IBA International Construction Projects Committee

ADR in Construction

Australia

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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?

Australian construction disputes are generally tried within the Australian states' court system. Statistics show that there is a steadily increasing number of filings, and number of trials disposed of, in the construction lists of the Australian state courts[2]. Despite this, industry experience would suggest that there is an increasing trend within the Australian legal system towards ADR methods, including arbitration, adjudication and dispute review boards. This is largely because ADR techniques are generally accepted as a faster and cheaper alternative to potentially long and expensive processes available in the Supreme Courts of Australia. Litigation is largely unsuitable for technically and factually complex construction disputes because of the time which litigation takes to finalise (including appeals).

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

Australia has introduced a statutory payment and adjudication regime in the construction industry. From 1999 to 2009, each Australian State and Territory enacted its own "Security of Payment" legislation[3] to provide a measure of protection to contractors and subcontractors that cash will flow in the manner anticipated by the contract.

The legislation attempts to address the following situations. The first situation is when a party further up the contractual chain refuses to make a payment which is due. Prior to the introduction of the legislation, only a court or arbitrator could force the party to pay. The time and cost in obtaining a judgment or award meant that a party further up the contractual chain could impose commercial pressure on the claimant by withholding payment.

The second situation is when a party further up the contractual chain becomes insolvent. A subcontractor, for example, could not recover a debt owed to the contractor from the owner because, typically, the subcontractor would not have a direct relationship with the owner. This meant that in the event of the winding up of an insolvent head contractor, the subcontractor would not be paid, except as an unsecured creditor.

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[2] The Supreme Court of New South Wales Annual Review, 2001 - 2009

[3] Building and Construction Industry Security of Payment Act 1999 (NSW); Building and Construction Industry Security of Payment Act 2002 (Vic); Building and Construction Industry Payments Act 2004 (Qld); Construction Contracts Act 2004 (WA); Construction Contracts (Security of Payment) Act 2004 (NT); Building and Construction Industry (Security of Payment Act) 2009 (ACT); Building and Construction Industry Security of Payment Act 2009 (SA); Building and Construction Industry Security of Payment Act 2009 (Tas).

The Security of Payment legislation gives any person who carries out construction work or supplies related goods or services under a construction contract a statutory right to receive progress payments. That is, if a construction contract provides for progress payments, the legislation effectively turns the contractor's contractual entitlement into a statutory one. And, where the contract does not provide for progress payments, then certain default provisions take effect entitling the contractor to monthly progress payments.

The Security of Payment legislation also entitles contractors, subcontractors and suppliers to pursue disputed progress payments by referring them to a rapid adjudication process. The adjudicator's decision may then be the subject of review of either court or arbitration proceedings but until overturned by such a process, the decision is on the parties.

If the respondent fails to pay the adjudicated amount, the claimant can recover the adjudicated amount by filing an adjudication certificate and supporting affidavit in the appropriate court. The adjudicated amount will become a judgment debt which is enforceable in the same way as any court judgment. If a subsequent review by a court or arbitrator concludes that the adjudicated amount, which has been paid, is excessive then the excess will be ordered to be repaid.

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

The types of binding but non-statutory dispute resolution process in Australia include arbitration and expert determination.

Arbitration

International and domestic arbitration in Australia are governed by separate statutory regimes. International arbitration is governed by the *International Arbitration Act 1974* (Cth) (**IAA**), which is a Federal Act. Domestic arbitration is regulated by the Commercial Arbitration Acts of the States and Territories (**CAA**)[4].

The IAA incorporates the UNCITRAL[5] Model Law on International Commercial Arbitration (**Model Law**) which is therefore the basis of the Australian law of international arbitration. The CAA is also based on the Model Law, which means that the processes for international and domestic arbitration are, with some exceptions, the same.

[4] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1990* (Qld).

[5] United Nations Commission on International Trade Law.

The main characteristics of domestic arbitration in Australia are as follows:

(a) determinations are final and binding;
(b) proceedings are confidential[6];
(c) courts must stay court proceedings and refer the matter to arbitration where an applicable arbitration agreement exists between the parties[7]; and
(d) the right to appeal in respect of an error of law is possible, but only if both parties consent to the appeal and are granted leave to appeal. Recourse against the award is also possible in respect of a serious error of a jurisdictional nature.

The main characteristics of international arbitration are the same except that:
(e) there is no right of appeal. Recourse against the award is limited to serious errors of a jurisdictional nature; and
(f) for the arbitration to be confidential, the arbitration agreement should so specify.

Expert Determination

Parties can also agree to a binding determination by an expert. Expert determination is purely a creature of contract and is not supported by legislation, unlike arbitration or adjudication under the Security of Payments Acts (noted above). Accordingly, the procedure to be followed by the expert is entirely a matter for the parties. If the parties fail to specify the procedure, then legislation will not simply "fill the gap". In that circumstance, the parties would need to reach further agreement about the procedure, failing which it would be determined by the expert.

Disputes that are most suited to this form of dispute resolution are single issue disputes that can be resolved by reference to a body of expertise. These include:
(a) questions as to value[8]; and
(b) questions as to the quality of work done[9].

However, expert determination is less suited to disputes:
(a) where there are mixed questions of fact and law;
(b) that involve the expert having to decide issues beyond his or her technical qualifications; or
(c) where a more formal process in the manner of a judicial inquiry would be more appropriate in the circumstances. For instance, where discovery or

[6] Although in the international arena it has long been accepted that confidentiality is an inherent feature of commercial litigation, the High Court of Australia held in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 that confidentiality was an obligation on parties to an arbitration agreement only where that obligation was explicitly specified in the agreement. For the avoidance of doubt, the new CAAs provide extensively for confidentiality obligations in arbitration, unless parties opt-out from the regime.
[7] Section 8 of CAA.
[8] *Public Authorities Superannuation Board v Southern International Developments Corporation Pty Limited* (NSWSC, 19 October 1987, unreported), at 7; *The Heart Research Institute Limited v Psiron Limited* [2002] NSWSC 646, at [25].
[9] *Ibid.*

production of documents in response to a subpoena is appropriate or necessary.

However, none of these matters prevents the parties from agreeing that such disputes are to be resolved by expert determination.

Other binding dispute resolution processes

Litigation is the traditional method of providing an involuntary, binding solution.

The other binding process is the Australian statutory payment and adjudication regime in the construction industry (discussed above), which is also known as the Security of Payment (**SOP**) regime. Statutory adjudication in Australia is provided for by SOP legislation in the States and Territories.

Under the SOP regime, the adjudicator's determination is binding, but not final. Therefore any determination made pursuant to the SOP legislation is on an interim basis only and will be subject to any final reckoning of the parties' respective entitlements pursuant to the dispute resolution procedure applicable to the contract.

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?

Arbitration in Australia is governed by the IAA and CAA Acts, which are both based on the UNICITRAL Model Law.

These Acts do not apply to other binding decisions, such as expert determination, statutory adjudication and litigation. The relevant procedural rules applying to the arbitration are those set out in any agreement between the parties and absent any agreement, as determined by the Arbitral Panel.

Statutory adjudication usually only requires written submissions without a hearing. Decisions of adjudicators appointed pursuant to the various statutory regimes in each state are not final and binding. They are subject to review either by way of arbitration (if that is the method of dispute resolution stipulated in the contract) or by litigation. Any reconsideration of an adjudicator's determination by way of arbitration or litigation is de novo. Until reviewed the adjudicator's determination is binding and must be complied with.

There are no procedural rules associated with expert determination. Again, those procedural rules will be determined by the agreement of the parties or absent agreement, the expert. Generally, expert determinations will not involve any hearing or quasi-judicial process. If an expert determination clause requires a judicial style hearing, it will be characterised as an arbitration, notwithstanding the clause refers to expert determination.

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

There are two arbitral institutions in Australia: the Australian Centre for International Commercial Arbitration (**ACICA**) and the Institute of Arbitrators and Mediators Australia (**IAMA**).

The Australian Centre for International Commercial Arbitration (**ACICA**) is a special institution which provides a range of arbitration-related services and is active in the promotion of international arbitration and the dissemination of related information. ACICA is prescribed under the IAA as the sole default appointing authority competent to perform the arbitrator appointment functions.

ACICA adopted a set of official arbitration rules in July 2005 to govern international commercial arbitrations conducted by ACICA. The ACICA Rules provide an advanced, efficient and flexible framework for the conduct of arbitrations. Under the ACICA Rules, ACICA is involved in the administration of arbitrations in the following ways:

- ACICA can extend periods of time prior to the constitution of the arbitral tribunal (Article 3.4);
- ACICA receives the Notice of Arbitration and the Answer (Articles 4 and 5).
- If the Notice of Arbitration does not comply with the Rules it is not sent to the Respondent, but instead ACICA may request the Claimant to remedy the defect (Article 4.5);
- ACICA can make available facilities such as hearing rooms, secretarial assistance and interpretation facilities, and provide assistance at the request of the parties (Article 7);
- If the parties do not agree on the number of arbitrators then ACICA decides, taking into account all relevant circumstances (Article 8);
- ACICA has a significant role in the appointment of arbitrators (Articles 8, 10 and 11);
- ACICA determines challenges to arbitrators (Article 14.4);
- ACICA has a role in determining the fees of arbitrators (Article 40.2); and
- ACICA maintains a Trust Account and arbitrators may take advantage of this facility and lodge the parties' deposits in the ACICA Trust Account (Article 42.5).

The objectives of ACICA are to support and facilitate international arbitration. ACICA maintains a panel of international arbitrators and a list of experienced arbitration practitioners. ACICA is involved with a range of educational activities including holding seminars and conferences to enhance knowledge and understanding of international arbitration. Members of ACICA's Board of

Directors include nominees of leading organisations in Australia as well as arbitration experts from Australia and abroad.

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 review boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested)?

Mediation has been used for construction disputes extensively for 25 years. Most contracts require mediation as a pre-arbitration or pre-litigation requirement. In litigation, parties are almost always ordered by state courts to mediate as a final attempt to resolve the dispute prior to the hearing of the proceeding.

Other forms of non-binding dispute resolution for constructions disputes in Australia include resolution by Dispute Resolution Boards (**DRB**). The panel will usually consist of three experts. Typically, one expert is nominated by each party and the final member is nominated by the panellists.

The use of DRBs in Australia is most common in larger projects and has increased significantly since 2003, with at least 24 major projects in Australia having used them since then[10]. The use of DRBs in Australia is set to continue, with the NSW Transport Infrastructure Development Corporation (**TDIC**) having announced that it will use DRBs on all projects valued in excess of $50 million and the Queensland Department of Main Roads having included DRBs as an option in their major design and construct standard form.

Like expert determination, the DRB is purely a creature of contract. The parties' agreement is typically set out in a combination of the construction contract and a tripartite agreement between the parties and the DRB members. The construction contract will tend to deal with issues such as whether the DRB's decisions will be binding and the procedure for replacing a DRB member in the event of a failure or impossibility to act. The tripartite agreement will tend to deal with more administrative matters such as the fees, confidentiality and the limitation of the DRB members' liability.

Although the parties may agree to make decisions of the DRBs entirely non-binding and merely advisory, in Australia, the most common procedure is to provide that the decision of the DRB is binding, but subject to review by (typically) arbitration or court proceedings (on a de novo basis). This means that the DRB decision will be binding on the parties in the interim and allow commercial relations to continue.

[10] R. Finlay, "Dispute Board Concepts Internationally - Divergence or Convergence - Australian Perspective", paper delivered at the 12th Annual DRBF International Conference, May 2012.

Alternatively, the parties can also agree that decisions are final and binding and not subject to review (such DRBs are also known as Dispute Adjudication Boards (**DAB**)).

Enforcement of a DAB's decision is dependent on the terms of the contract between the parties. A successful party usually brings an action for breach of contract for failure to comply with the DAB's decision, or sues for the value of the decision as a debt due and payable to it.

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?

DAB decisions, not being subject to any relevant privilege (such as without prejudice privilege), will be admissible as evidence of any expert opinion that may be expressed in the DAB decision (assuming that the DAB panel is suitably qualified as an expert). However, findings of fact made by the DAB will not be admissible into evidence in court as they are hearsay. A more lenient approach may be taken by an arbitrator, as the rules of evidence are less likely to apply (absent an express agreement by the parties that they do apply). However, even if admitted into evidence, its probative value will be low, if the determination is merely based on a limited hearing without a full exploration of the issues and otherwise makes determinations which are hearsay.

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.

A well drafted arbitration agreement is likely to result in an arbitration which is more efficient and cost-effective.

The types of costs that a party incurs in arbitration are similar to court litigation. It includes:

(a) direct costs of engaging lawyers, counsel, experts and others to assist in the arbitration; and
(b) indirect costs such as the parties' employees' time in preparing for and participating in the arbitration (e.g. manage the lawyers, provide instructions, other research) time lost where those employees who could otherwise be engaged in productive profit earning work.

However, the parties must also pay each arbitrator and provide the facilities for the hearing. All travel, accommodation and other costs associated with the appointment of the arbitral panel and the running of the hearing itself are also the responsibility of the parties.

The total costs of the arbitration will be a function of the following:

(a) the length of time between the commencement of the proceedings and the date of hearing to determine the substantive matters in dispute; and

(b) the length of the hearing.

If the arbitrator mimics the process of the courts then the process is unlikely to provide any improved efficiency. However, large arbitration matters conducted by a first-class arbitrator adopting international practices can be significantly cheaper than the dispute resolution process offered by the Supreme Courts of the Australian states, principally because processes are streamlined from those usually adopted by the 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?

As noted above, the basis of the Australian law of international and domestic arbitration is the Model Law. Whether or not there is a valid arbitration agreement can be decided by the arbitrators pursuant to Article 16(1) of the Model Law.

An "arbitration agreement" under Australian arbitration law is therefore defined to have the same meaning given to it in Option 1 of Article 7 of the Model Law. Accordingly, in order for an arbitration agreement to be valid, the agreement:

(a) must be an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(b) may be in the form of an arbitration clause in a contract or in the form of a separate agreement;

(c) shall be in writing;

(d) is deemed to be in writing:

(i) if its content is recorded in any written form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means;

(ii) by electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(iii) if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(e) constitutes an arbitration agreement in writing if a reference is made in a contract to any document containing an arbitration clause, provided that the reference is such as to make that clause part of the contract.

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?

Arbitration clauses in domestic building contracts (i.e. for the construction of houses) are unenforceable. Likewise, arbitration clauses in contracts of insurance (but not reinsurance) are also unenforceable. Otherwise, arbitration clauses will be enforced subject to the usual requirements set out in the New York Convention and Model Law. Subject to the same requirements, courts must stay their own process, on application by one of the parties to the arbitration agreement.

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

Standard construction contracts in Australia include provisions for resolving disputes through a multi-tiered dispute resolution clause which often refer the dispute to arbitration after the provisions for negotiation or alternative dispute resolution procedures have been exhausted.

The clause will often state that the arbitration will be conducted according to a set of institutional procedural rules provided by bodies such as the Australian Centre for International Commercial Arbitration (**ACICA**) or the Institute of Arbitrators and Mediators Australia (**IAMA**).

In addition to arbitration, other techniques which are commonly incorporated into multi-tiered dispute resolution clauses in Australia include executive negotiation/compulsory conference, mediation, referral to superintendent and expert determination.

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

An arbitration agreement entered into by a subsidiary may bind the parent company if it can be proven that the subsidiary was the agent of the parent company and when so acting entered into the arbitration agreement. This issue was recently considered by the Victorian Court of Appeal in *IMC Aviation*

Solutions Pty Ltd v Altain Khuder LLC [2011] VCA 248. In this case the Court of Appeal held that an award creditor must show, on the balance of probabilities, that the award debtor was actually a party to the original arbitration agreement. In determining the question of whether a party is a party to an arbitration agreement, the parties may apply alter-ego/agency principles. In *Altain Khuder* however, this was not established on the evidence available.

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?

There is no requirement for expert determination agreements to be in writing. An oral agreement can provide the basis for an expert to proceed. In practice, however, this is very rare.

As with all contracts it is necessary that all critical matters be the subject of agreement. If critical issues are not agreed then Australian courts will regard the expert determination clause as void, lacking the necessary certainty. However, the matters which need to be agreed are limited but include the method of appointment of the expert and the scope of the expert's mandate or jurisdiction. Expert determination is not regulated by legislation. Therefore, there is no mandatory stay of court proceedings commenced in breach of an expert determination clause. However, all superior courts have an inherent jurisdiction to stay their process in favour of expert determination. Modern authority is to the effect that the courts will hold parties to their bargain by staying their own process in favour of expert determination.

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

Whilst multi-tiered dispute resolution clauses are becoming increasingly common in Australian construction contracts, the use of the clause can have difficulties depending on their level of complexity. Generally issues arise where the interpretation of the terms of the tier is unclear and the requirements of the tier are incomplete, resulting in parties filing a request for arbitration or litigation without having engaged in processes of the initial tier.

Accordingly, the wording of the multi-tiered dispute resolution clause is vital to its enforceability. So long as the obligation to comply with each tier of the process is clear, Australian state courts are likely to enforce the clause and

stay their own process until the agreed pre-conditions for commencing proceedings have been followed[11].

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?)

All disputes can be mediated, the subject of expert determination or other ADR techniques other than arbitration.

All disputes arising from construction projects can be arbitrated except those relating to domestic building contracts or insurance.

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?

Provided that the subject matter of the dispute is within the scope of the expert determination agreement, there are no restrictions on matters which may be subject of the expert determination.

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)?

No.

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

No. Where the Crown or a government agency is party to an arbitration, DRB or mediation agreement, it is bound by and liable under such an agreement.

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

Generally, the Doctrine of Immunity presumes that statutes do not bind Australian governments unless the statute evinces such intention.

However, as noted above, the State and Federal governments are bound under any commercial contracts. Further, the IAA, CAA and SOP Acts specifically provides that they bind the State and Federal governments.

[11] See *Hopcroft v Olsen* [1998] SASC 7009.

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?

Yes. There are no special requirements for procurement disputes.

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?

This is possible if the relevant clause establishing the DRB prescribed a mandate or jurisdiction wide enough to encompass disputes which are not contractual or otherwise under the contract.

However, usually there will need to be some connection with the contract containing the DRB clause. For example, the clause may stipulate that "all disputes arising out of or in any way connected with the contract" will be referred to the DRB. Such wording will give the DRB very wide jurisdiction. However, some connection with the contract will be required.

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 (such as DABs) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

Pursuant to Article 11(2) of the Model Law, which is incorporated into the IAA and CAA, the parties are free to agree on the procedure of appointing the arbitrator(s). If the parties do not agree on the number of arbitrators to be appointed, the IAA provides that there shall be three arbitrators for international arbitrations and the CAA provides that there shall be one for domestic arbitrations.

Failing such agreement, Article 11 of the IAA provides that in an arbitration with three arbitrators the parties shall appoint one arbitrator each, who will in turn appoint the third arbitrator. If there is an arbitrator then either party can apply to any superior court, which will appoint the arbitrator.

The appointment of the adjudicator under the Australian statutory payment regime is governed by each of the Security of Payment Acts (**SOPA**) enacted by

the Australian states[12]. For example, in Victoria, the SOPA provides that the adjudication application be made to an authorised nominating authority, which in turn refers the application to an adjudicator[13]. The adjudicator is taken to have been appointed upon accepting the application by causing notices of acceptances to be served on the claimant and respondent[14].

In Australia there are no formal requirements in relation to arbitrators and arbitrators are not required by law to have any special qualifications. However arbitral institutions in Australia usually require arbitrators to meet specific criteria in order to be listed on their register or panel of arbitrators. For example, in order to qualify for the IAMA Register of Practising Arbitrators, arbitrators must complete specified training courses, pass an examination and undergo an assessment by the Interviewing Committee, pursuant to which they are graded from 1 to 3 (1 being the highest).

In most States specialist tribunals have been created to deal with disputes arising from domestic building contracts (i.e. contracts for construction of homes).

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?

In Australia, ACICA maintains a panel of recommended arbitrators. IAMA has a Register of Practising Arbitrators, which contains a list of arbitrators arranged in accordance with their professional and occupational fields.

There are no rules which require the parties to appoint arbitrators from the recommended list of arbitrators. According to the ACICA and IAMA rules, the parties are free to agree on the appointment of an arbitrator or arbitrators of their choice. However, in certain circumstances, that power to appoint arbitrators can be referred to the arbitral institutions.

Under the ACICA rules, if the parties fail to reach an agreement on the choice of a sole arbitrator within a specified time then ACICA has the power to determine the arbitrator (Rule 9). Similarly, in the case of three arbitrators, if one of the parties fails to appoint an arbitrator of its choice, ACICA may appoint an arbitrator at the request of the other party (Rule 10). Under the

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[12] *Building and Construction Industry Security of Payment Act 1999* (NSW)*; Building and Construction Industry Security of Payment Act 2002* (Vic)*; Building and Construction Industry Payments Act 2004* (Qld)*; Construction Contracts Act 2004* (WA)*; Construction Contracts (Security of Payment) Act 2004* (NT)*; Building and Construction Industry (Security of Payment Act) 2009* (ACT)*; Building and Construction Industry Security of Payment Act 2009* (SA)*; Building and Construction Industry Security of Payment Act 2009* (Tas).

[13] Section 17 of *Building and Construction Industry Security of Payment Act 2002* (Vic).

[14] Section 20 of *Building and Construction Industry Security of Payment Act 2002* (Vic).

IAMA rules, IAMA may nominate an arbitrator upon the request of the parties (Rule 8).

Unlike arbitration, statutory adjudication under the SOPA in most Australian states requires the authorised nominating authority to appoint an adjudicator. The claimant is however entitled to apply to an authorised nominating authority of its choice (subject to the terms of the contract).

In the event that the parties have agreed that there shall be some ADR process prior to referral to court, the court may (although the relief is discretionary) stay its own process until the agreed ADR process is complete. An arbitrator will have a similar discretion.

If the ADR process is final and binding expert determination, the court has concurrent jurisdiction with the expert. The current trend of cases is that the court will enforce the agreement of the parties requiring expert determination unless very special circumstances exist. Therefore, if the parties have agreed to expert determination, the courts will stay their own process until the expert has made his/her determination. Once the expert has made a determination, the court will enforce that determination by way of summary judgment (subject to limited exceptions where the determination is subject to attack for bias, minimal requirements in relation to natural justice not having been observed or a decision outside the mandate prescribed by the expert determination clause). Otherwise the court will not consider the merits of the expert determination or interfere with that determination.

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 Australia there are no formal restrictions in relation to arbitrators. Parties are at liberty to have their dispute decided by whomever they consider appropriate. Usually, however, arbitrators in major technical arbitrations include senior lawyers experienced in arbitrations. Candidates for consideration come from a wide pool, including ex-judges from Supreme and Federal Courts.

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?

Arbitration panels in Australia can include both lawyers, construction professionals or anyone else nominated. In the past, it has been argued that the arbitrator in a technical arbitration should not be a lawyer, but an engineer or other technical person with appropriate qualifications. However

experience has shown that the appointment of an engineer arbitrator as sole arbitrator can give rise to problems, unless that engineer has extensive experience in dispute resolution.

Expert determinations are more often than not decided by professional experts who are qualified in the engineering/construction industry. Similarly, statutory adjudications are usually referred to a technical expert.

DRBs are similar to arbitrations in that they commonly consist of a lawyer and technical experts who assist the lawyer on the Board.

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?

An award may be challenged and set aside where the enforcement of the award would contravene aspects of Australian public policy that go to the fundamental, core questions of morality and procedural fairness. Section 34A of the CAA provides that arbitral tribunals must act judicially and must have an evidentiary basis for their decisions. Where an arbitral tribunal relies upon its own expertise, this may provide grounds for an award to be set aside as an error of law[15]. However section 34A(1) of the CAA allows an appeal only where the parties have chosen to "opt-in", by stipulating in the arbitration agreement that such an appeal may be made or doing so subsequently. If the parties do not agree to "opt-in", either in their arbitration agreement or within three months of the date of the award, an appeal is not available. Alternatively, if the parties are not aware that the arbitrator has formed a view about a particular matter, not based on the evidence but rather by reference to his/her own expertise, and the arbitrator does not give the parties an opportunity to adduce evidence (including expert evidence) about that opinion, recourse against the award may be had for breach of the rules of natural justice.

According to English cases, circumstances where an arbitrator uses his or her expertise to arrive at his decision may be considered a breach of principles of morality and justice (*Annie Fox & Ors v P J Wellfair Limited (1981) 2 Lloyds Reports 514*) as the parties have a right be heard and persuade the arbitrator otherwise. To deny them this opportunity and catch the parties by surprise would be unjust to the parties and against Australian public policy (*Thomas Borthwick (Glasgow) Limited v. Faure Fairclough Limited* [1968] 1 Lloyds Report 16). This authority is likely to be followed in Australia.

In general an arbitrator must provide notice of, and an opportunity to respond to, issues, ideas, methods, research, investigations, and/or studies of the arbitrator that were not reasonably foreseeable in the light of the arguments put before the arbitrator.

[15] *Commercial Arbitration Act 2010* (Cth) s 34A. See for example, *Sabemo (SA) Pty Ltd v AIW Engineering Pty Ltd* (1992) 9 BCL 280.

There is no requirement of the arbitrator (expert or otherwise) to make the parties aware of the arbitrator's knowledge in all circumstances. However, s18 CAA requires the parties to be treated with equality and each party must be given a reasonable opportunity to present the party's case.

Expert determinations by contrast commonly rely upon the expert's own skills, experience and enquiries to reach a decision on a dispute.

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 used rules for Australian construction arbitrations are the ACICA rules.

The ACICA rules contain a rule for the tribunal to apply the law designated by the parties as applicable to the substance of the dispute. However, failing such designation by the parties, the tribunal shall apply the rules of law which it considers applicable (Article 34.1).

Article 34.2 of the ACICA rules provides further that where the parties authorise the tribunal in writing, the tribunal can decide as amiable compositeur or ex aequo et bono.

If the parties agree that an expert is to make a determination "ex aequo et bono", the expert must do so. A failure to make a decision ex aequo et bono is likely to result in a decision not permitted by the mandate given to the expert. Therefore the expert determination could be the subject of challenge that it is void because it is made outside the jurisdiction prescribed by the expert determination agreement.

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?

Lack of due process may be a ground upon which a party can seek to resist the enforcement of or seek review of an arbitral award. Article 36 of the Model Law (incorporated into Australian Law by IAA and ACC) provides that an arbitral award will be not be recognized if the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

Under section 29 of the IAA, parties are at liberty to be represented by whomever they consider appropriate, including him or herself, a duly qualified

legal practitioner from any legal jurisdiction of that party's choice, or by any other person of that party's choice.

An adjudicator in expert determination is not governed by statute and therefore does not have the same duties as an arbitrator. Unless there is a term in the expert determination agreement specifically saying so, the expert is not required to act in a manner consistent with due process and there is no implied term in the agreement that the expert act with due process (*Owen Pell Ltd v Bindi (London) Ltd* [2008] EWHC 1420 (TCC)).

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 arbitration, the focus tends to be on oral hearings. By contrast, experts in expert determination processes will usually receive written submissions from the parties in determining the dispute.

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?

Arbitral tribunals in Australia are not bound by the usual rules of evidence applicable to Australian court proceedings. In fact, under the CAA and IAA the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Where the parties fail to reach a such agreement the tribunals are empowered to determine the admissibility of evidence under the CAA and IAA[16]. The CAA and IAA also allow the tribunal or the parties with the permission of the tribunal to request assistance from the court in taking evidence[17] and obtaining subpoenas to compel the production of evidence from parties[18].

Most institutional arbitration rules in Australia only deal with basic aspects of evidence procedure and parties rarely come to an agreement on a comprehensive evidence procedure for the tribunal to rely upon. Thus, it is common in Australia for evidentiary issues to be determined by the tribunal.

However the ACICA rules includes a useful reference to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration. Should parties choose to apply the ACICA rules, the rules require the tribunal to have regard to the IBA Rules but it is not bound to apply the IBA Rules. Notwithstanding, the IBA Rules provide a helpful guide to the parties and the tribunal when considering evidentiary matters and the reference in the ACICA rules has resulted in their application to many domestic arbitrations.

[16] Article 19(2) Model Law as reproduced in Schedule 2 of IAA and section 19(3) of the CAA.
[17] Article 27 Model Law as reproduced in Schedule 2 of IAA and section 27 of the CAA.
[18] Section 23 of the IAA, which are "opt-out" provisions, which means that they will apply unless the parties agree otherwise.

Expert determination often dispenses with the safeguards of traditional rules of evidence. The expert also does not have the same powers as an arbitrator to compel the production of evidence. However, the expert determination agreement may include traditional rules of evidence and obligations on the parties to provide evidence should they wish.

5.4 Is a hearing mandatory for all forms of ADR?

No. Arbitral tribunals may decide whether oral hearings should be held for the presentation of evidence or whether the proceedings should be conducted on the basis of written materials alone. However, unless the agreement specifically states that no hearings be held, the arbitral tribunal shall hold a hearing if requested by a party (Article 24(1) of the Model Law (incorporated into the IAA and CCA)).

In expert determinations, subject to the terms of the contract, an expert is not obliged to conduct a hearing.

Similarly, hearings by a DRB are not mandatory, subject to the terms of the contract.

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 will be required to comply with any procedural requirements of the contract, and, subject to the contract, will be under an implied obligation to follow fair procedures consistent with the expert's duty to act honestly and impartially[19]. The exact content of this duty may be debated. However, this duty is not necessarily considered as equivalent to an obligation to accord procedural fairness of a kind required in arbitration[20]. For example, subject to the contract, an expert is not obliged to conduct a hearing. Much will depend upon the nature of the dispute and the mandate given to the expert. If, for example, the expert is to determine the dispute by appraisal (i.e. based on the expert's expertise only and not on evidence submitted) the obligation to be fair will not constrain the expert much, if at all.

[19] *Enron Australia Finance Pty Ltd (in liquidation) v Integral Energy Australia* [2002] NSW SC 753, paras 117-121.

[20] *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307, para 69, and see also *Kioa v West* (1985) 159 CLR 550, 585 per Mason J.

5.6 What types 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?

Construction arbitrations often involve technical experts and delay/programming experts.

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?

In Australia, experts are mostly party appointed however it is not an uncommon occurrence for tribunals to appoint experts. There are no specific rules which differentiate the evidential value of tribunal appointed experts from party appointed experts and the tribunal has discretion to determine the admissibility and weight of the evidence of each expert.

During the arbitration the costs of tribunal appointed experts are usually divided equally between the parties whilst each party bears the costs of their own appointed expert. Ultimately the tribunal has a discretion to award costs to one of the parties or otherwise order that such costs be apportioned unequally between the parties.

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

Expert witnesses in Australia are expected to remain independent and impartial of the parties, even if party appointed.

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

The expert normally produces and exchanges written evidence in the arbitration and gives oral testimony at the hearing. Article 7.2 of the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witness in International Arbitration (**CIArb Protocol**) requires each expert who has provided written evidence to give oral testimony at the hearing unless the parties agree otherwise. If the expert does not appear without a valid reason then the expert's evidence may be disregarded according to the CIArb Protocol.

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 tribunal can reject the evidence of an expert appointed by it. A tribunal is required to state the reasons upon which its award is based (unless the parties have agreed that no reasons are to be given). In light of this obligation, a tribunal should give some degree of explanation for following or not following

the statement of an expert. The tribunal should not delegate part of the decision 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?

Hot-tubbing is becoming an increasingly common feature in construction arbitration in Australia. Although hot-tubbing is not always appropriate, it may be especially effective in highly technical arbitrations, where complex factual and technical issues need to be resolved by a number of experts. When used appropriately, it may help to identify and narrow the issues in dispute and reduce the hearing time.

Lay witness hot-tubbing may also sometimes be used in disputes before a DRB to allow parties to air their grievances. This provides an opportunity for potential issues to be identified early before they are able to escalate. The chance to "vent" may also assist in avoiding disputes altogether.

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 are unregulated by Australian laws. Site visits are not mandatory but are permitted provided that it is agreed by the parties.

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?

Unless a party elects not to attend, site visits will involve all parties to the dispute. It is highly unlikely that a party will elect not to be represented at a site visit.

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?

Witnesses are a common feature of arbitral proceedings. There are no specific provisions which differentiate the treatment of witness testimony from witness testimony of employees or consultants related to the party presenting the testimony. Arbitrators are free to determine the admissibility, relevance, materiality and weight of evidence.

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?

As mentioned above, arbitrators are free to determine the admissibility, relevance, materiality and weight of evidence under the IAA and CAA. Arbitration rules also rarely provide detailed evidentiary procedures. Arbitrators therefore have a significant degree of discretion to determine the value of the evidence.

Article 9 of the IBA Rules (which are not binding but are referred to as a guide under the ACICA rules) set out the reasons for which evidence can be disregarded, such as lack of relevance, privilege, unreasonable burden, confidentiality, procedural economy, proportionality, fairness or equality.

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?

Articles 17-17J of the Model Law, which are reflected in both the IAA and CAA, provide concurrent jurisdiction to both arbitral tribunals and courts to order various interim measures of protection in relation to arbitral proceedings.

Article 17 empowers the arbitral tribunal to grant interim measures to maintain or restore the status quo, prevent harm or prejudice to the arbitral process. This section also provides a non-exhaustive list of examples of the types of orders the tribunal may make including, security for costs, discovery, giving of evidence by affidavit, inspection of property, taking of photographs and samples in relation to the subject matter of dispute.

Section 17H allows the interim measure to be recognised as binding and enforced by the Australian Supreme courts.

Finally section 17J provides that the Supreme Court can issue the same interim measures in arbitration proceedings as those ordered in court proceedings.

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?

The DAB derives its jurisdiction from the contract of the parties and issues interim decisions that are binding on the parties as a term of the contract, unless and until overturned by a formal dispute process such as arbitration or court. A successful party who seeks to enforce a decision of a DAB must therefore rely on an action for breach of contract if the other party fails to comply.

7 Awards, decisions, recommendations, negotiated agreement

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

The DAB derives its jurisdiction from the contract of the parties and issues interim decisions that are binding on the parties as a term of the contract, unless and until overturned by a formal dispute process such as arbitration or court. A successful party who seeks to enforce a decision of a DAB must therefore rely on an action for breach of contract in litigation if the other party fails to comply. Absent special circumstances the party seeking to enforce the determination of a DAB should be able to enforce the determination by way of summary judgement (i.e. a judgement without a trial). Depending on the relevant jurisdiction such a judgement should be able to be obtained within 6 to 10 weeks.

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

Section 31(3) of the Uniform Commercial Arbitration Acts provides that an award must state the reasons upon which it is based (unless the parties have agreed that no reasons are to be given or the award records a settlement between the parties).

The High Court of Australia in *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 considered the extent of reasons an arbitral tribunal was required to provide under the old domestic arbitration legislation in Australia. Section 29(1)(c) of the old Commercial Arbitration Act 1984 (NSW) required an arbitrator to include in the award a statement of the reasons for making the award.

The High Court was faced with reconciling two competing judicial approaches. In *Oil Basins Ltd v BHP Billiton* [2007] VSCA 255, the Victorian Court of Appeal said arbitrators were to be held to a judicial standard and were required to give reasons for the making of an award equivalent to those that a judge would be obliged to give. The New South Wales Court of Appeal in *Gordian Runoff Ltd v Westport Insurance Corp* [2010] NSWCA 57 disagreed. The Court said it was wrong to require arbitrators to be held to the standard of reasons of judges because a court judgment is an act of state authority whereas an arbitration award is the outcome of a private consensual process that is meant to be shorn of the technicalities of curial decision making.

The High Court took an intermediate view. It agreed that reasons did not have to be of a judicial standard. But, it said it was "going too far to conclude that performance of the arbitral function is purely a matter of private contract" and a higher degree of explanation was required of an arbitrator than the NSW Court of Appeal found appropriate. The plurality said that more was required than a statement of conclusion.

Although the High Court's decision is based on the old legislation, the language of that provision (s. 29(1)(c)) is similar to s 31(3) of the Uniform Commercial Arbitration Acts. Accordingly, the better view is that the same judicial approach will be taken in construing s 31(3) of the Uniform Commercial Arbitration Acts.

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?

Australia's domestic arbitration law does not prohibit an arbitrator from giving a dissenting opinion. There are no specific provisions governing the issue of dissenting opinions by an arbitrator. In practice, dissenting opinions may be provided as part of the explanation of the award. This is also the case in other forms of ADR.

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?

Section 33 of the CAA replicates Article 33 of the Model Law.

An award can be corrected either by request of a party (with notice to the other party) or by the tribunal on its own initiative, within 30 days of the date of the award.

A party may also, with the consent of the other party, request the tribunal give an interpretation of a specific point or part of an award.

A party may, with the consent of the other party, request the tribunal make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

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?

Section 8 of the IAA implements Australia's obligations under the New York Convention and provides that a foreign award may be enforced in the Federal Court or the State or Territory Supreme Courts as if it were a judgment or order of that Court. This procedure only applies to awards made in a New York Convention country outside of Australia unless the party seeking enforcement is domiciled in Australia or a Convention country.

Under section 9 of the IAA, the party seeking enforcement must supply the court with the original award and arbitration agreement, or certified copies of both. The burden of proof is then on the party resisting the application to prove the existence of one of the limited grounds for refusal set out in Article 36 of the Model Law. The grounds for refusal are:

(a) the party seeking enforcement was under some incapacity at the time the arbitration agreement was made;
(b) the arbitration agreement is not valid;
(c) the party seeking enforcement was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present his case;
(d) the award is beyond the scope of the arbitration agreement;
(e) the composition of the arbitral tribunal was not in accordance with the arbitration agreement;
(f) the award has been set aside;
(g) the subject matter of the dispute is not arbitrable;
(h) to enforce the award would be contrary to public policy.

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?

No. Determinations of the DAB are not final and binding, unlike 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?

Yes. The only recourse to the award allowed is that permitted by Article V of the New York Convention and Article 36 of the Model Law. The relevant grounds which may give rise to a right to have recourse against the award are set out in the answer to the previous question.

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)?

It is likely that determinations by the DAB will be subject to review for the same reasons as expert determinations are subject to review. The courts will not review the merits of a DAB decision. A party seeking to have the DAB decision challenged would have to establish a jurisdictional error. For example, a failure to follow minimal due process, bias or a failure to make a determination in accordance with the mandate prescribed by the contract, would all be grounds for review of the DAB decision. That said, successful challenges of DAB decisions can be expected to be extremely rare.

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

No. The circumstances in which a party may challenge an expert determination agreed to be final and binding are very restricted. Mistake, error or negligence is not of itself sufficient. The error must have been of such a nature that the determination was not in accordance with the contract such that the determination is beyond the mandate given to the expert. That is, a jurisdictional error is required before a court will interfere with a determination of an expert which is prescribed to be final and binding. If there is some form of jurisdictional error which relates to the whole of the determination then the purported determination is likely to be void.

9 Trends and developments

While Dispute Avoidance Processes (**DAPs**), including Dispute Review Boards (DRBs) and Dispute Adjudication Boards (**DABs**), continue to gain momentum and result in success around the world, the Australian construction industry is yet to fully embrace DAPs, despite their documented global success. The only DAP model tried in Australia is the DRB, which was first used on the Sydney ocean outfall tunnels and ocean risers project in 1987. As at 2012, only 25 projects are recorded as having used a DRB.

Reasons that Australia has been slower to embrace DAPS than its global counterparts may include the following:

- absence of DAPS in Australian standard form contracts (unlike FIDIC contracts);
- Australian construction industry's lack of familiarity with DAPS;
- Australian construction industry's enthusiasm for and reliance on project alliancing[21].

[21] Thomas Denehy and Paula Gerber, 'What constitutes world's best practice for dispute avoidance in standard form contracts?' (2012) 28 *Building and Construction Law Journal* 266.

However, the establishment of the Dispute Resolution Board Australia, the Australian branch of the DRBF, and the not-for-profit organisation, DAPs Australia, in 2011 may promote knowledge and understanding in the Australian construction industry regarding the DAP process and its worldwide success. Furthermore, DAPs have become part of construction law courses at several of Australia's pre-eminent universities, meaning that future mainstreaming of DAPs in Australia may become possible.

10 Other Important Issues

An important issue of recent times has been the updating of the arbitration legislation for all Australian states, territories and the Commonwealth[22]. In 2010, the International Arbitration Act 1974 (Cth) (**IAA**) was amended to incorporate the revisions made to the UNCITRAL Model Law in 2006. In addition, the amendments addressed various problematic Australian court decisions. For instance, confidentiality has become an essential feature of domestic commercial arbitration. Although in the international arena it has long been accepted that confidentiality is an inherent feature of arbitration, the High Court of Australia held in *Esso Australia Resources Ltd v Plowman*[23] that confidentiality was an obligation on parties to an arbitration agreement only where that obligation was explicitly specified in the agreement. The new Commercial Arbitration Acts provide extensively for confidentiality obligations that are presumed to apply unless parties opt out.

Another development that has resulted from the amendments to the arbitration legislation is that where previously parties could impliedly opt out of the IAA by selecting arbitral rules such as the ICC Rules of Arbitration to govern their arbitrations (resulting in such arbitrations being governed by the relevant domestic arbitration legislation), it is now not possible for parties to opt out of the mandatory provisions of the UNCITRAL Model Law with the revised IAA now in place.

[22] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1990* (Qld).
[23] (1995) 183 CLR 10