IBA International Construction Projects Committee

ADR in Construction

Scotland

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Date: August 2018

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1 Background

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

The most common type of dispute resolution in domestic construction matters in Scotland is adjudication.

Adjudication was introduced by the Housing Grants Construction & Regeneration Act 1996 ("HGCRA 1996") which came into force for contract entered into after 1 May 1998. It provided for a binding (but interim) decision by an adjudicator within 28 days of referral of a dispute. The speed of this process and the cost savings this represented made it attractive and, as a result, it overtook arbitration and court as the primary method of dealing with construction disputes.

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

The HGCRA 1996, as amended by the Local Democracy Economic Development & Construction Act 2009, provides for statutory adjudication. They require every construction contract (as defined) to include a provision allowing disputes to be referred to adjudication. In the absence of a contract term, the Act provides for The Scheme for Construction Contracts (Scotland) Regulations 1998, as amended by The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011, to apply. The Scheme includes adjudication provisions which will be applied to parties' contracts in their entirety if their contract does not comply with the requirements of the Act.

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).

Many standard form construction contracts provide for adjudication. Decisions in adjudication are binding although they are interim so that the dispute can be re-run in a final form of dispute resolution procedure (court or arbitration). The purpose of the provision is primarily to comply with the statutory requirement (as above).

There is no legislation applicable to non-statutory dispute adjudicators. However, there is a huge amount of case law concerning enforcement of both statutory and contractual adjudication awards in the UK and guidance in Scotland can often be taken from English cases. In general, and as recently demonstrated, the courts will enforce decisions except in limited situations such as lack of jurisdiction of the adjudicator, bias of the adjudicator or breach of natural justice by the adjudicator.

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?

In Scotland, arbitration is governed by the Arbitration (Scotland) Act 2010 which incorporates as a Schedule, the Scottish Arbitration Rules.

Awards of an arbitrator or arbitral tribunal are final and binding on the parties (Arbitration (Scotland) Act Section 11(1)). Decisions of an adjudicator will be enforced (therefore are binding) but are not final, only interim, meaning the dispute can be re-run in court or arbitration.

The Arbitration (Scotland) Act 2010 only applies to arbitration, not adjudication.

Expert determination is a matter of contract. There are no statutory or procedural rules applicable although parties are free to apply procedural rules of their choice. If the contract provides for the decision in an expert determination to be binding on the parties, the courts will enforce the decision unless in limited circumstances such as the expert exceeding their jurisdiction.

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

In the Court of Session in Scotland there is the Commercial Court which is the most appropriate court for construction disputes.

There are a number of appointing bodies who will appoint arbitrators or adjudicators on request (e.g. Royal Institution of Chartered Surveyors, Chartered Institute of Arbitrators, Royal Incorporation of Architects in Scotland). However, they have no supervisory role in terms of the conduct of any proceedings. There is a Scottish Arbitration Centre but it does not have an administrative or supervisory role in relation to arbitrations.

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 is increasing in popularity for construction and other disputes, particularly where there are multiple parties. The courts are supportive of its use but will not compel parties to mediate or penalise them for a failure to mediate.

There has been an increasing trend towards early-stage management and resolution of disputes. The most commonly used standard forms of construction contract –

SBCC and NEC – provide for escalating dispute resolution. The first step of this is referral to senior representatives of the parties who are to try to reach a resolution.

Expert determination is sometimes used although not widely. It can be binding or non-binding, depending on what parties have agreed.

Dispute boards have been used on large infrastructure contracts in Scotland but their use is not common. That said, the most recent NEC4 suite of contracts, launched in June 2017, now makes provision for a Dispute Avoidance Board (DAB). This new procedure is, however, aimed for use on international projects and others that fall outside the scope of the HGCRA 1996. The objective of a DAB is to resolve potential disputes before they become disputes.

Hybrid forms of dispute resolution (such as Mediation-Arbitration or Arbitration-Mediation) are rarely used although in some standard form contracts an adjudicator's decision will become final if not challenged within a certain time.

1.7 Would FIDIC Red Book (2017) type DAAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAAB decisions be for further proceedings?

The nearest equivalent to FIDIC Red Book type DAAB decisions is likely to be adjudication. As adjudication decisions are only interim, parties can re-run the dispute in court or arbitration. In the re-run, the dispute is dealt with of new and the prior adjudication decision is not likely to have much status. Whilst attention may be drawn to it and the decision could be put forward in evidence, it is not likely to be given much weight.

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

Adjudication is cost effective, being cheaper and quicker than court or arbitration. Decisions are to be issued within 28 days of being referred or an extended period if agreed. Normally, parties bear their own legal and expert costs although contracts can contain a provision concerning allocation of these costs between the parties as long as the adjudicator's power to allocate his own fees and expenses between the parties is retained. The adjudicator may decide on who pays their fees with the principle that costs following the event being the norm.

Mediation is also cost effective. Normally parties bear their own costs and split the mediator's fees equally between them.

Expert determination is also cost effective in that it is often done only on the basis of documents and tends to be a quick procedure. Again, parties would tend to bear their own costs and split the cost of the expert but this is a matter for agreement.

In court, costs generally follow success. The parties are entitled to recover their legal and expert costs on the court scale (which does not generally amount to full recovery,

only a proportion). Court is likely to be significantly more expensive than either adjudication or mediation.

2 Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 21.6 of the FIDIC Red Book (2017) be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

The Arbitration (Scotland) Act 2010, section 4, simply provides:

> "*An 'arbitration agreement' is an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with arbitration provisions contained in a separate document).*"

An arbitration agreement can either be an arbitration clause in a contract or a post-contractual agreement to arbitrate in the form of a Deed of Submission to arbitration. The former is the more common. It is helpful if the agreement sets out the mechanism for the appointment of the tribunal, the number of arbitrators and the seat of the arbitration but the Act and Rules contain default positions on these if it does not. The same provision would apply to a multi-party agreement. In relation to that, the contract should contain conjoining provisions to allow all parties to be joined into one arbitration. These require careful drafting to be effective.

Clause 21.6 of the FIDIC Red Book (2017) would be considered a valid arbitration clause.

Scottish Arbitration Rule 46 sets out the court's powers to grant interim measures such as to order sale of any property in dispute in the arbitration, to make an order securing any amount in dispute, to grant interdict or interim interdict (Scottish equivalent of injunctions / interim injunctions). Rule 46 is a Default provision which means parties can contract out of it in whole or in part.

Section 9(4)(a)(ii) of the Arbitration (Scotland) Act 2010 provides that parties are to be treated as having agreed to modify or disapply a default rule if or to the extent the rule is inconsistent with, or disapplied by, any arbitration rules which the parties agree are to govern the process.

The FIDIC Red Book (2017), contains a 'multi-tiered' dispute resolution procedure. The first stage is referral of the dispute to the Dispute Avoidance/Adjudication Board (DAAB) followed if necessary by amicable settlement discussions and finally international arbitration. Clause 21.6 of the FIDIC Red Book provides that unless the parties agree otherwise, arbitration is to be under the Rules of Arbitration of the International Chamber of Commerce (ICC).

Article 28(1) of the ICC Rules provides for the arbitral tribunal having power to order interim or conservatory measures at the request of the parties, as it deems appropriate.

Article 28(2) allows the parties to apply to any competent judicial authority for interim or conservatory measures. The ICC Rules are therefore consistent with the Scottish Arbitration Rules. Clause 21.6 of the FIDIC Red Book (2017) therefore would not prevent a party seeking interim measures.

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

There has been some reluctance to force private individuals to be required to accept arbitration as a dispute resolution process in consumer matters. The Consumer Rights Act 2015 (CRA) provides a "modern framework of consumer rights" by consolidating previous consumer legislation on unfair terms such as the Unfair Terms in Consumer Contracts Regulations 1999 in its entirety and theUnfair Contract Terms Act 1977 in so far as it affects consumer contracts. The Act applies in relation to unfair terms in contracts concluded between a trader and a consumer.

Section 62(4) of the CRA provides that a contractual term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Section 63.1 states that Part 1 of Schedule 2 contains an indicative and non-exhaustive list of the terms which may or must be regarded as unfair.

Part 1 of Schedule 2 at paragraph 20 includes terms which have the effect of:

> *"…excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions…"*

Section 64 of the CRA describes how the assessment of fairness of price and subject matter terms in consumer contracts is limited. However, if such price or subject matter terms are not transparent (expressed in plain and intelligible language) and prominent (brought to the consumer's attention) then they can be assessed for fairness. Terms of the type listed in Part 1 of Schedule 2 can be assessed for fairness. It is therefore a matter of assessing the facts and circumstances in each case.

The Supreme Court case of *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2016] AC 1172 deals with Unfair Terms in Consumer Contracts and the fairness test [see from paragraph 102]. The court referred to the Spanish case of Aziz v Caixa d'Estalvis de Catalunya, Tarragona I Manressa (Catalunyacaixa) (Case C-415/11) [2013] All ER (EC) 770. The Aziz case was a reference from a Spanish court seeking guidance on the criteria for determining fairness of provisions of a loan agreement. It provided:

(1) The test of "significant imbalance" and "good faith" in article 3 of the Council Directive 93/13/ECC of 5 April 1993, "merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated". A significant element of judgment is left to the national court, to exercise in the light of the circumstances of each case.

(2) The question whether there is a "significant imbalance in the parties' rights" depends mainly on whether the consumer is being deprived of an advantage which he would enjoy under national law in the absence of the contractual provision.

(3) A provision derogating from the legal position of the consumer under national law, however, will not necessarily be treated as unfair. The imbalance must arise "contrary to the requirement of good faith". That will depend on "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations".

(4) The national court is required by article 4 of the Directive (regulation 6(1) of the 1999 Regulations) to take account of, among other things, the nature of the goods or services supplied under the contract. This includes the significance, purpose and practical effect of the term in question, and whether it is "appropriate for securing the attainment of the objectives pursued by it in the member state concerned and does not go beyond what is necessary to achieve them".

Where an arbitration clause is valid, the Arbitration (Scotland) Act provides at section 12 that the court will, on an application by any party, and subject to certain conditions, order enforcement of the award.

The approach in relation to other forms of ADR such as mediation would be that this is not mandatory but that it is encouraged. However, if a contract provides for mediation as a mandatory step, for example as part of an escalating dispute mechanism, then as long as the clause is drafted in sufficiently clear terms so as to make clear what is meant by this and whether or not a party has fulfilled the obligation, then this will be enforced (see answer 2.6 below).

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?

The most commonly used standard forms are the Scottish Building Contract Committee (SBCC) (the Scottish equivalent of the JCT forms in England & Wales) and the New Engineering Contract (NEC). NEC 4 was launched in June 2017. This amended much of the dispute resolution provisions contained with NEC3 and introduced the new Dispute Avoidance Board (DAB) option. Whilst still in its infancy, NEC4's aim is to become the contract of choice for international projects and others that fall outside the scope of the HGCRA 1996 (such as certain tiers of PFI projects).

The SBCC form contains clauses providing for court or arbitration, leaving it for parties to make an election as to which one to select. The default provision if they fail to make a selection is arbitration.

In SBCC, reference is made to the Arbitration (Scotland) Act and the Scottish Arbitration Rules which are contained in a Schedule to the Act as opposed to any institutional rules.

The NEC3 allows parties to select their tribunal, either court or arbitration. There is also an option to specify an arbitration procedure so this is left for parties to decide.

Both SBCC and NEC4 provide for Adjudication as required in terms of the HGCRA 1996. They both also allow for either Court or Arbitration to be selected as the final form of dispute resolution. However, both now provide for an escalating dispute procedure. SBCC contains a non-mandatory mediation provision directing parties to consider this as an option. It also contains an optional clause allowing for senior management review as a first step to resolve disputes.

NEC4 provides for a multi-tier dispute resolution with the initial referral of all disputes to the parties' Senior Representatives. It is the intention that the Senior Representatives process should act as the primary dispute resolution process, adjudication as a secondary process and arbitration/litigation as a third and final resolution process. A new Option W3 has also been introduced. It is only applicable where the HGCRA 1996 does not apply and provides for the obligatory referral of all "*potential disputes*" to an impartial standing DAB before any subsequent referral to a tribunal. A dispute cannot be referred to litigation/arbitration unless a notice of dissatisfaction is served in relation to a recommendation of a DAB within four weeks.

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

There would require to be either back to back dispute resolution provisions, including conjoining provisions or some form of equivalent project relief provisions or a name borrowing provision whereby a sub-contractor can take the name of the main contractor and pursue the employer in order to involve a third party.

The same would apply to other forms of ADR also. As these tend to be consensual as opposed to being mandatory, it tends to be a matter of agreement what parties are involved.

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

Expert determination is not supported by legislation and its binding nature is a matter of contract. The process is only mandatory if parties have contracted for this. Whether the determination is binding or not depends on the terms of the contract – the contract can provide for it to be binding or non-binding. Some contracts (such as the Institute of Chemical Engineers (IChemE) and PFI contracts) contain expert determination provisions. The IChemE has a set of Rules for Expert Determination. However, it is of course open to parties to agree to an expert determination if they wish to do so.

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?

Whether a party may skip any tiers will depend on whether these are stated in the contract to be mandatory (where the contract states that each step is a necessary prerequisite before moving on to the next) or optional (where the contract is written in non mandatory language stating that parties may choose what steps to pursue, their decision then being based on what is suitable for the particular circumstances). Multi-tiered processes are recognised and each would be interpreted on its own terms.

These clauses are increasingly common and now feature in the most commonly used standard forms of construction contracts. They can serve as an effective way to achieve early resolution of disputes at senior management or board level or through mediation, without the need for formal dispute resolution procedures such as arbitration or litigation. However, in some cases, they can be misused by a party on the receiving end of a claim simply as a way to delay the claim being dealt with if this suits their purpose.

The sort of difficulties that can arise are shown in the following *English* cases:

In *Cable & Wireless plc* v *IBM United Kingdom Limited* [2002] EWHC 2059 (Comm), Cable & Wireless applied to the court for a declaration of the meaning of a clause of a Global Framework Agreement (GFA) they had entered into with IBM. IBM applied for the claim to be stayed pending the dispute being referred to ADR. This required the court to consider the multi-stage dispute resolution provisions of the GFA.

The court analysed the clause and considered there was no doubt it was the intention of parties that litigation was to be a last resort if negotiation or ADR failed. The court considered there to be extremely strong case management grounds for allowing the reference to ADR to proceed and delayed hearing the Cable & Wireless claim pending all outstanding disputes going to ADR.

In *Tang Chung Wah* v *Grant Thornton International Limited* [2012] EWHC 3198 (Ch) it was argued an arbitrator's award was of no effect because the tribunal did not have jurisdiction. The basis for this argument was that the underlying contract contained an escalating dispute clause which, it was argued, operated as a condition precedent to any arbitration taking place. The requisite steps had not been taken and therefore the arbitration was premature and the award should not be enforced.

The court considered whether the dispute clause constituted an enforceable obligation and whether it was a condition precedent to arbitration.

On the basis of numerous authorities, the court listed the relevant guidelines:

Agreements to agree and agreements to negotiate in good faith, without more, are unenforceable.

Good faith is too open-ended a concept to provide a sufficient definition of what such an agreement must, as a minimum, involve and when it could objectively be determined to be properly concluded.

However whether a provision is only one part of an otherwise enforceable contract the court will do its utmost to find a construction which gives it effect. It may imply criteria or supply machinery sufficient to enable the court to determine (1) what process is to be followed and when and (2) how, without the necessity for further agreement, the process is to be treated as successful, exhausted or properly terminated.

The court will consider each case on its own terms. The test is not whether a clause is a valid provision for a recognized process of ADR but whether the obligations it imposes are sufficiently clear and certain to be given legal effect.

In the context of a positive obligation to attempt to resolve a dispute amicably before referring a matter to arbitration, the test would be whether the provision prescribes, without the need for further agreement, a sufficiently certain and unequivocal commitment to commence a process. That would need to include the steps each party is required to take to put that process in place. These need to be sufficiently clearly defined to enable the court to determine objectively what is the minimum required of the parties to the dispute in terms of participation and when the process will be exhausted without breach.

Where there is a negative stipulation preventing a reference to arbitration until a given event, it would be necessary for the event to be sufficiently defined and it would need to be possible for a court to ascertain whether or not it had happened.

In this case, the negotiation clause was considered *"too equivocal in terms of the process required and too nebulous in terms of the content of the parties' respective obligations to be given legal effect"*. The clause contained no guidance on the quality or nature of efforts to be made to resolve a dispute. This left the court unable to determine whether or not there had been compliance. However a further clause which prevented a reference to arbitration until a panel determined it could not resolve or one month after the reference to the panel, was interpreted taking into account the purpose of the provision namely to provide an end date after which any restriction on the right to arbitrate would lapse.

Here, the panel had not been established as no Board member considered they could participate. However, more than a month had passed before the reference to arbitration. That was considered sufficient. The court considered it unrealistic to consider parties could have intended the Board could indefinitely postpone the right to arbitration simply by not convening the requisite panel.

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?

Questions of criminal liability and status such as divorce, marriage and paternity of children would require to be dealt with by the courts.

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?

Expert determination is a matter of contract between the parties so they are free to agree what matters may be referred.

Adjudication can be contractual in which case it is again for parties to agree. It may also be statutory adjudication under the HGCRA 1996 (as amended) in which case it applies only to disputes arising out of construction contracts as defined in the Act.

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (for example, may a FIDIC Red Book (2017) type DAAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAAB may decide)?

An arbitral tribunal may, in terms of Scottish Arbitration Rule 48, order the payment of a sum of money, including a sum in respect of damages. The award is to be made in any currency agreed by the parties or, in the absence of agreement, in such currency as the tribunal considers appropriate.

In terms of Scottish Arbitration Rule 49, the arbitral tribunal's award may (a) be of a declaratory nature, (b) order a party to do or refrain from doing something (including ordering the performance of a contractual obligation) or (c) order the

rectification or reduction of any deed or other document (other than a court decree) to the extent permitted by the law governing the deed or document.

In terms of Scottish Arbitration Rule 50, the tribunal has power to award interest, specifying the interest rate and the period for which interest is payable.

It is clear from the above that both issues of fact and of law may be the subject of an arbitral award.

In terms of other binding decisions that can be issued by other tribunals such as DAB's, this would be a matter of what the contract allows and what falls within their jurisdiction in terms of what question(s) is referred to them for a decision.

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

No, although, in common with most commercial entities, they will require to bear in mind the need to be able to justify the basis of any settlement reached.

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

No. The Arbitration (Scotland) Act 2010 section 34 provides that the Act binds the Crown. Governmental bodies also have no immunity.

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?

A typical procurement dispute would be a challenge taken by the losing party in a tender process to the effect that the award of the contract to another party was not justified. In the first instance their aim would be to prevent the formal contract award from taking place. That requires a court action to be raised. It is unlikely that any form of ADR would be appropriate at that stage. If, however, the unsuccessful bidder does not manage to prevent formal contract award, their remedy is then one of damages. That would normally be pursued through a court action also. There is no statutory provision for ADR and it is an EU requirement in terms of the Remedies Directive that there be effective remedies. At that stage a Mediation may become appropriate to reach a negotiated resolution if parties are agreeable to this. Arbitration is something that the parties would have to contract for or separately agree to as it is not mentioned in the statute. At the stage of a procurement challenge, there is no contract in place. In practice, it is therefore not used.

3.7 In the FIDIC Red Book (2017), Appendix General Conditions of Dispute Avoidance/Adjudication Agreement, Annex DAAB Procedural Rules under 5.1 is stated "…the Parties empower the DAAB, to (c) decide on the DAAB's own jurisdiction, and the scope of any Dispute referred to the DAAB". In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAAB clause), would the DAAB be allowed to decide on issues outside the contract with the DAAB clause?

No. The DAAB would require to restrict itself to issues referred to it. Unless there were conjoining provisions allowing for disputes under more than one contract, the DAAB would only be allowed to decide matters under the contract referred to it.

3.8 If the DAAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

Yes. An adjudicator or DAAB only has jurisdiction to determine matters referred to it.

4 Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (such as DABs) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

There are no special rules for construction as opposed to any other types of disputes but it would be normal for parties to select an arbitrator with suitable expertise and/or to select an appointing body with an ability to appoint arbitrators with suitable expertise.

Parties may include in the arbitration agreement or may agree subsequently that an arbitrator requires to have certain qualifications or expertise. Rule 10 of the Scottish Arbitration Rules allows a party to object to the appointment of an arbitrator on the ground that the arbitrator does not have a qualification that the parties have agreed (before the appointment) that the arbitrator must have.

Similarly, adjudicators do not need to have special qualifications *per se*, however, parties can insist upon certain experience or expertise in the contract or that a particular nominating body is used. There is also scope in the application forms submitted to nominating bodies to indicate the nature of the dispute and the most appropriate expertise of the adjudicator (e.g. a QS for valuation issues).

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators?

There are appointing bodies which would commonly be used or referenced within standard form contracts for construction arbitrations such as the Royal Institution

of Chartered Surveyors (RICS), Royal Incorporation of Architects in Scotland (RIAS) and Chartered Institute of Arbitrators (CIArb). These bodies usually hold a list of names of arbitrators who are on their panels. These lists are not generally made public. Instead, parties apply to the relevant body, requesting that they appoint an arbitrator and providing brief details of the nature of the dispute and the body then appoints someone from their list with the relevant expertise.

4.3 Do these institutions appoint the arbitrators or do the parties appoint the arbitrators?

Where stated in the contract that they will do so, these bodies will appoint arbitrators. It is still open to parties to agree the identity of arbitrators and appoint them direct. In practice they would often be members of one or more of these bodies although they do not have to be.

4.4 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?

Parties may agree to appoint any party they wish.

Each body holds its own list of arbitrators who meet the criteria set by the relevant body for inclusion on their list such as having undergone relevant training, having passed assessment courses or peer reviews or having undertaken sufficient Continuing Professional Development to ensure they remain up to date.

4.5 Is there a difference with other forms of ADR?

There is a similar procedure with adjudication. As with arbitration, there are appointing bodies which would commonly be used or referenced within standard form contracts for construction adjudications such as the Royal Institution of Chartered Surveyors (RICS), Royal Incorporation of Architects in Scotland (RIAS) and Chartered Institute of Arbitrators (CIArb). These bodies usually hold a list of names of adjudicators who are on their panels. These lists are not generally made public. Instead, parties apply to the relevant body providing brief details of the nature of the dispute and requesting that they appoint an adjudicator. The body then appoints someone from their list with the relevant expertise.

For mediation, the construction specialism is often a secondary requirement to mediation skills. There, parties are usually able to reach agreement on the identity of a mediator but bodies such as the Centre for Effective Dispute Resolution (CEDR) and other mediation providers can make appointments if requested to do so.

4.6 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer?

In most cases, arbitrations are dealt with by a sole arbitrator. This would often be a construction professional but could also be a lawyer depending on the nature of the dispute.

4.7 If not, are there requirements that the secretary added to the tribunal must be a lawyer?

Sometimes arbitrators seek legal / procedural assistance from lawyers who would be appointed as a clerk. This is not always done, even where the tribunal requires to rule on an issue of law. Given the cost implications, Rule 32 of the Scottish Arbitration Rules provides that parties' consent is required.

In most cases, adjudications are dealt with by a sole adjudicator and in most cases this would be a construction professional, although sometimes a lawyer. Adjudicators sometimes seek legal / procedural assistance from a lawyer. This is not always done, even where the adjudicator requires to rule on an issue of law.

4.8 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?

There would be no requirement for a lawyer to be on the tribunal, even if issues of law are involved.

4.9 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession?

In most cases, domestic arbitrations are dealt with by a sole arbitrator and in many cases this would be an engineering/construction professional, although sometimes a lawyer.

4.10 Are panels integrated both by lawyers and construction professionals possible/common?

Panels consisting of lawyers and construction professional would be possible (and common if there was a tribunal of three) but in most cases there is a sole arbitrator or adjudicator.

4.11 Is there a difference with other forms of ADR?

The same would apply in adjudications. The norm is one decision maker only.

4.12 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?

Arbitrators should base their decisions on the submissions and evidence presented. They may use their own technical expertise so that they understand the issues but should not conduct their own investigations or add to the evidence presented. In the event that they plan to rely on a matter within their expertise but which neither party has addressed, they should give the parties an adequate opportunity to comment on this. Failure to do so would run the risk of being regarded as a breach of natural justice and render the decision unenforceable.

4.13 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?

Rule 47(1) of the Scottish Arbitration Rules requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute or, if no such choice is made, the law determined by the conflict of law rules which the tribunal considers applicable.

Rule 47(2) specifically provides that the tribunal must not decide the dispute on the basis of general considerations of justice, fairness or equity unless they form part of the law concerned or the parties otherwise agree.

Rule 47(3) provides that the tribunal must have regard to the provisions of any contract relating to the substance of the dispute, the normal commercial or trade usage of any undefined terms in the provisions of any such contract, any established commercial or trade customs or practices relevant to the substance of the dispute and any other matter the parties agree is relevant in the circumstances.

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?

Rule 24 of the Scottish Arbitration Rules requires the tribunal to be impartial and independent, treat the parties fairly and conduct the arbitration without unnecessary delay and without incurring unnecessary expense. Treating the parties fairly is said to include giving each party a reasonable opportunity to put its case and to deal with the other party's case.

A party does not have a right to legal representation nor does it require to have this. It is a matter for each party to decide on its representation.

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

Rule 28 of the Scottish Arbitration Rules allows the tribunal to determine the procedure to be followed. This includes the extent to which the arbitration is to proceed by way of hearings for the questioning of parties, written or oral argument, presentation or inspection of documents or other evidence or submission of documents or other evidence.

In practice, for some lower value and / or non complex disputes, a documents only procedure would be used as a matter of course (eg rent reviews). For most construction cases, it would be usual to have a combination of documents being

produced, possibly some written submissions on legal issues and often hearings for the questioning of witnesses of fact and experts.

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?

Rule 28 of the Scottish Arbitration Rules allows the tribunal to determine the procedure to be followed. This includes whether to apply the rules of evidence used in legal proceedings or any other rules of evidence.

5.4 Is a hearing mandatory for all forms of ADR?

No. This is a matter for the arbitrator/adjudicator to decide depending on the circumstances of each case. Parties can include this requirement in their contract provisions but one of the advantages of arbitration is its flexibility and the ability of the arbitrator to adopt a procedure appropriate to the particular dispute and with an overriding principle of resolving the dispute without unnecessary delay and without incurring unnecessary expense (Arbitration (Scotland) Act 2010 Section 1(a) and Scottish Arbitration Rule 24(1)).

As stated above, for most construction cases in arbitration, it would be expected that a hearing would take place.

In adjudication however, adjudicators often make their decision with either only a very short hearing (usually one day) or else with no hearing. This tends to be due to the short timescales within which adjudications are run. If the parties request a hearing or the adjudicator considers that they would benefit from hearing from the parties to clarify matters then it would usually take place.

5.5 In the FIDIC Red Book (2017) Appendix General Conditions of Dispute Avoidance/Adjudication Agreement, Annex procedural rules under 5.1 is stated (f) *conduct any meeting with Parties and/or any hearing as the DAAB thinks fit, not being bound by any rules or procedures for the hearing other than those contained in the Contract and these Rules*". Under your jurisdiction, would the DAAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

It would be expected that a hearing would be conducted following the rules of natural justice. This would include treating the parties fairly, giving each party a reasonable opportunity to put its case and to deal with the other party's case and not having private discussions with one party without the presence of the other.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)?

The most commonly used experts in arbitrations are quantum experts (valuation issues, loss and expense, disruption claims), delay experts (for extension of time claims) and sometimes designers if there are matters of design changes or defective

design. If there are issues related to defects then it is common to use experts in relation to the particular type of defect at issue.

5.7 Is there a difference on this topic between arbitration and court litigation in your jurisdiction?

This would be the same as in court actions.

5.8 Are experts used in the same manner in procedures for tribunals issuing binding decisions?

In adjudications, experts are less often used. The adjudicator appointed tends to be someone with expertise in the appropriate area (often concerning valuation issues) and they are regarded as being expert in the area. However if there are technical matters on which expert input is considered to be required, they can be used. They would not have the same role as in arbitration or court. For example, there would not be meetings of experts or time to fully consider their evidence by examination/cross examination. Their reports would simply be included as part of the supporting documents submitted for consideration by the adjudicator.

In mediation, parties often involve their experts if there are particularly complex technical matters involved but this is a matter for each party to decide. Again, they would not have the same role as in arbitration or court. Instead, they will be used in the mediation to assist in presentation of a party's case (for example identifying key issues of focus), to test technical points made by the other party and to assist in the risk assessment carried out by parties when considering potential routes to a resolution. If the resolution involves a technical solution such as carrying out remedial work they may be involved to agree a scope for this.

5.9 Are these experts mostly party appointed or appointed by the tribunal?

In most cases the experts are party appointed rather than appointed by the tribunal.

5.10 Is there a difference as to the evidential value?

Experts are expected to be independent and owe a duty to the tribunal, not to the party appointing them. In theory therefore there should be no difference in evidential value whether they are party or tribunal appointed. However, where each party has appointed an expert, it is quite likely that they will have conflicting views and therefore the tribunal will require to prefer the position of one expert over the other, based on the report prepared and the evidence they give in a hearing. A tribunal appointed expert will not be subject to the same comparison with others.

5.11 How are the costs of experts allocated?

Costs of experts would generally follow success so that the winning party would expect to recover the cost of its experts from the losing party. There are exceptions to this. For example if the expert was dealing with a distinct matter on which the overall winner lost, although succeeding on other matters, that expert's cost may not be recovered from the other party.

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

Yes the expert is to be independent and owes a duty to the tribunal.

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

Normally experts submit a written report and would then give oral evidence in relation to it.

5.14 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert?

The tribunal requires to reach a decision based on its assessment of the evidence – both factual and expert. It should not ignore evidence but should weigh it up and reach its decision.

5.15 Does the tribunal need to give reasons for following or not following the statement of an expert?

In arbitration, Rule 51 of the Scottish Arbitration Rules requires the tribunal to state in its award the tribunal's reasons for the award. This is a default rule so parties are able to disapply it if they agree to do so. It would be good practice in writing an award to explain in the reasons why evidence has been accepted, rejected or preferred and other relevant elements of the reasoning.

In adjudication, the adjudicator may be asked by one or both of the parties to provide reasons for the decision. In the absence of a request they are not obliged to do so, but in practice most parties request this and adjudicators do so as a matter of course.

5.16 Can part of the decision by the tribunal be "delegated" to the expert?

No. The tribunal requires to make the decision. An expert can be asked for views but the tribunal requires to weigh this up with the rest of the evidence presented and make its decision.

5.17 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?

The procedure in an arbitration is entirely a matter for the arbitral tribunal. It is sometimes the case that one expert gives evidence while the other(s) are in attendance. There is no reason why hot tubbing should not be used and its use is becoming more common.

5.18 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?

The arbitral tribunal determines the procedure to be followed in the arbitration (Scottish Arbitration Rule 28). This would include procedure in relation to site visits. They are allowed and are usually used when viewing the site will assist the tribunal to gain an understanding of the matters at issue. The tribunal requires to bear in mind the overriding general duty of the tribunal to conduct the arbitration without unnecessary delay and without incurring unnecessary expense (Scottish Arbitration Rule 24).

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

It is best practice for all parties to be present during any site visit. This would be in accordance with Scottish Arbitration Rule 24 which requires the tribunal to treat the parties fairly. That is said to include giving each party a reasonable opportunity to put its case and to deal with the other party's case.

The issue if one party did not attend could be that the other takes an opportunity to put matters relevant to its case to the tribunal which the non-attending party is not then aware of and does not get an opportunity to respond. Even if this does not happen, there can be a suspicion that it did. In the interests of justice being seen to be done, attendance of both parties is best.

If the tribunal intends to treat information gained during a site visit as material to its decision then each party should be given an opportunity to comment on this.

5.20 How common and how important generally are witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction?

Witnesses of fact are very commonly used and it would be unusual if there was no factual evidence presented.

5.21 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?

There are no restrictions on admission of evidence from witnesses who are employees or consultants. In fact, they often have valuable information about the factual background to matters at issue which can be highly relevant. It can be that if a witness is clearly presenting a biased view that their evidence is given less weight but that is not so much an issue of admissibility as of the value or weight of the evidence presented.

5.22 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?

This is entirely a matter for the discretion of the tribunal.

5.23 Are there any rules on valuation of evidence in the law or in such rules?

Evidence requires to be relevant to the matters at issue. It also requires to be admissible. Subject to this, it is then a matter of weighing up considerations such as the witness being independent, the witness' evidence being based on contemporaneous records, whether the witness' evidence is consistent with records and whether the witness was the person best placed to have knowledge of the matters on which evidence was given.

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?

Scottish Arbitration Rule 28(2)(c) (a default provision meaning parties can contract out of it if they wish) provides that it is for the arbitral tribunal to determine whether any documents or other evidence should be disclosed by or to any party and, if so, when such disclosures are to be made and to whom copies of disclosed documents and information are to be given.

Rule 35 (a default provision) allows the tribunal to direct a party to allow the tribunal, an expert or another party (a) to inspect, photograph, preserve or take custody of any property which that party owns or possesses which is the subject of the arbitration (or as to which any question arises in the arbitration) (b) to take samples from or conduct an experiment on any such property or (c) to preserve any document or other evidence which the party possesses or controls.

Rule 45 (a mandatory provision) allows the court, on an application by the tribunal or any party, to order any person to attend a hearing for the purposes of giving evidence or to disclose documents or other material evidence to the tribunal.

Rule 46 (a default provision) allows the court to order the sale of any property in dispute, to make an order securing any amount in dispute and to make an order under section 1 of the Administration of Justice (Scotland) Act 1972 (which relates broadly to inspection, photographing, preserving, taking custody or detaining of any documents or property in relation to which any question may arise in the proceedings and orders for production and recovery, taking of samples of carrying out of experiments).

6.2 Are these measures usually decided by the arbitral tribunal or by a judge?

As is evident from the above, interim measures are available both from the tribunal and the court.

6.3 In the FIDIC Red Book (2017) Appendix General Conditions of Dispute Avoidance/Adjudication Agreement, Annex procedural rules under 5.1 is stated *(j) decide upon any provisional relief such as interim or conservatory measures (...)* The FIDIC Red Book has no explicit provisions for DAAB 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?

Adjudicators do not have the sort of powers referred to above in relation to interim or conservatory measures but as the process is intended only to take 28 days from referral of a dispute, that does not tend to cause any difficulty in practice.

However, adjudication decisions are, by their nature, interim only so that, if parties choose to do so, the dispute can be re-run in a final dispute resolution process in court or arbitration where these powers are available.

7 Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced?

Yes a binding decision in, for example, adjudication, would be enforceable. There are numerous reported cases concerning enforceability of adjudicator's awards in which the courts emphasize that they will enforce except in restricted circumstances such as breaches of natural justice, the adjudicator failing to exhaust or indeed acting outside his jurisdiction or bias of the adjudicator.

Enforcement requires the party wishing to enforce to raise a court action requesting a court order which requires compliance with the adjudicator's decision.

7.2 Would FIDIC Red Book (2017) clause 21.7 allow enforcing a DAAB decision directly through court in your jurisdiction (skipping the arbitration)?

It is considered that the approach which would be adopted if Scots law and the Arbitration (Scotland) Act 2010 applied would be to seek a provisional award ordering the other party to perform their contractual obligation to give effect to the DAAB decision. The Scottish Arbitration Rules allow for both provisional awards (Rule 53) and for such orders for performance of a contractual obligation to be made (Rule 49).

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

The award does not have to be reasoned but normal practice is for parties to request reasons and the adjudicator to provide these.

7.4 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?

There is nothing precluding dissenting opinions but in the majority of domestic arbitrations, there is a sole arbitrator so the issue does not arise.

The issue would also not arise in adjudication or expert determination where there is normally only one decision maker.

7.5 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?

Rule 58 of the Scottish Arbitration Rules provides for correction of an award to correct any clerical, typographical or other error in the award arising from act or omission or to clarify or remove any ambiguity in the award.

The arbitral tribunal may make such correction on its own initiative or on an application by any party. The application requires to be made within 28 days of the award or such later date as the court may allow.

In adjudication, the HGCRA 1996 as amended by the Local Democracy Economic Development & Construction Act 2009 provides at section 108(3A) for the construction contract to include a provision permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.

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?

A party would require to raise a court action for enforcement.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book (2017) DAAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

The Arbitration (Scotland) Act 2010 section 18 makes reference to New York Convention Awards being awards made further to a written arbitration agreement. Given the specific reference to arbitration both there and in the New York Convention itself, it is considered that recognition and enforcement of awards would be restricted to arbitral awards.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book (2017) type DAAB decision?

The Arbitration (Scotland) Act section 19 provides for any award made pursuant to a written arbitration agreement in the territory of a state which is party to the New York Convention to be recognised as binding and that the court may enforce such an award.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book (2017) type DAAB decision in case of fraud, failure to follow minimum due process or other serious irregularity?

Grounds for challenge of an adjudication decision would include fraud, bias of the decision maker and failure to follow the rules of natural justice (or due process) and the decision-maker exceeding its jurisdiction.

8.5 Will these remedies make a DAAB decision unenforceable in court without first having to go through arbitration (clause 21.6 FIDIC Red Book (2017))?

In the event of a successful challenge based on these grounds, an adjudicator's decision would not be enforced by the court.

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

In certain, limited circumstances, yes.

In the English Court of Appeal case of *Jones and Others* v. *Sherwood Computer Services plc* [1992] 1 W.L.R. 277 it was said the principal ground for challenge would be that an expert had materially departed from his instructions, so that the determination is not a determination made in accordance with the terms of the contract. Material is said to be anything other than trivial or de *minimis*, meaning that it is so minor as not to make any possible difference to either party. In such cases, the determination would not be binding on the parties.

In the English Court of Appeal case of *Ackerman v Ackerman* [2011] EWHC 3428 (Ch) a departure from the expert's instructions was found not to be material where the decision arrived at by the expert was inevitable and the decision was not invalidated by virtue of the departures. The departures from the agreement did not amount to a breach and the contract had not been repudiated.

In the English case of *Nikko Hotels (UK) Ltd* v. *MEPC plc* [1991] 2 E.G.L.R. 103, it was said that unless the terms of the contract provided otherwise, an expert determination cannot be challenged on the ground the expert made a mistake, as long as the expert answered the question which was put to him and had not otherwise departed from his instructions.

In the English Court of Appeal case of *Veba Oil Supply & Trading GmbH* v. *Petrograde Inc* [2001] EWCA Civ 1832 the principle was stated (following Lord Denning in *Campbell* v. *Edwards* (1976)) that:

'if an expert makes a mistake whilst carrying out his instructions, the parties are nevertheless bound by it for the very good reason that they have agreed to be bound by it. Where, however, the expert departs from his instructions, the position is very different: in those circumstances the parties have not agreed to be bound.'

It was said that once a material departure from instructions is established, the court is not concerned with the effect of that on the result. The departure itself is sufficient to render the decision non-binding. The case set out the test for establishing whether an expert has materially departed from his instructions. It was said that any departure would be material unless it could truly be characterized as trivial or de *minimis*. In considering what parties would have regarded as being material, the court will take into account the subject matter and express terms of the contract and all the relevant circumstances.

In the English case of *Bernhard Schulte GmbH & Co. KG v Nile Holdings* [2004] EWHC 977 (Comm) the court recognised that there was a distinction between the expert making a mistake in carrying out his functions on one hand (which was said to be part of the risk run by parties in agreeing to be bound by the expert's decision) and failures to carry out his instructions on the other (which would mean the expert's determination had not been made under the contract and would therefore not be binding due to the failure to adhere to the contract requirements and failure to carry out the functions required of him). It was also noted that where the contract provides for the decision of an expert to be final and binding, it binds the parties as long as there is no fraud, collusion or bias.

The above cases are likely to be of persuasive effect in Scotland in the absence of any specific Scottish authority on the points but the Scottish Courts are not necessarily bound by them.

9 Trends and developments

Adjudication is now the primary means of resolution of construction disputes. Although decisions are only interim, not final, the reality in practice is that the vast majority of these are treated as final by the parties in that they are prepared to live with the decisions and move on. This is particularly so given guidance from the Technology and Construction Court in London which has held that for adjudications relating to interim payment applications, a dissatisfied party is best placed to challenge any financial award made by an adjudicator, in a subsequent application process as opposed to challenging the adjudicator's decision in enforcement proceedings in court.

Generally speaking, the attraction to parties has been the speed with which they can get a decision, the relatively low cost (significantly cheaper than court or arbitration) and the support of the process by the courts which have repeatedly emphasised through decisions in enforcement actions that it is only in very limited circumstances that decisions will not be enforced.

In terms of a choice between court and arbitration, one of the widely used standard forms, SBCC (the Scottish equivalent to JCT), had court as the default option with parties requiring to specifically opt in if they wish to arbitrate for several years but in the latest edition (2016), changed that back to Arbitration. However, the popularity of adjudication, has seen domestic arbitration decline. Where the contract is silent or where the parties select court as the dispute resolution method of choice, the courts are equipped through the Court of Session Commercial Court and the Commercial Courts in certain Sheriff Court areas to deal effectively with construction disputes. These can be dealt with in a more flexible and managed way that ordinary, non commercial actions.

The introduction of the Arbitration (Scotland) Act 2010 and the establishment of the Scottish Arbitration Centre in 2011 has, however, seen an increase in the use of arbitration in Scotland. This is particularly so in the case of cross-border disputes. The results of the 2018 International Arbitration Survey carried out by Queen Mary University of London revealed that over 80% of respondents favored arbitration as the dispute resolution mechanism for international construction disputes.

Mediation is also increasing in popularity. In terms of the Simple Procedure Rules which deal with low value claims of less than £5,000 a court can order parties to go to mediation. In other actions, while there is no requirement to mediate, there is a certain degree of judicial encouragement to do so and certainly a recognition that it can be successful, but, to date, without sanctions being imposed for failure to do so. This is in line with the philosophy of the courts which is that a party has a right to have their dispute dealt with by the courts if they so desire.

There are an increasing number of standard form contracts with collaborative working provisions, often accompanied by escalating or multi-tier dispute resolution clauses which are an attempt to resolve disputes at an early stage. It is difficult to gauge if these are having an impact since, if this resolves matters, the disputes will remain out of the public eye.

10 Other Important Issues

N/A