve construction disputes. The costs usually allocated to the parties[10] are the following: (i) the lawyers' fees; (ii) the arbitration institution's fees (not in ad hoc arbitrations); (iii) the arbitrators' fees; and (iv) the cost of possible means of evidence such as expert reports. In court litigation there are no arbitrators and no arbitration institution to be paid but the parties have to pay a tax and the fees corresponding to the agent at Court. Additionally, in court litigation the parties must face the costs corresponding to a possible appeal before the provincial courts against the judgment rendered by the court of first instance, as well as possible appeals before the Spanish Supreme Court.

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?

According to Section 9 of the Spanish Arbitration Act, the arbitration agreement must incorporate the consent of the parties to submit the dispute to arbitration. Moreover, the arbitration agreement must be in writing (including electronic means). Both requirements also apply to multiparty arbitration agreements.

Clause 20.6 of the FIDIC Red Book would be considered a valid arbitration clause according to Spanish Law. This clause would not prevent a party from seeking interim measures from a competent court. Section 11 of the Spanish Arbitration Act provides that the arbitration agreement shall not preclude the right of the parties to request interim measures from state courts.

[10] The Arbitral Tribunal is empowered to allocate the costs as it may deem convenient. The criterion most often used is that the losing party pays the costs.

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?

The Spanish Consumer Protection Act of 2007[11] provides a specific legal framework for the arbitration of disputes involving consumers, which can be resolved by a public body named "Sistema Arbitral de Consumo". Section 58 of said Act provides that the submission of the parties to the "Sistema Arbitral de Consumo" is also based on the will of the parties and must be in writing. Consumer protection laws do not apply to contracts between companies.

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?

There are no standard conditions commonly used for construction projects in the Spanish jurisdiction.

As we have mentioned, in the recent years the construction disputes that are submitted to arbitration have notably increased due to the enhancement of the Spanish Arbitration Act of 2003 and the development of arbitration courts. In particular, the arbitration courts to which most disputes are submitted for the resolution of construction disputes are the Court of Arbitration of the Chamber of Commerce and Industry of Madrid (Court of Arbitration of Madrid), the Civil and Commercial Court of Arbitration ("CIMA") of Madrid, and the Arbitration Court of Barcelona.

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

No. Section 9 of the Spanish Arbitration Act is clear in stating that the arbitration agreement must incorporate the consent of the parties to submit the dispute to arbitration and that the arbitration agreement must be in writing. Therefore, an arbitration agreement cannot bind a non-signatory.

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?

As we have mentioned, an adjudicators' decision is not directly enforceable in Spanish Law. According to Sections 1255 and 1256 of the Spanish Civil Code, if the parties to a contract have validly agreed to submit to expert determination any dispute arising from it that process must be followed. Upon non-observance of the adjudicator's decision by the

[11] Royal Decree 1/2007, of 16 November.

defeated party, the winning party must start legal proceedings and request an order for specific performance, apart from damages.

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?

If the parties have agreed several tiers of dispute resolution processes before resorting to arbitration/litigation, as a general rule those processes must be followed and complied with. Nevertheless, in certain specific circumstances the arbitrator/court could allow a party to skip one or more tiers. For example, if the parties have agreed that they shall make their best efforts to reach an agreement before resorting to arbitration/litigation, an arbitrator/court could conclude that the same existence of the arbitration/litigation evidences that an agreement has not been possible. Multi-tiered dispute resolution clauses, although well known, are not frequently used in construction contracts in Spain.

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?)

As mentioned before, the Contentious-Administrative courts have the powers to hear disputes arising *"in relation to actions of the public administrations subject to administrative law*[12]*"*. Based on this provision, the jurisdiction of the Contentious-Administrative Courts to hear a dispute is determined according to two criteria: (i) Subjective: one of the parties to the dispute must be a public administration; (ii) Objective: the action challenged must come under the framework of a public administration's public activity. Therefore, there are construction disputes that can only be decided by Contentious-Administrative courts.

As to construction disputes subject to civil law, the same may be resolved by litigation or arbitration irrespectively. In particular, disputes relating to decennial liability are arbitrable.

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?

As we have mentioned, under Spanish law adjudicators' decisions are not directly enforceable but can be enforced as contractual obligations. Therefore, the restriction

[12] Section 1.1 of Act 29/1998, of July 13, on the jurisdiction of Contentious-Administrative courts.

applicable is the same applicable to contractual obligations. According to Section 1255 of the Spanish Civil Code, the parties may reach any agreements that they wish, provided that they are not contrary to the Law, morals or good faith.

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 restrictions on the type of arbitral awards that may be issued, provided that the subject matter of the dispute is arbitrable. The content of the arbitral award is governed by the Spanish Arbitration Act, which is clearly based on the UNCITRAL Model Law. As to expert determination, it is not directly enforceable. Therefore, the scope of the expert determination shall depend on the agreement by the parties, as long as the same is not contrary to the Law, morals or good faith.

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

As a general rule public entities are barred from settling disputes by ADR. Nevertheless, Section 50 of the Public Sector Contracts Act[13] provides that certain public bodies such as public corporate entities -not the General State Administration, the Administrations and the autonomous regions or the entities comprising the local administration- may resort to arbitration. Notwithstanding, most often they resort to litigation.

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

State parties enjoy immunities of jurisdiction and of execution. Nevertheless, the immunity of execution is limited to those goods devoted to sovereign activities "iure imperii" (Judgment by the Constitutional Court of 1 July 1992). Therefore, there is no rule of absolute immunity of execution.

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?

Public procurement disputes can be decided by arbitration –not by other means of ADR- in certain cases. As we have mentioned, Section 50 of the Public Sector Contracts Act provides that certain public bodies such as public corporate entities -not the General State Administration, the Administrations and the autonomous regions or the entities comprising the local administration- may resort to arbitration.

[13] Royal Legislative Decree 3/2011, of November 14.

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?

Any decision taken by a DAB would probably be treated in Spain as an adjudicator's decision. Therefore, the DAB would have no "jurisdiction" and the sole basis of his duties would be the agreement between the parties.

Accordingly, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), the DAB would not be allowed to decide on issues outside the contract with the DAB clause. By the same token, if the DAB purports to make a decision on a matter not referred to it, that decision would have no contractual basis.

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 in Spanish Law on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions regarding construction disputes.

Moreover, there is no rule on the possible qualifications of adjudicators, so this question remains at the discretion of the parties. As to arbitrators, Section 15 of the Spanish Arbitration Act provides that in arbitrations that are not to be decided *ex equo et bono*, and unless otherwise agreed by the parties: (i) in the case of a sole arbitrator, the qualification as a law professional will be required; and (ii) in the case of an arbitration tribunal, at least one of the arbitrators shall have to be a law professional.

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 are no special arbitral institutions for construction arbitrations.

The procedures for the appointment of arbitrators are detailed in the rules of the different arbitration institutions. The general rule is that failing an agreement by the parties: (i) in arbitrations with a sole arbitrator, the arbitrator shall be appointed by the competent court of arbitration at the request of either party; and (ii) in arbitrations with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator by mutual agreement; if they fail to do so, the third arbitrator shall be appointed by the court of arbitration.

In ad hoc arbitration, it is not possible to appoint arbitrators following the procedures agreed upon by the parties (if any), any of the parties may request the competent court to appoint the arbitrators or, if appropriate, to take the necessary measures to do so[14].

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 our jurisdiction, and according to our experience, sole arbitrators and arbitrators of an arbitration tribunal are almost always lawyers or law professionals, even in arbitrations *at aequo et bono*. There are no rules in Spanish Law regarding the "secretary" or its qualifications, although a "secretary" is sometimes appointed to assist the arbitrator.

If a tribunal has to rule on issues of law at least one of its members must be a law professional, although in our experience all of the members of the arbitration tribunal are always law professionals.

The secretary has only administrative functions, and cannot 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?

Very seldom. Arbitrators are always law professionals. Panels integrated both by lawyers and construction professionals are possible but not common. On the contrary, adjudicators in the field of the construction industry usually belong to the engineering/construction profession.

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?

According to our experience, arbitrators are always law professionals without technical expertise. However, arbitrators are free to determine the admissibility, relevance, materiality and weight of evidence and in doing so they can use their own expertise.

[14] Section 15.3 of the Arbitration Act 60/2003, of December 23.

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?

Most of the rules of arbitration institutions allow the parties to choose if the arbitrators have to apply rules of law ("arbitraje de Derecho") or to decide *ex aequo et bono* ("arbitraje de equidad"). According to Section 34 of the Spanish Arbitration Act, the arbitrators shall only decide ex equo pro bono if the parties have expressly authorized them to do so.

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?

Yes. The Civil Procedure Act 2000[15] provides the requirements that shall govern the proceedings conducted before civil courts, and the Arbitration Act provides the rules for arbitral proceedings conducted within the Spanish jurisdiction. In both cases the compliance with principles of equality, due process and contradiction is required.

In court litigation, parties have to appear with legal representation. Indeed, if a party cannot afford the services of lawyers and court agents, the State, granting the Fundamental Right of the Spanish citizens to justice, would provide their services for free.

In arbitration proceedings, parties are normally represented by legal counsel of their choice. However, parties can waive their right to appear with legal representation.

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

According to our experience, arbitration proceedings are evenly focused both on written submissions, which are of vital transcendence for the purpose of setting the parties' positions regarding the issues in dispute, and on oral presentations, since evidence is taken during the hearings. The conclusions, as the milestone in which the parties definitely set their respective positions and after which the arbitration proceedings are declared closed, can be held in writing or orally, pursuant to the parties' agreement.

[15] Act 1/2000, of 7 January.

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 Spanish Civil Procedure Act provides rules on evidence for court proceedings. There are no rules on evidence for arbitration proceedings, being this left to the discretion of the arbitration tribunal.

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

No, hearings are not mandatory for all forms of ADR. In arbitration proceedings, parties can freely agree not to hold the hearing –i.e., if the parties do not intend to practice oral evidence. Otherwise, in mediation, the celebration of the so called constitutive session is mandatory.

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?

No, it would not. However, if the hearing takes place, under Spanish Law it should be conducted according to the general principle of “good faith”, pursuant to which parties should try to be efficient; both from the cost-saving and time-reducing perspectives.

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?

Experts most frequently used in court and in arbitration proceedings regarding construction disputes are architects, civil engineers and accounting experts. But depending of the kind of disputes, other kind of experts such as geologists or industrial engineers might be used.

Experts do usually have a key role both in court and in arbitration proceedings.

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?

Technical experts are mostly appointed by the parties. However, they can also be appointed by the judge in court litigation or by the arbitrators in case of arbitration proceedings.

When there is a court appointed expert, judges and arbitrators usually concede more accuracy and truthfulness to the statements issued by this expert, due to their alleged

higher level of impartiality and independence, rather than to the statements prepared by the party-appointed experts.

In court litigation as well as in arbitration proceedings, the costs incurred by the technical expert –i.e., their fees and costs of travelling if incurred- are satisfied by the party who appointed him/her or by both parties in case of tribunal-appointment.

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

Technical experts are supposed to be independent and impartial both to the party and the counsel of the appointing party. According to Section 335.2 of the Spanish Civil Procedure Act, technical experts shall, under oath or affirmation in lieu thereof, intervene with the possible highest objectivity.

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

Firstly, the technical expert must prepare a written report, in which the background of the dispute, the scope of the analysis, his/her opinion and conclusions are described in detail. Secondly, he/she is usually summoned to give his oral explanation during the hearing.

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?

The arbitral tribunal may deviate in its award from the statement issued by the technical experts as long as it reasons its decision. Part of the decision by the tribunal cannot 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?

It is not common, but it could happen if both parties request so to the tribunal (for example, if several technical advisors and experts have been appointed and they disagree on fundamental issues of the dispute).

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?

Site visits are allowed in the Spanish jurisdiction, both for court litigation (Sections 353 to 359 of the Spanish Civil Procedure Act) and arbitration proceedings, as a mean of evidence. Site visits are frequent in court and arbitration proceedings.

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?

In order to grant the compliance with the equality of arms principle, Section 354 of the Spanish Civil Procedure Act provides that the legal counsel of the parties may intervene in the site visit and be given an opportunity to comment. Parties usually attend to site visits with their legal representations and the appointed technical experts. This is also the rule in arbitration proceedings although there is no legal provision on this topic in the Spanish Arbitration Act.

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?

The arbitrator/arbitral tribunal shall evaluate the witness testimonies at his/her discretion according to "good judgment" rules ("reglas de sana crítica").

According to the Spanish Civil Procedure Act, the parties are empowered to challenge the value of the testimony given by witness and technical experts if there are reasonable doubts as to their impartiality and/or independence.

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?

All the evidence taken before the arbitrators/arbitral tribunal during the arbitration proceedings shall be evaluated according to the "good judgement" rules ("reglas de sana crítica"). There are no additional specific rules on the evaluation of evidence.

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?

In an arbitration proceeding interim measures may be requested by either party to arbitrators (Section 23 of the Spanish Arbitration Act) or to state courts (Section 722 of the Spanish Civil Procedure Act) in order to protect situations of fact and of law.

These measures are usually decided by arbitration tribunals and judges. However, interim measures within the arbitration proceeding cannot be directly enforced by the arbitrators - due to their lack of coercive powers – but by the judges.

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?

It could contravene the provisions of the Spanish Civil Procedure Act since adjudicators do not hold authority to adopt interim measures.

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)?

As we have mentioned, any decision taken by a DAB would probably be treated in Spain as an adjudicator's decision, which is not directly enforceable according to Spanish Law. In particular, upon non-observance of the DAB's decision by the defeated party, the winning party should start legal proceedings and request an order for specific performance, apart from damages.

According to FIDIC Red Book clause 20.7 in case of failure to comply with the DAB decision the other party may resort to arbitration. If one of the parties tried to enforce the DAB decision directly through court it is our opinion that the other party would be entitled to challenge the court jurisdiction alleging the existence of a valid arbitration agreement.

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

Pursuant to Section 37.4 of the Arbitration Act, every award must be duly reasoned. There is the risk that an award under-reasoned could be challenged according to Section 40.1.f) on the basis of having contravened the public order. Nevertheless, if the award has been issued pursuant to the settlement agreement reached by the parties the award shall not 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 the arbitration proceedings conducted according to Spanish law, and shall be added to the award as a separate opinion that must be reasoned and signed by the dissenting arbitrator.

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?

Pursuant to Section 39.1 of the Arbitration Act, parties may request the arbitrator/arbitral tribunal to amend, clarify, complete and/or rectify due to extra limitation the arbitral award, in the term of the ten subsequent days to its notification.

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?

The arbitral awards and the agreements reached in mediation proceedings are directly enforceable according to Section 517.2 of the Spanish Civil Procedure Act. As already mentioned, adjudicator's decisions are not directly enforceable.

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?

According to our view, FIDIC Red Book DAB decisions would not be allowed recognition and enforcement by 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?

It is our opinion that the Spanish courts would allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision. The grounds to challenge the enforceability of a foreign arbitration award are very restricted -those contained in the New York Convention- and the fact that an award enforces a FIDIC Red Book type decision does not affect said enforceability.

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 is no specific provision on possible remedies to challenge a FIDIC Red Book type DAB decision or any adjudicator's decision. As it has been explained, it would probably be against Spanish law to completely exclude the competent court's or arbitral tribunal's review of a DAB decision. Therefore, in case of a serious irregularity of the DAB decision the court or arbitral tribunal would probably not follow said decision and allow further evidence on the subject matter of the dispute.

Additionally, according to our opinion, the fact that the DAB decision could be rendered unenforceable cannot imply that the arbitration agreement is void. Therefore, any challenge to the FIDIC Red Book type DAB decision should be alleged in the arbitration proceeding.

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

As we have mentioned, the court or arbitration tribunal would be in principle entitled to review the merits of the decision. However, the scope of review of a DAB decision by a national court or an arbitral tribunal would vary depending on whether the parties established the criteria that the DAB had to follow when addressing disputes. In the absence of these criteria, it is our opinion that the DAB decision should only be reviewed based on evidence that it acted in bad faith. If these criteria were set out, the review could also focus on whether they were followed or whether the parties' consent to submit to adjudication was defective.

9. Trends and Developments

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

Based on what has been put forward, it can be concluded that construction disputes arising in Spain are resolved through informal negotiation or through court or arbitration proceedings. Alternative dispute resolution ("ADR") methods, such as mediation, conciliation, and adjudication, are rarely used.

Spanish lawyers specializing in construction law are fully aware of the advantages that ADR methods offer a sector as prone to disputes as the construction sector, and of the outstanding results these methods are having in other countries, particularly common law countries.

Also, Spanish construction companies engaging in activities abroad are "exposed" to these methods more and more.

In this context (awareness of the advantages of ADR methods in the construction sector and of their limited use), initiatives have sprung up to incorporate ADR methods into the resolution of disputes in the Spanish construction sector. The enactment of the Mediation Act in Civil and Commercial Matters provides a very favorable framework for the resolution of construction disputes[16], is one of the examples of the efforts that are being invested to promote the ADR methods in the Spanish construction field.

Therefore, one of the main developments we will likely witness in the coming years in dispute resolution in the construction sector in Spain will be the progressive introduction of ADR methods, particularly mediation and adjudication.

10. Other Important Issues

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

The recent creation of a group specializing in construction law backed by the Court of Arbitration of the Chamber of Commerce of Madrid must be mentioned; one of the group's objectives is to promote ADR methods in the construction/engineering sector.

[16] As it is costs-saving and brings the possibility of selecting a technical expert in construction issues as mediator.