IBA International Construction Projects Committee

ADR in Construction

Argentina

Authors: Ricardo E. Barreiro-Deymonnaz and Matias Galice
Rattagan, Macchiavello, Arocena & Peña Robirosa Abogados

Date: April 2014

Table of Contents

Ricardo E. Barreiro-Deymonnaz and Matias Galice
RATTAGAN, MACCHIAVELLO, AROCENA & PEÑA ROBIROSA Abogados
Buenos Aires - Argentina
Ricardo E. Barreiro-Deymonnaz (rebd@rmlex.com)

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 is the judicial action. In a judicial action the plaintiff sues the defendant for breach of the construction contract.

Judicial action is preferred above other dispute resolutions mechanisms such as mediation, arbitration, amiable composition, and expert arbitration. Expert arbitration is different from just arbitration. The main difference is that regular arbitrators can rule about facts and law, while expert arbitrators only rule on facts. Expert arbitrators are the same as expert determinators. However, Section 773 of the Federal Code of Civil and Commercial Procedure (CPCCN) names this procedure as expert arbitration. That is the reason why they are called expert arbitrators and not expert determinators.

The main reason for the preference for judicial action is tradition and trust. Even if judicial actions take longer and are more expensive than, for example, arbitration, parties tend to trust in courts more than any other mechanism. The jurisdiction is often stipulated in the contract.

In 1995, a significant change to the judicial action was introduced. Law 24,573 established a mandatory mediation proceeding before filing a claim at court. However, not many cases are resolved with mediation. Mediation, in many cases, is carried out just to fulfil the formal requirement needed to admit the filing of a lawsuit.

Although not as widely used as judicial action, arbitration is slowly gaining importance in the construction industry. There are two different types of arbitration in Argentina: institutional arbitration, where parties agree to solve their dispute under the rules of an institutional arbitral tribunal, and ad-hoc arbitration, where parties establish the procedure for the designation of the arbitrators and the procedural rules.

The General Arbitration Tribunal of the Buenos Aires Stock Exchange and the Centre for Mediation and Arbitration of the Argentine Chamber of Commerce are the most prestigious institutions administering arbitration in Argentina. The Argentine Construction Chamber has also created an arbitration tribunal specially focused on construction disputes, but so far it has been seldom used by construction companies.

There are also other dispute resolution procedures provided under the CPCCN, such as the designation of an *amiable compositeur* or an expert arbitrator.

The *amiable compositeur* is an arbitrator *ex aequo et bono*, and under no obligation to observe the rule of law. The a*miable compositeur* must deliver judgment within a three-month period. The award is not appealable, unless it is delivered after said period or resolved an issue that it was not asked to resolve.

Lastly, expert arbitrators only rule on facts and not law. Expert arbitrators must be specialised in the subject they are working on. They must deliver judgment within a one-month period.

Nevertheless, amiable composition and expert arbitrations are not used very frequently. Parties prefer the typical judicial action, in which they have much more confidence. Moreover, the fees of an *amiable compositeur* and an expert arbitrator are often expensive.

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

There are no special laws on resolving construction disputes.

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 three provisions in the legislation that apply to binding decisions of non-statutory dispute adjudicators. The CPCCN sets forth the manner in which decisions must be executed by non-statutory adjudicators.

Specifically, article 499 of the CPCCN explains how to execute an arbitrator's decision, how to enforce the decision of an arbitrator or any settlement agreement signed in mediation or the execution of an agreement approved by a judge. If the binding decision involves awarding cash, plaintiff may request the seizure of the defendant's goods.

The defendant can use some defense strategies such as the misrepresentation of the execution, the statute of limitation of the execution and the complete or partial payment of the debt.

The binding decisions used for construction disputes are those made by the General Arbitration Tribunal of the Buenos Aires Stock Exchange (*Tribunal de Arbitraje General de la Bolsa de Comercio de Buenos Aires*); Centre for Mediation and Arbitration of the Argentine Chamber of Commerce (*Centro de Mediación y Arbitraje Comercial de la Cámara*

Argentina de Comercio); and Arbitration Tribunal of the Buenos Aires Bar Association (*Tribunal Arbitral del Colegio Público de Abogados de la Capital Federal*).

The General Arbitration Tribunal of the Buenos Aires Stock Exchange offers the following ADR services: mediation, conciliation, amiable composition and legal arbitration.

In mediation, the tribunal's mediator hears the parties, looks at all the circumstances in dispute, and tries to bring the parties into an agreement. If the tribunal is successful, it must authorise said agreement.

In conciliation, the tribunal's arbitrator hears the parties and proposes equitable solutions.

In amiable composition, arbitrators try to solve conflicts based on equity and not on rigorous law enforcement. Arbitrators may make an award based upon broad principles of equity and not necessarily on rules of law or evidence.

Lastly, legal arbitration decides the disputes based on strict application of the law and not based on equity considerations unless expressly agreed otherwise by the parties.
In the Centre for Mediation and Arbitration of the Argentine Chamber of Commerce construction parties may choose between mediation and arbitration.

In the Arbitration Tribunal of the Buenos Aires Bar Association, only the arbitration process is used.

Some of the benefits construction parties have are that proceedings carried out at the above mentioned institutions are cheaper and shorter than judicial processes and, most importantly, the proceedings and awards remain confidential. Parties may voluntarily agree to choose one of these entities in the case of a dispute.

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

The main legal difference between arbitration and litigation is that arbitration is agreed upon by parties whereas litigation is not; the defendant must abide by this procedure. Additionally, arbitration and litigation have different procedures and regulations.

The difference between arbitration and expert determination is that experts only rule on facts and not law. Expert arbitrators must be specialised on the subject matter they are working on.

The difference between arbitration and amiable composition is that the latter is arbitration *ex aequo et bono* whereas regular arbitration is not.

There is not a specific federal legislation for arbitration in Argentina. Arbitration is regulated in general by the Federal Procedure Codes, which is used by Federal courts only. Provinces are authorised to establish their own procedure codes. For this reason, arbitration may have many different procedural rules.

In regard to international arbitration, Argentina has ratified international conventions such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington DC, 1966) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

Litigation, amiable composition and expert arbitration are governed by the CPCCN and the Procedure Codes of each Province.

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?

Argentina has only one special institution dealing with construction disputes. This special institution is the Arbitration Tribunal of the Argentine Construction Chamber. In practice, however, the special institution is rarely used for construction disputes. Actually, this arbitration tribunal has never issued an award. Construction companies normally prefer court proceedings.

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).

Mediation is only used for construction disputes (and all commercial disputes in general) in Argentina as a step for the lawsuit to be admitted to court. This means that most of the construction disputes do not use mediation as the mechanism to solve the problem. Parties comply with mediation as a mere formal requirement to reach the judicial proceeding stage.

There are not many forms of non-binding dispute resolution for construction disputes in Argentina. As stated above, the General Arbitration Tribunal of the Buenos Aires Stock Exchange and the Centre for Mediation and Arbitration of the Argentine Chamber of Commerce provide some of these in the form of mediation and conciliation.

However, these non-binding dispute resolution methods are not used as frequently as judicial actions. Construction parties prefer court to arbitration to settle their disputes.

Notwithstanding the above, during the last few years there has been a trend to include, international arbitration, DAB or DRB provisions in contracts relating to large industrial or infrastructure projects.

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?

FIDIC Books are not used very often in Argentina and therefore construction parties are not accustomed to drafting their contracts following the FIDIC guidelines. Both arbitration and court proceedings render their judgments according to the local law.

DAB decisions are considered to be valid evidence in arbitration or court proceedings and might be used as a reference by arbitrators or judges.

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.

Mediation is considered to be cost effective for construction disputes in Argentina. If the dispute is resolved in mediation, parties only pay the mediator's fees, which is not too expensive. In mediation, parties do not pay arbitrator or expert's fees.

On the other hand, court and arbitration are more expensive and lengthier than mediation.

The general rule, applicable to both court proceedings and arbitration, is that the defeated party pays for all litigation costs, including the winning party attorneys' fees. However, in arbitration parties may regulate the allocation of costs. The regulation may be included as part of the arbitration clause of the contract, or agreed upon at a later stage, but before formally commencing arbitration.

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?

There are very few requirements for a valid arbitration agreement in Argentina. These requirements are established in articles 736 through 741 of the CPCCN. One of these requirements is that the arbitration commitment must be specifically agreed upon by the parties in writing.

Another requirement is that the arbitration agreement must include the date, names and addresses of the parties; name and address of each arbitrator; the subject that is submitted to arbitration; and the determination of a fine that a party must pay in case it fails to fulfil the necessary acts for the arbitration proceeding.

Aside from these requirements, other specific requirements will depend on the institution administering the arbitration procedures, or the rules governing the arbitration proceedings, pursuant to the parties' agreement.

In the event of *ad hoc* arbitration, parties may establish other specific requirements, which may or may not resort to existing arbitration rules.

Clause 20.6 of the FIDIC Red Book would be considered a valid arbitration clause in Argentina if agreed to by parties. However, this clause would not prevent a party from seeking interim measures from a competent court.

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

There are no restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts. The consumer protection law only states that the Consumer Protection Authority must provide an arbitration tribunal to rule on consumer relationships.

However, the Consumer Protection Authority will not have the power to override the arbitration tribunal appointed by the parties. The Consumer Protection Tribunal will rule as an amiable composition tribunal. The Consumer Protection law does not make reference to the enforceability or validity of arbitration clauses.

In the event the case is reviewed at court, the arbitration clauses or the arbitration proceedings may be declared invalid if the court understands that the arbitration clause

or the arbitration proceedings breached basic constitutional principles. This is a common feature for all arbitrations. They must be consistent with the national constitution.

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 is not a clause on arbitration in the standard conditions typically used for construction projects in Argentina. Parties usually agree to establish jurisdiction at Buenos Aires courts.

There have been few cases where parties agreed to settle their disputes through arbitration, and far less if such disputes were related to very large public construction or infrastructure projects. Disputes arising out of, or related to, public works or in projects financed through public funds are normally decided in court.

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

Arbitration agreements do not bind non-signatories. These agreements have an effect on the signatory's parties.

This principle is similar to other forms of ADR.

2.5 If expert determination isn't 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?

The process of expert determination is mandatory if the parties have agreed to it. The determination of the expert binds the parties as per the terms of the respective agreement.

The CPCCN includes some basic rules governing determinations made by experts. One of them establishes that the contract must specifically stipulate that the parties must settle their disputes through an expert's decision. The expert's name and the subject of the determination must be included in the contract. Expert arbitrators shall render their opinion within one month after the agreement of the parties.

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?

Tiers can not be skipped before starting litigation or arbitration, and parties usually seek to solve problems in a friendly manner. Notifications and deadlines are set up in the contract before the parties can initiate arbitration or litigation. Moreover, parties must fulfil a mediation process before they start litigation. Otherwise, the lawsuit would not be admitted at court.

A contractual multi-tiered dispute resolution process is characterised as a dispute resolution clause where a party must notify the other party of the breach of the contract. After said notification, the parties are given time to negotiate in a friendly manner and resorting to different levels of corporate authority. If no agreement is reached, the claimant must notify the defendant that the former will start the arbitration or litigation process.

Multi-tiered dispute resolution clauses are common in construction contracts.

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?)

Generally, there are no construction disputes that can only be decided by a court or by an administrative law tribunal. This means that practically any construction dispute can be resolved by arbitration. The limitation (if any) is defined by rules of the institution chosen by the parties to administer the arbitration.

Another exception to the principle is given by article 737 of the CPCCN. Article 737 states that any dispute that can be subject of settlement (*transaccion*)[1] may be resolved by arbitrators. This means that not many disputes are related to personal, family, succession, labour and other public policy issues, which are exclusively under the jurisdiction of the courts.

[1] See Articles 842 to 849 of the Civil Code Of Argentina.

Any construction project dispute may be subjected to ADR. However, if the subject of the dispute is already clarified by legislation (such as decennial liability, Article 1646 of the CPCCN), the arbitrators will resolve by referring to this legislation. If the dispute cannot be clarified by law, then arbitrators are empowered to act as arbitrators *at aequo et bono*.

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?

No, there is no restriction on the matters that may be the subject of a binding expert determination or other binding third party decision, except for the limit set forth by article 737 of the CPCCN, which states that matters that cannot be subject to settlement (*transacción*) cannot be treated in arbitration.

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)?

Generally, there are no restrictions on the type of arbitral awards or binding decisions. This depends on the requirements of each arbitration tribunal.

As an exception, we can mention article 737 of the CPCCN, which states that matters that cannot be subject to settlement cannot be treated in arbitration.

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

No, public entities are not barred from settling disputes by ADR. However, public entities normally negotiate to avoid arbitration clauses, and tend to include regular litigation as the dispute resolution mechanism in their contracts.

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

State parties enjoy immunity in the sense that public goods cannot be seized. However, state parties do not enjoy immunities in Argentina.

If the state does not comply with the award once it has been notified, the party must go ahead with the national budget process stipulated by Law 24,624. This means that the judicial debt must be included in the national budget of the following year so that the debt is paid.

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?

Procurement disputes can be decided by ADR. There are no special requirements. Parties can use arbitration or any other forms of ADR.

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?

In Argentina, DAB is only allowed to decide on issues about the contract. This is because DAB is only able to decide on matters that have been agreed by parties.

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 to appoint arbitrators, tribunals or entities regarding construction disputes. Parties are free to agree on how they will resolve their conflicts, and to establish the requirements or qualifications for arbitrators.

Under Argentine law, arbitrators do not need to comply with any requirements to be appointed. When the arbitration is *ad hoc*, arbitrators are chosen by the parties; but when the arbitration is institutional, the arbitrators must be chosen from a list of arbitrators, pursuant to the rules of the institution administering the arbitration. Arbitrators usually are well known and highly specialised professionals with great expertise and knowledge in the area they are arbitrating.

There are no regulations regarding foreign arbitrators ruling under Argentine law. It is not frequent that a national institution arbitration tribunal or parties that agreed for an *ad hoc* arbitration appoint a non-Argentinean lawyer as an arbitrator.

Mediators must complete a mediation course, pass an exam and obtain a license before they can be appointed as Mediators.

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 aren't on the list? How are these lists composed? Is there a difference with other forms of ADR?

Parties to construction disputes may choose their arbitrators from a list given by the Argentine Construction Chamber Arbitration. The list includes professionals with knowledge and expertise in construction matters.

As previously stated, the Arbitration Tribunal of the Argentina Construction Chamber has never issued a ruling. Moreover, this institution does not have a specific procedure. However, arbitrators are generally appointed by the authorities of this institution.

The parties must choose arbitrators from the Argentine Construction Chamber lists. The Argentina Construction Chamber has no regulations concerning the appointment of an arbitrator in the case of a failure of the parties' agreement.

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?

The Argentine Construction Chamber does not include lawyers in the arbitrators list. The secretary is not required to be a lawyer.

Under Argentine law, lawyers do not need to be present at the tribunal hearing when arbitrators rule on issues of law. This depends on the arbitration procedures of each institution.

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?

Arbitrators are usually engineers and construction professionals. The tribunal members are usually renowned specialists in construction matters.

Panels may be made up by lawyers and construction professionals. However, this is not common. For example, the Argentina Construction Chamber does not have any lawyer in the Tribunal.

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?

Yes, arbitrators and tribunals are allowed to use their own technical expertise without consulting the parties.

A party may challenge the technical expertise of the arbitrator if the institutional or ad hoc arbitration allows it. The CPCCN establishes that it is in the parties' discretion as to whether they appeal the Tribunal award.

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?

The most frequently used rules for construction arbitrations do not contain specific rules for the Tribunal to apply rules of law or equity. That will depend on the type of arbitration proceeding that the parties choose and on the procedural code of each jurisdiction where the arbitration takes place. For example, if the parties choose an *amiable compositeur* to settle their dispute, the award will be based on equity. On the other hand, if parties resort to institutional arbitration, then the award will most likely be based on rules of law.

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?

Arbitration, amiable composition and expert ADR are ruled by the CPCCN. The CPCCN provides minimum process rules for these ADR methods.

Regarding arbitration, there are very few process rules established in the CPCCN. One rule establishes that arbitration commitment must be specifically agreed upon by the parties in writing.

Another rule sets forth that the agreement must include the date, the names and addresses of the parties; the name and address of each arbitrator; the subject for arbitration; and the fine that a party must pay in case it fails to fulfil the necessary steps for arbitration proceeding.

The parties are free to agree upon the type of arbitration that they find fit for their dispute (i.e., *ad hoc* or institutional arbitration). If the parties choose an *ad* hoc arbitration, then they must establish the rules that will govern the arbitration process, either by referring to the rules of an arbitration institution (e.g., The General Arbitration Tribunal of the Buenos Aires Stock Exchange, the Centre for Mediation and Arbitration of the Argentine Chamber of Commerce, etc.) or by defining their own "tailor made" arbitration rules, which must always be clearly established in the arbitration commitment. If the parties choose an arbitration institution to settle their disputes, then the rules of said institution will govern the arbitration process.

It is important to highlight that if the parties fail to clearly define their will to submit themselves to arbitration, the type of arbitration of their choice and the rules that will govern such arbitration, then a court, at the request of one of the parties, may declare that the arbitration clause as void, and in such case the dispute shall be settled at court, unless the parties agree otherwise in writing.

The *amiable compositeur* is an arbitrator *ex aequo et bono,* and must deliver judgment within a three-month period. The award is not appealable, unless it is delivered after said period or resolved an issue that it was not asked to resolve.

Lastly, expert arbitrators only rule on facts and not law. Expert arbitrators must specialize in the subject they are to decide upon. They must deliver judgment within a one month period.

Mediation is ruled by law 24,573 as amended. Mediators do not issue binding decisions; their mission is to help the parties reach a negotiated solution for a given dispute.

The parties always have the right to legal representation. While legal representation may be optional in expert arbitration and amiable composition processes, it is mandatory in mediation and arbitration.

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

In general terms, the procedural rules applicable to most arbitration proceedings in Argentina are similar to the rules applicable to court actions, and hence there is a strong focus on written presentations. However, arbitrations tend to allow for a higher degree of oral debate and argument, especially in *ad hoc* arbitration.

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 in Argentina. The CPCCN extensively regulates it. Nevertheless, arbitrators use the procedural rules of the arbitration institution of which they are members. The procedural rules of the CPCCN are used in the absence of institutional rules regarding a particular situation.

5.4 Is a hearing mandatory for all forms of ADR?

Hearings are not mandatory for all forms of ADR. The CPCCN does not establish a hearing for arbitration, amiable composition, or expert ADR. However, most institutional arbitration rules include hearings as part of the arbitration process.

The mediation hearing is mandatory for a lawsuit to be admitted at court.

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 would not be bound to conduct a hearing according to rules of natural justice.

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?

The experts most frequently used in construction arbitration or litigation are engineers, architects or other technical experts, depending on the nature of the controversy. These may include delay and disruption experts, valuation specialists, etc.

There is no significant difference between court litigation and arbitration in this field, except that, at court, each party may appoint one or more technical experts to advise on a given matter, and the court will designate an official expert to provide the judge with an expert opinion on such matter.

The court experts are randomly selected from a roster of experts administered by the relevant court of appeals, except where there is no official expert available on a given matter, in which case the court will invite the parties to nominate independent experts. The party-appointed experts may, in turn, give their own view on the issue in question

(which may or may not coincide with the court-appointed expert's opinion) and the judge will be free to make his/her own independent decision.

In terms of expert advice, arbitrations typically involve the same proceeding as court litigation, except that the tribunal-appointed expert will be appointed pursuant to the rules governing the arbitration process or, in the absence of such rules, pursuant to the parties' agreement.

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?

As mentioned above, in the great majority of cases experts are appointed by the tribunal. Parties may also appoint experts to advise and comment on the tribunal-appointed expert's findings. Arbitrators or judges are free to evaluate the evidence and the advice provided by the expert, and are not forced to follow the expert's advice. Party-appointed experts are usually not considered as tribunal experts whereas court-appointed or tribunal-appointed experts usually have more influence on the rulings of arbitrators or judges.

Under most arbitration rules used in Argentina, the parties are free to agree on the designation of a single expert, in which case the tribunal will follow the parties' decision.

Usually, the defeated party must pay the costs of the expert, unless the parties have agreed otherwise.

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

Court-appointed or tribunal-appointed experts must remain independent from the parties/counsel at all times. If one of the parties feels that the expert is not acting independently or if for some reason, the expert is biased against one party or in favour of the other, the affected party may present the case to the court and ask for the expert's removal and that a another expert be appointed. The court or arbitration tribunal will hear the affected party's case, analyse the evidence, and decide.

Party-appointed experts will likely support the position of the party that appointed them, although they must follow certain procedural principles and remain independent (i.e., there should be no personal, commercial or other kind of relationship between the party and its counsel and the expert).

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

Experts are typically required to submit their opinions in written form. However, the court and the arbitration tribunal may call the expert and the parties to one or more hearings. This is most frequently seen in arbitrations.

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?

Both the court and the arbitration tribunal can ignore the expert's statement when issuing a decision, even if the tribunal appointed the expert. Section 386 of the CPCCN states that judges are not obligated to account for their decision as to whether to follow an expert's opinion. However, if the dispute is about a very specific technical issue, judges must base their ruling on the expert's statements. The dispute is specific enough to rule based on expert statement when judges or arbitrators cannot rule on that issue based on their own knowledge.

Court or arbitration ruling cannot be delegated to an expert.

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

There are no restrictions on "hot tubbing" in construction arbitration, but in practice this is not used very often.

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 by the arbitral tribunal may be considered as source of evidence in any arbitration dispute. There are no specific rules governing site visits.

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?

Parties must be informed of the site visit. Nevertheless, they may or may not be present during said visits. This means that the visits take place regardless of whether parties are present. Parties have the right to express their opposition during such visits.

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

Witness testimonies are common in construction arbitration. However, they are not as important as other means of evidence, such as expert reports or documents. Usually, arbitrators or judges do not give much value to testimonies.

The only restriction on admitting testimony is that individuals related to litigating parties cannot act as witnesses. Employees or consultants of the parties can present their testimony but the arbitrators will not take into account these declarations, as they may be deemed to be biased because of their relation to the designating party.

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?

Both the arbitrators and the court issuing binding decisions are able to freely weigh evidence as they consider necessary or appropriate. There are no specific rules on assessment of evidence. The CPCCN states that judges must rule with logical and reasonable principles of 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?

The Argentine legal system provides for a number of measures aimed at preserving a situation of fact or of law, in order to preserve evidence or ensure the final award. The most relevant measures in construction disputes are injunctions, an interim measure by which the construction may be stopped until a dispute is clarified, and sequestration of documents in the parties' possession.

These measures must be requested before the proceeding and issued by a court and not by the arbitral tribunal. Under Argentine law, arbitration tribunals are not empowered to award interim measures.

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 isn't 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?

Pre-trial provisional or conservative measures in Argentina are decided by a judge's ruling. Provisional measures, like those regarding evidence, can also be issued during the course of the proceeding. These measures may be awarded if the court understands that the claimant's alleged rights are plausible, that a delay in granting the interim relief of conservative measures may be detrimental to the claimant's rights, and subject to the claimant securing payment for loss and damage if the final decision is adverse.

Arbitrators are not allowed to order interim or conservatory measures. They can only be ordered by court.

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)?

In general, binding decisions are enforceable in Argentina. Articles 517 and 519 of the CPCCN provide for the recognition and the enforcement of foreign rulings or arbitration awards. This process is known as *exequatur*.

Nevertheless, DAB decisions are not regulated in the CPCCN. To be admitted, a DAB decision must be in line with the requirements provided under the CPCCN. In that sense, it would be necessary to have an arbitration award or a court ruling enforcing a DAB decision so that the exequatur can be admitted.

Clause 20.7 of FIDIC Red Book does not allow the enforcement of a DAB decision directly through court in Argentina. In the event the parties have agreed that they must refer the failure to arbitration, then they cannot omit it and enforce a DAB decision directly through court.

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

According to the requirements of Articles 517 and 519 of the CPCCN, the award or binding decision must 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 arbitral awards and other ADR proceedings in Argentina. They are added as a separate opinion to the binding decision.

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

Both arbitral awards and court decisions can be corrected or clarified either at the request of the parties or at the tribunal's/court's own accord. The correction/clarification is reserved for minor, non-material issues. Interim or conservatory measures by courts may also be reconsidered at the request of a party.

Article 758 of the CPCCN states that arbitration awards can be appealed in the same manner that a court decision can be appealed, unless parties have specifically waived the right to appeal in writing. Once the final ruling or award is issued, it may only be subject to the correction/clarification mentioned above or to an appeal.

The court decision will be final if parties do not appeal the court decision within five days. With regard to arbitration, the appeal term will depend on each institution's procedure.

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?

According to the Argentine Constitution, when a foreign decision subject to recognition or enforcement in Argentina is originated in a country that has ratified a treaty or convention that recognises foreign awards applicable in Argentina, the provisions thereof will prevail over any Argentine procedural code.

Therefore, Argentine procedural codes are applied only when there is not an international treaty regarding recognition and/or enforcement of foreign awards, entered into by Argentina and the country where the decision was rendered.

Sections 517 to 519 of the CPCCN address the issue of procedural requirements that must be met in order to enforce foreign awards when there is no treaty.

The substantial requirements for enforcement – listed in Article 517 of the CPCCN – are:

1. final judgment (the foreign judgment must have the status of *res judicata* in the country where it was rendered);

2. judgment given by a competent court pursuant to Argentine rules of international jurisdiction;

3. judgment originated in a personal action or in a real action regarding an object that was transferred to Argentina during or after the trial in foreign countries;

4. due process (i.e., the defendant must be duly served with the summons pursuant to the laws where the proceedings took place and must be entitled to defend himself);

5. valid judgment, (i.e., a judgment that fulfils all formal requirements of the jurisdiction where it was rendered); and

6. the foreign judgment does not violate Argentine international public policy principles.

According to Section 518 of the CPCCN, an *exequatur* is a process to enforce a foreign judgment in Argentina. During the *exequatur* procedure, Argentine courts examine the foreign judgment in order to determine its validity and enforceability, pursuant to the above mentioned principles.

1. Filing. Request for *exequatur* must be filed before the first instance court that is competent to enforce the foreign award. The *exequatur* must be requested by means of a rogatory letter.

2. Opposition. The party against the execution of a foreign judgment which is sought is called to the trial and given the opportunity to file its defence and produce evidence if necessary. Subsequently, the court renders its decision as to whether it will enforce the foreign decision.

3. Enforcement of the foreign judgment. The prevailing party demands seizure of the defendant's assets, who can only use facts that took place after the foreign decision as evidence for the defence. Once the judge orders the execution of the award, the plaintiff collects payment through the sale of the defendant's assets that have been seized.

4. Remedies of appeal.

(i) During the *exequatur* procedure, the parties may appeal the court decision ordering or denying the *exequatur*; and

(ii) During the execution procedure, the defendant may appeal the court decision that orders the attachment of assets belonging to him, in which case, assets cannot be sold until a final decision is given unless the plaintiff offers a security.

Regarding recognition and enforcement of arbitration awards, the New York Convention applies in Argentina.

Argentina ratified the New York Convention with certain reservations allowed by Article 1. Two of these reservations are: (a) that it will apply the Convention, on a reciprocity basis, only to arbitral awards issued in states that are also signatories to the Convention, and (b) that it will only apply the Convention to matters considered as commercial by its internal laws. Furthermore, Argentina expressed that it will interpret the Convention in accordance with the clauses and principles of its National Constitution, as amended from time to time.

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?

Argentina signed the New York Convention in 1958 and ratified it in 1989. Nevertheless, Argentine laws do not consider DAB decisions as equivalent to arbitral awards.

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

If the foreign arbitration award fulfils the requirements established in Articles 517 and 519, then Argentina jurisdiction will allow it, regardless of whether that award enforces in turn a FIDIC Red Book type DAB decision.

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)?

Remedies to foreign awards are the same as those remedies to a judge's ruling. Parties may challenge a FIDIC Red Book type DAB decision in the case of fraud or failure to follow minimum due process.

If parties agree that any dispute with respect to DAB decisions must be settled by international arbitration, then DAB decisions are not enforceable in court without first having to go through arbitration.

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

A binding expert determination would be subject to review on the merits by the courts on Argentina. The CPCCN provides ways to review a binding expert determination.

9 Trends and developments

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

N/A

10 Other Important Issues

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

N/A