IBA International Construction Projects Committee

ADR in Construction

United States of America

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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?

Most construction disputes that are not settled through informal negotiations between the parties are resolved by mediation. If the parties fail to reach a settlement through mediation, the dispute will be resolved either through court litigation or binding arbitration.

Consistent with other types of civil litigation in the United States, the vast majority of construction disputes are resolved through informal negotiations or mediation. As between court litigation and arbitration, the construction industry has historically embraced arbitration due to the complexities often attending such cases, relative speed and flexibility of the process, and the unease with which many commercial actors view the American jury system.

This preference for arbitration was for many years reflected in the most popular form construction agreements used in the United States, those produced by the American Institute of Architects (AIA). Since 2007, however, the AIA A201 family of contract documents have provided for court litigation as the default dispute resolution mechanism, reflecting some degree of dissatisfaction among participants in the construction industry with the increasing expense and delay of arbitration, as arbitration procedure (e.g., use of extensive document discovery and witness depositions) becomes more like court litigation without the corresponding benefits of appellate review of the final decision.

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

Generally speaking, no. The United States has a federal system of government, under which there are federal, state, and local sources of law. In terms of procedural law, federal law applies in the federal courts, and state law applies in state courts.

The Federal Arbitration Act applies to all arbitration proceedings involving construction affected by interstate commerce and pre-empts any state arbitration laws to the extent they conflict with it. In terms of substantive law, federal law will apply to resolve construction disputes involving the United States Government while the law of one of the fifty (50) states—often supplemented by local or municipal law—will apply to resolve all other domestic construction disputes.

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

Aside from the Federal Arbitration Act and the arbitration acts of the fifty (50) states, there is no legislation that applies to binding decisions of non-statutory dispute adjudicators.

"Arbitration" is the generic term under US law for all types of binding private dispute resolution, regardless of the label used by the parties to describe the process ("arbitration," "expert determination," etc.). Whether a process amounts to "arbitration" depends upon whether the parties have agreed to submit a dispute to a third party for binding determination. *See*, *e.g.*, *Bakoss v. Certain Underwriters at Lloyds of London*, 707 F.3d 140, 143 (2d Cir. 2013) (citing cases).

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?

As noted above, all forms of binding private dispute resolution fall under the generic label of "arbitration" in the United States, the essence of which is an agreement to submit a dispute to a third party for binding determination. In the United States, "arbitration" is regulated at both the federal (national) level and by each of the fifty (50) states. Thus, the Federal Arbitration Act (FAA) and, to the extent not inconsistent with the FAA, the laws of the applicable state jurisdiction govern "arbitration." The FAA does not define "arbitration," which has led to some debate whether the term "arbitration" should be defined, for purposes of the FAA, by reference to federal judicial opinions applying the FAA (i.e., federal common law) or by reference to the laws of the individual states. This was the issue in *Bakoss v. Certain Underwriters at Lloyds of London*, 707 F.3d 140 (2d Cir. 2013), in which the United States Court of Appeals for the Second Circuit (which includes New York) held that federal common law should supply the definition of "arbitration" and that an agreement to submit a dispute to a third party to make a final and binding decision was an agreement to arbitrate. Use of the word "arbitration" (or variants thereof) are thus unnecessary for US courts to consider the process "arbitration." Moreover, the cases relied upon in *Bakoss* considered as "arbitration" submission of the dispute to "binding resolution" or "decision" by a third party, without specifying that the resolution or decision be "final" as well. Because the FIDIC forms of construction contract are not generally used in the United States, the US courts have had little occasion to consider the two-step FIDIC dispute resolution procedure in which an adjudicator's decision may be

binding, but not necessarily final. There are no procedural rules unique to arbitration that do not apply to other forms of binding private dispute resolution.

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 a number of arbitral institutions in the United States that have specialized rules for the resolution of construction disputes and rosters of individuals qualified to serve as arbitrators in such disputes. The leading institutions are the American Arbitration Association (AAA), JAMS, and the International Institute for Conflict Prevention & Resolution.

The rules of these institutions give the institution a limited role in the administration of arbitrations, such as making a preliminary determination that the parties have agreed to arbitrate under the institution's rules, providing to the parties lists of individuals qualified to serve as arbitrators, appointing arbitrators when necessary, deciding challenges to arbitrators, and administering the collection and payment of fees and expenses associated with the arbitration.

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 of construction disputes is very common in the United States, along with a panoply of other forms of nonbinding dispute resolution, including partnering facilitators, project neutrals, early neutral evaluators, and dispute review boards. Use of such boards, whose decisions typically take the form of recommendations only (*see*, *e.g.*, AAA, Dispute Resolution Board Hearing Rules and Procedures, Rule 17.0), is increasingly common on larger projects, where the cost of construction will justify retention of multiple standing neutrals.

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?

Absent an agreement by the parties to the contrary, preliminary determinations of disputes (such as DAB decisions) would be, in principle, admissible in subsequent arbitration or court proceedings in the United States.

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

In the United States, the term "ADR" includes any form of private dispute resolution, such as mediation and arbitration. Mediation is probably considered the most cost-effective form of ADR, followed by arbitration.

Dispute review boards are not uncommon on large projects. The term "costs" as used in the United States refers to comparatively minor expenses such as court filing fees; it does not include attorneys' fees, which generally are not recoverable in either arbitration or court proceedings, absent an agreement of the parties or a statute providing for such recovery.

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?

A valid arbitration agreement, regardless of the number of parties involved, requires an agreement to submit a dispute to a third party for binding determination. Thus Clause 20.6 of the FIDIC Red Book would be considered a valid arbitration clause. The clause would not prevent a party from seeking interim measures from a competent court, nor should a party seeking such interim measures be deemed to have waived its right to arbitrate for that reason alone.

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

The United States Supreme Court, applying Section 2 of the Federal Arbitration Act, has repeatedly held that the Federal Arbitration Act reflects a national policy in favour of arbitration of disputes, and that agreements to arbitrate may not be invalidated except on grounds applicable to other types of contracts, such as fraud, duress, or unconscionability. *See, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010).

Thus, arbitration agreements in standard forms of contracts, including consumer contracts, are not, *per se* unenforceable. However, some courts have held that certain types of construction-related disputes are not subject to arbitration on grounds of public policy. These include claims brought by unlicensed contractors and architects, claims under mechanics' lien statutes, and claims under

consumer protection statutes. (*See* Troy L. Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the New York Convention, With Particular Reference to Construction Disputes," 24(1) *Journal of International Arbitration* 9, 22-23 (2007).)

As noted above, "arbitration" is the generic name in the United States for all forms of binding private dispute resolution. Because all other forms of ADR (e.g., mediation) are non-binding, there is no basis for additional or different restrictions on the enforceability of agreements requiring such other forms of ADR.

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

The 2007 versions of the American Institute of Architects' A201 family of contract documents provide for court litigation as the default dispute resolution mechanism, although they also permit parties to opt for arbitration under the construction industry rules of the AAA by checking the appropriate box. This was a change from previous versions, which provided for AAA arbitration as the default dispute resolution mechanism.

Similarly, Section 12.5 of ConsensusDOCS™—200 (2007) permits the parties to designate either court litigation or AAA arbitration as the dispute resolution mechanism. Both sets of forms call for mediation prior to initiation of a binding dispute resolution procedure.

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

Parties may be bound by—or permitted to intervene in—arbitration proceedings under agreements to which they are not signatories under a variety of theories, including (a) incorporation by reference; (b) assumption; (c) agency; (d) veil piercing/alter ego; and (e) estoppel. *See Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 776-780 (2d Cir. 1995). As the Court in *Thomson-CSF* stated, with respect to the "incorporation by reference" theory, "A nonsignatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the nonsignatory which incorporates the existing arbitration clause." *Id.* At 777. Likewise, a nonsignatory may be bound to arbitrate under an "assumption" theory where "its subsequent conduct indicates that it is assuming the obligation to arbitrate." *Id.* Under general rules of agency law, a principal is bound by the acts of its agent, which could include an agent's agreement to arbitrate, even though the principal is not itself a signatory to the agreement. Under a veil piercing/alter ego theory,

"the corporate relationship between a parent and its subsidiary are sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other," including the other's agreement to arbitrate. *Id.* Finally, the "estoppel" theory may apply where the nonsignatory has knowingly availed itself of the benefits of an agreement containing an arbitration clause. In that case, the nonsignatory may be "estopped" from denying an obligation to arbitrate. *Id.* at 778. The same principles apply to other, non-binding forms of ADR.

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?

Generally speaking, expert determination in construction disputes is not a subject of legislation in the United States. Thus, whether an expert determination process is mandatory and the resulting determination binding on the parties depends upon whether the agreement of the parties makes it 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 would be permitted to skip one or more tiers of dispute resolution process before starting litigation or arbitration will depend upon (1) whether the preliminary tiers are considered conditions precedent to the right to litigate or arbitrate (as the case may be) and (2) even if the preliminary tiers are such conditions precedent, whether the condition has been waived or insistence on its performance would be futile under the circumstances. For example, in *George A. Fuller Co. v. Albin Gustafson Co.*, 390 N.Y.S. 2d 416 (1977), the intermediate appellate court for the State of New York held that a contractor (Fuller) did not violate a condition precedent to exercising its right of arbitration by failing to submit the dispute for resolution in the first instance to the project architect, where the dispute involved alleged fault on the part of the architect: "As Fuller alleged fault by the architect, it would be futile to conduct before the architect lengthy proceedings or Fuller's claim." *Id.* at 417Thus, the Court held, "Fuller has not violated any condition precedent by not waiting . . . to commence arbitration proceedings." *Id.*

Such multi-tiered dispute resolution processes go by a variety of names in the United States, including "stepped" and "tiered" dispute resolution provisions. They are very common in construction contracts. The chief problem with such stepped or tiered clauses is poor drafting, which can create vague obligations to engage in negotiation or mediation (for example) before the right to initiate litigation or arbitration ripens.

3 ADR and jurisdiction

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

As a matter of public policy, there are certain types of disputes that may not subject to (binding) arbitration, although they may still be subject to other forms of (non-binding) ADR such as mediation. These disputes include claims implicating an important public interest, as reflected (typically) in various legislative enactments. Thus, claims brought by contractors or architects not properly licensed under the applicable statutes, claims under mechanics' lien statutes, and claims under consumer protection statutes may not be arbitrable, depending upon the language of the statute creating the right that is sought to be enforced. *See* Troy L. Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the New York Convention, With Particular Reference to Construction Disputes," 24(1) *Journal of International Arbitration* 9, 22-23 (2007). For example, in the United States, contractors and others making improvements upon real property often have statutory rights against the improved property if the party making the improvement does not receive payment for its goods or services. The statutes creating these rights (which vary from state to state) are generically referred to as "mechanics' lien statutes," and they often provide, expressly or by implication, for exclusive enforcement in the courts of the state. This was the case in *Tsombikos v. Brager*, 559 N.Y.2d 460 (1990), for example, in which a New York state court held that arbitration of a dispute regarding a mechanic's lien was improper because, "the power to enforce a mechanic's lien has been statutorily bestowed exclusively on the courts. An arbitration proceeding cannot be substituted for a judicial decree." *Id.* at 461 (internal quotation marks omitted). *See also Hearthshire Braeswood Plaza Ltd. Partnership v. Bill Kelly Co.*, 849 S.W.2d 380, 390-391 (Tex. App. 1993) (requiring court proceedings for enforcement of mechanic's lien).

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

As a matter of public policy, there are certain types of disputes that may not subject to (binding) arbitration, although they may still be subject to other forms

of (non-binding) ADR such as mediation. These disputes include claims implicating an important public interest, as reflected (typically) in various legislative enactments. Thus, claims brought by contractors or architects not properly licensed under the applicable statutes, claims under mechanics' lien statutes, and claims under consumer protection statutes may not be arbitrable, depending upon the language of the statute creating the right that is sought to be enforced. *See* Troy L. Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the New York Convention, With Particular Reference to Construction Disputes," 24(1) *Journal of International Arbitration* 9, 22-23 (2007). For example, in the United States, contractors and others making improvements upon real property often have statutory rights against the improved property if the party making the improvement does not receive payment for its goods or services. The statutes creating these rights (which vary from state to state) are generically referred to as "mechanics' lien statutes," and they often provide, expressly or by implication, for exclusive enforcement in the courts of the state. This was the case in *Tsombikos v. Brager*, 559 N.Y.2d 460 (1990), for example, in which a New York state court held that arbitration of a dispute regarding a mechanic's lien was improper because, "the power to enforce a mechanic's lien has been statutorily bestowed exclusively on the courts. An arbitration proceeding cannot be substituted for a judicial decree." *Id.* at 461 (internal quotation marks omitted). *See also Hearthshire Braeswood Plaza Ltd. Partnership v. Bill Kelly Co.*, 849 S.W.2d 380, 390-391 (Tex. App. 1993) (requiring court proceedings for enforcement of mechanic's lien).

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, subject to, the parties' agreement and the general caveat that, as a matter of public policy, there are certain types of disputes that may not subject to (binding) arbitration, although they may still be subject to other forms of (non-binding) ADR such as mediation. These disputes include claims implicating an important public interest, as reflected (typically) in various legislative enactments. Thus, claims brought by contractors or architects not properly licensed under the applicable statutes, claims under mechanics' lien statutes, and claims under consumer protection statutes may not be arbitrable, depending upon the language of the statute creating the right that is sought to be enforced. *See* Troy L. Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the New York Convention, With Particular Reference to Construction Disputes," 24(1) *Journal of International Arbitration* 9, 22-23 (2007). For example, in the United States, contractors and others making improvements upon real property often have statutory rights against the improved property if the party making the improvement does not receive payment for its goods or services. The statutes creating these rights (which vary from state to state) are generically referred to as "mechanics' lien statutes," and they often provide, expressly or by implication, for

exclusive enforcement in the courts of the state. This was the case in *Tsombikos v. Brager*, 559 N.Y.2d 460 (1990), for example, in which a New York state court held that arbitration of a dispute regarding a mechanic's lien was improper because, "the power to enforce a mechanic's lien has been statutorily bestowed exclusively on the courts. An arbitration proceeding cannot be substituted for a judicial decree." *Id.* at 461 (internal quotation marks omitted). *See also Hearthshire Braeswood Plaza Ltd. Partnership v. Bill Kelly Co.*, 849 S.W.2d 380, 390-391 (Tex. App. 1993) (requiring court proceedings for enforcement of mechanic's lien).

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

A public entity may be barred from settling disputes by arbitration where the public entity has not waived its sovereign immunity from suit or where it has no authority to enter into an agreement to arbitrate. *See* 6 *Bruner & O'Connor on Construction Law* §§21:132-21:1342013Thus, for example, in *Envirotest Systems Corp. v. Commissioner of Motor Vehicles*, 978 A.2d 49 (Conn. 2009), the Connecticut Supreme Court first noted that, "The doctrine of sovereign immunity is a rule of common law that operates as a strong presumption in favour of the state's immunity from liability or suit." *Id.* at 54. The Court went on to reject the argument that a statute empowering a public entity to "enter into a negotiated inspection agreement" which included an arbitration clause thereby waived the state's sovereign immunity from suit. *Id.* at 54-60. Accordingly, the purported arbitration agreement was of no effect, and the claimant was limited to presenting its claim to the state "claims commissioner." *Id.* at 60. Similarly, in *W.M. Schlosser Co. v. School Board of Fairfax County*, 980 F.2d 253 (4th Cir. 1993), the United States Court of Appeals for the Fourth Circuit held that, under Virginia state law, a local school board had no power to enter into an arbitration agreement:

> Accordingly, because the Virginia General Assembly has not expressly conferred upon school boards the power to arbitrate, and because such a power cannot . . . be implied from the express power to contract, we hold that the School Board lacked the legal authority to agree to a binding arbitration provision . . . . Any agreement to arbitrate, therefore, was unenforceable. (*Id.* at 258)

Non-binding dispute resolution generally does not implicate sovereign immunity, and therefore public entities are not barred from settling disputes by mediation or other forms of non-binding ADR.

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

Governmental parties (at all levels: federal, state, and local) enjoy sovereign immunity but have, by statute, waived that immunity with respect to their commercial activities. Commercial activity in this context includes contracting for construction.

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?

Any type of private commercial dispute, including those arising out of or related to the procurement of goods or services, may be subject to (binding) arbitration or (non-binding) forms of ADR such as negotiation or mediation, subject to the general caveat that, as a matter of public policy, there are certain types of disputes that may not subject to (binding) arbitration, although they may still be subject to other forms of (non-binding) ADR such as mediation. These disputes include claims implicating an important public interest, as reflected (typically) in various legislative enactments. Thus, claims brought by contractors or architects not properly licensed under the applicable statutes, claims under mechanics' lien statutes, and claims under consumer protection statutes may not be arbitrable, depending upon the language of the statute creating the right that is sought to be enforced. *See* Troy L. Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the New York Convention, With Particular Reference to Construction Disputes," 24(1) *Journal of International Arbitration* 9, 22-23 (2007). For example, in the United States, contractors and others making improvements upon real property often have statutory rights against the improved property if the party making the improvement does not receive payment for its goods or services. The statutes creating these rights (which vary from state to state) are generically referred to as "mechanics' lien statutes," and they often provide, expressly or by implication, for exclusive enforcement in the courts of the state. This was the case in *Tsombikos v. Brager*, 559 N.Y.2d 460 (1990), for example, in which a New York state court held that arbitration of a dispute regarding a mechanic's lien was improper because, "the power to enforce a mechanic's lien has been statutorily bestowed exclusively on the courts. An arbitration proceeding cannot be substituted for a judicial decree." *Id.* at 461 (internal quotation marks omitted). *See also Hearthshire Braeswood Plaza Ltd. Partnership v. Bill Kelly Co.*, 849 S.W.2d 380, 390-391 (Tex. App. 1993) (requiring court proceedings for enforcement of mechanic's lien).

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?

Because the various forms of ADR, including arbitration and mediation, are the product of the parties' agreement, only those decisions the parties have agreed the DAB may make are properly so made. Thus, the DAB would not be allowed to decide on issues outside the contract with the DAB clause, and any purported decision on a matter not referred to it would be a nullity. *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1773-1777 (2010).

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?

No, subject to the parties' agreement (including any institutional rules incorporated by reference therein) to the contrary.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

There are a number of institutions that administer arbitrations according to specialized rules for construction disputes. These include the AAA, JAMS, and the International Institute for Conflict Prevention & Resolution.

While these organizations maintain lists of individuals qualified to act as arbitrators in construction disputes, parties are free to choose their arbitrators, subject to any prior agreement between them as to number or qualifications. Inclusion on the institutional lists generally requires extensive experience in construction dispute resolution, prior training in arbitration, and letters of recommendation from existing members of the lists.

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?

Arbitral tribunals usually include a lawyer and are often comprised exclusively of lawyers. This is due to the desire of most parties to have an arbitrator skilled in procedure and advocacy, not any legal requirement that the tribunal include a lawyer. Except in the very largest cases in which the additional expense can be justified, arbitral tribunals rarely enjoy the assistance of law clerks or secretaries with legal training.

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?

Construction arbitrators who are not lawyers are in the minority. It is possible to have panels comprised of both lawyers and construction professionals, but it is more common to have tribunals comprised of arbitrators with formal training and qualifications in both law and a construction-related discipline (e.g., engineering, architecture, or construction management). Where technical expertise is required, parties are generally more comfortable engaging their own experts to serve as witnesses rather than seeking such expertise in tribunal members. The same general observations apply to other forms of ADR in the United States.

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?

As a practical matter, it is difficult to wholly prevent arbitrators from using their own expertise without consulting the parties, for two reasons. First, arbitrators are frequently chosen precisely because of their technical expertise, including their familiarity with the applicable law, relevant engineering or scientific principles, etc. In that case, it is to be expected that the arbitrators will draw on their expertise without necessarily consulting with the parties ahead of time. Second, the grounds for attacking an arbitral award are extremely limited: under Section 10(a) of the Federal Arbitration Act, awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4)

the arbitrators exceed their powers. As result, so long as the parties have been given an opportunity to be heard on the merits, an error of law, an unsupported factual finding, or a mistaken technical conclusion is not likely to affect the enforceability of the award.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

The AAA's Construction Industry Arbitration Rules do not expressly require arbitrators to apply the rules of law to the merits of a case. Moreover, as noted above, the grounds for attacking an arbitral award are extremely limited: under Section 10(a) of the Federal Arbitration Act, awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers. As result, so long as the parties have been given an opportunity to be heard on the merits, an error of law, an unsupported factual finding, or a mistaken technical conclusion is not likely to affect the enforceability of the award. In addition, in some jurisdictions, an arbitral award may be subject to attack on the grounds that the arbitrator was guilty of a "manifest disregard of the law," although such a challenge is rarely successful in practice. Thus, while the AAA rules do not expressly permit arbitrators to act *ex aequo et bono* or as *amiables compositeurs*, there is little practical recourse against an award premised upon a mistaken application of the law. Because nearly all forms of ADR other than arbitration and DABs are non-binding, the question does not arise in connection with mediation.

5 ADR procedure

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

Yes, arbitrators are required to follow minimum due process rules. Thus, under Section 10(a) of the Federal Arbitration Act, awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers.

Parties have the right to be represented in arbitration proceedings by the counsel of their choice. *See* AAA, Construction Industry Arbitration Rules, R-26. However, the ethical rules of different state bar associations may restrict or prohibit the representation of clients in arbitral proceedings by lawyers not admitted to practice in that jurisdiction.

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

The focus of arbitration hearings is primarily upon oral presentations of fact and expert testimony. However, these presentations are typically supplemented by voluminous project records (e.g., construction schedules, daily production reports, cost records, engineering drawings, etc.) as well as written analyses of disputed issues prepared by expert witnesses.

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 the United States have great discretion to determine the admissibility and weight of evidence, and the grounds for attacking an arbitral award are extremely limited and generally do not include evidentiary rulings that, in court litigation, might be grounds for reversal of a judgment. Specifically, under Section 10(a) of the Federal Arbitration Act, awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers.

5.4 Is a hearing mandatory for all forms of ADR?

Each party is entitled to notice and an opportunity to be heard before a binding decision is made, but this does not mean that the tribunal in an arbitration must hold live hearings for the presentation of oral evidence. Indeed, failure to hold live hearings is not a ground for setting aside an award under Section 10(a) of the Federal Arbitration Act. That Section provides that awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers. Subject to these basic due process considerations, "documents-only" arbitration are permissible, but

relatively uncommon. *See*, *e.g.*, AAA, "Procedure for the Resolution of Disputes through Document Submission."

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?

To the extent that the parties' agreement authorized a DAB to render final and binding decisions, the same due process considerations contained in Section 10(a) of the Federal Arbitration Act will apply: awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

The most common types of experts in construction disputes in the United States are schedule-related experts, technical (e.g., engineering) experts, and construction accounting experts. This is true whether the proceeding is court litigation or arbitration.

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?

Party-appointed experts are the norm in construction disputes in the United States. Only rarely will a tribunal appoint its own expert. When it does, the evidential value of the tribunal's expert is likely to be—though is not necessarily—greater than that of the party-appointed experts.

In the absence of a fee-shifting agreement between the parties, the costs of party-appointed experts are borne by the appointing party, while costs of a tribunal-appointed expert is normally split between the parties.

5.8 Is the expert supposed to be independent to the parties/counsel? Does the expert normally give written evidence or oral evidence?

Experts should be independent of the parties and counsel, and many (e.g., engineers and accountants) have ethical rules governing their service as expert witnesses.

Experts normally prepare written reports, which are given to the opposing party and the tribunal, may be deposed in advance of the hearing, and then present oral evidence at the hearing itself.

5.9 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?

Arbitral tribunals in the United States have great discretion to determine the admissibility and weight of evidence, and the grounds for attacking an arbitral award are extremely limited and generally do not include evidentiary rulings that, in court litigation, might be grounds for reversal of a judgment. Specifically, under Section 10(a) of the Federal Arbitration Act, awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers. Thus, a tribunal has great discretion with respect to the admissibility and weight of proffered evidence, including the evidence of its own expert (if any).

Whether the tribunal is obliged to give any reasons at all for its decision (including, but not limited to, a decision to disregard an expert's statement) depends upon the parties' agreement, including any rules incorporated by reference therein.

Historically, arbitral tribunals in the United States have not provided reasons supporting their awards. The explanation typically given for this practice is that arbitral awards are less vulnerable to attack if the tribunal's rationale for its decision is left unstated. Nonetheless, the parties may agree to require the tribunal to provide a reasoned award, and Rule R-44(c) of the AAA's Construction Industry Arbitration Rules gives the parties and tribunal a range of options from which to choose:

> "The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R-44(b) of these Rules the

arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award.(...)"

Absent an agreement of the parties to the contrary, a tribunal may not delegate its decision-making authority to any other person, including any expert. *See*, *e.g.*, AAA, Construction Industry Arbitration Rules, R-42 ("When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions; however, in a multi-arbitrator case, if all parties and all arbitrators agree, the chair of the panel may make procedural decisions.")

5.10 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" of experts is not the norm, but it is becoming more common as domestic arbitration is increasingly influenced by procedural techniques developed in international arbitration.

5.11 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 tribunal are not, *per se*, regulated by the laws of the United States.
They are expressly permitted, though not required, by Rule 35 of the AAA's Construction Industry Arbitration Rules:

An arbitrator finding it necessary to make a site inspection or other investigation in connection with the arbitration shall set the date and time for such inspection or investigation and shall direct the AAA to so notify the parties.

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

Rule 35 of the AAA's Construction Industry Arbitration Rules entitles parties to be present at site visits:

> Any party who so desires may be present at such an inspection or investigation. Absent agreement of the parties, the arbitrator shall not undertake a site inspection unless all parties are present. In the event of a case proceeding in the absence of a party pursuant to Section R- 31 of these Rules, agreement of the parties for the arbitrator to proceed without all

parties' present is not necessary so long as sufficient notice of the inspection or investigation is provided.

The parties' right to comment on the findings of the tribunal is subject to the practical limitation that the grounds for attacking an arbitral award are extremely limited. Specifically, under Section 10(a) of the Federal Arbitration Act, awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers.

5.13 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?

Live presentation of witness testimony is considered essential in construction arbitrations and other forms of ADR in the United States.

The testimony of employees or consultants of the party presenting the testimony is not subject to exclusion on that ground alone, although the tribunal is generally entitled to give such testimony the weight it thinks appropriate. *See* AAA, Construction Industry Arbitration Rules, R-33(b), R-34(a).

5.14 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?

Arbitral tribunals in the United States have great discretion to determine the admissibility and weight of evidence. *See* AAA, Construction Industry Arbitration Rules, R-33(b), R-34(a). As a practical matter, the grounds for attacking an arbitral award are extremely limited and generally do not include evidentiary rulings that, in court litigation, might be grounds for reversal of a judgment. Specifically, under Section 10(a) of the Federal Arbitration Act, awards may be set aside if, *inter alia*, (1) the award was procured through fraud or corruption; (2) there is evident partiality or corruption on the part of the arbitrators; (3) the arbitrators are "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to

the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;" or (4) the arbitrators exceed their powers.

6 Interim measures and interim awards

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

The provisions of the Federal Arbitration Act do not explicitly cover the granting by arbitrators of preliminary or interim relief, however arbitrators award many different types of interim measures if they can be persuaded that such relief is necessary.

Arbitral tribunals in the United States are usually operating under Rules adopted by the parties from various administrative bodies. Generally such rules provide for interim measures and awards. See AAA, Construction Industry Arbitration Rules, R-36 Interim Measures which provides wide discretion to the arbitrators to do what is necessary including injunctive relief.

Similar language is to be found in the International Dispute Resolution Procedures of the International Centre for Dispute Resolution, R-21 Interim Measures of Protection; and in the CPR Rules for Expedited Arbitration of Construction Disputes, R-13: Interim Measures of Protection.

These Rules usually state that interim measures addressed by a party to a judicial authority shall not be deemed incompatible with agreements to arbitrate. Where a court determines that there is an agreement to arbitrate subject to the Federal Arbitration Act, the court will usually defer ruling on interim measures in favor of the arbitrators.

Normally the actual decision constituting interim relief will be in the form of an interim or partial award. Section 10(a)(4) of the Federal Arbitration Act provides that arbitral awards, both interim and on the merits, must be 'final' in order to be enforceable, so interim measures are not normally the subject of judicial enforcement. Such interim awards are normally enforced by the Courts in the United States when incorporated into a final award, but few reported decisions are to be found.

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 role of a DAB decision will be determined by the contractual language creating the DAB to include the Appendix Conditions, rule 8(g). A court would likely treat a DAB decision of a provisional nature as probably not binding, but rather subject to some specified subsequent procedure and the issuance of a final decision by the DAB.

However, if the arbitration or DAB is a "nondomestic" international arbitration being conducted in the United States, there is the possibility that an interlocutory arbitral decision will be subject to immediate review by a U.S. court. Designating the award as a preliminary ruling or otherwise to make clear that it is not a final award, may help, but not guarantee, that a U.S. court will not view the award as being final and subject to immediate review.

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)?

If the decision of the DAB under the contractual agreement executed by the parties is stated to be binding and enforceable, it likely can be taken to the applicable Federal District Court, but may have to be first referred to arbitration under the terms of clause 20.7.

FIDIC Conditions of Contract For Works Of Civil Engineering Construction 4th Edition 1987 as amended 1988 and 1992, in Clause 67 entitled "Settlement of Disputes," specified the Engineer as the decision maker, with the Employer or the Contractor given the right when dissatisfied with the Engineer's decision to take the decision to Arbitration. Given the inherent imbalance in this Clause, contractors were often reluctant to request a decision from the Engineer as the Engineer was normally retained by the Employer. When DRBs were utilized in such contracts, it often did not work well with then existing Clause 67. Under some encouragement from the World Bank, the FIDIC Red Book evolved by 1999 so that the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreements, Annex providing procedural rules under 8, set forth a clearer, more

binding and enforceable role for a DRB. While the earlier "Settlement of Disputes Clause" did not call for a DRB with final, binding and enforceable decision making power, the current Red Book comes much closer to doing so. FIDIC contracts are not widely used for construction based in the United States and the US Courts have not clearly determined the outcome of all issues arising out of the current use of DABs as provided for in the FIDIC Red Book. In the United States non-binding Dispute Resolution Boards are utilized on some projects, but by their nature the decisions are not appealable to U.S. Courts, and therefore written Court decisions are not available. However, see the analogous non-construction decision in *Bakoss v. Lloyds of London*, 707 F.3d 140 (2nd Cir. 2013) where the determination of a third physician agreed upon to be "final and binding" was found to be enforceable.

The Federal Arbitration Act applies to any matters in foreign commerce or commerce between the several states in controversy, and the New York Convention which the United States has long ratified applies to the enforcement of awards applicable to international commerce. The US Court decisions under both strongly support contractually agreed upon alternate dispute resolution where it is agreed to be final, binding and enforceable. Interim Measures issued by a FIDIC Red Book DAB, may not necessarily be reviewable as a final and binding decision under the Federal Arbitration Act, but may be treated as final under the New York Convention unless specially designated as not being final. A transaction solely within a single state may not be subject to either the Federal Arbitration Act or the New York Convention. However the fact that the project site, employer, contractor or the subcontractors, engineer and major suppliers and equipment manufacturers are located in different states or foreign countries, has been held sufficient to make the Federal Arbitration Act applicable. Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 2, 103 S. Ct. 927, 929, 74 L. Ed. 765 (1983). This decision of the highest Court in the United States has been often relied upon as binding authority by lower courts and referred to as applicable authority by more recent Supreme Court decisions. Where subject to applicable state law or a state Uniform Arbitration Act, the result should in most states be the same, but subject possibly to greater challenges.

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

The New York Convention, which is incorporated into the Federal Arbitration Act, requires that foreign awards must be in writing in order to be enforceable.

Depending on the rules being applied, an award does not always have to be reasoned, and a standard award is often not reasoned, but only itemized. For example parties to an arbitration to save time and money may under the applicable rules only be entitled to or agree to only ask for an itemized award listing amounts, but not a reasoned award with a lengthy explanation. An award will be reasoned where requested by the parties before the conclusion of the first preliminary management hearing or before the appointment of the arbitrator[s]

depending on the applicable rules. See AAA Construction Arbitration Rules, R-44 Form of Award, but see International Disputes Resolution Procedures of the ICDR, R-27 Form and Effect of the Award which provides that the tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given, and similar result would occur under CPR Rules for Expedited Arbitration of Construction Disputes, R-14.2 The Award, and under JAMS Engineering and Construction Arbitration Rules, R-24(h) unless all Parties agree otherwise, the Award shall contain a concise written statement of the reasons for the award.

A DAB under the FIDIC Red Book General Conditions of Dispute Adjudication Agreement will be subject to its own procedure contained in the Annex which will determine whether or not the DRB decision is to be a reasoned decision which it normally would be. DRBs set up on large projects within the United States, which is now becoming more common particularly with Public Private Partnerships, usually specify the procedures to be followed by the DRB and more than likely would call for reasoned decisions, but which are usually non-binding.

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?

The applicable rules usually provide, unless contradicted by law or by the arbitration agreement, that a majority of the arbitrators must make all decisions. See AAA Construction Arbitration Rules, R-42 Majority Decision and the International Dispute Resolution Procedures of the ICDR, R-26 which also provides that if any arbitrator fails to sign the award, it shall be accompanied by a statement of the reason for the absence of such signature.

Under CPR Rules for Expedited Arbitration of Construction Disputes, R-14.3 any member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute part of the award.

Whether or not a dissenting opinion is allowed in a DAB decision depends on what the DAB agreement and rules provide for.

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?

It is permissible under Section 10(a)(4) of the Federal Arbitration Act, for a party to seek remand under Section 10(b) to the arbitration tribunal in order to request clarification from the tribunal provided that the time limitation to issue the award has not expired. Consequently applicable rules often address the right of a party to seek correction or clarification or reconsideration of a decision.

Under AAA Construction Industry Arbitration Rules R-48 Modification of the Award, correction or clarification can occur provided that it is requested within 20 calendar days after the transmittal of the award to correct any clerical, typographical, technical or computational errors in the award, but not to re-determine the merits.

ICDR Rules R-30 Interpretation or Correction of Awards allows similar corrections if requested within 30 days. JAMS Rules R-24(j) Awards, allows similar corrections if requested within 7 calendar days of service.

Normally Tribunals can initiate their own corrections provided it is done within the time period provided in the applicable Rules.

Binding expert determinations are unusual, but if the applicable executed agreement between the parties make such an opinion binding and enforceable, it would likely be subject to similar limited review by the courts in the United States which would generally not go to the merits of the opinion.

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?

It has long been the law in the United States that arbitration disputes involving transactions implicating interstate commerce are subject to the Federal Arbitration Act which expresses a strong public policy toward the enforcement of arbitration and arbitration awards. (Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)).

In Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 2, 103 S. Ct. 927, 929, 74 L. Ed. 2d 765 (1983) the Supreme Court held that the Federal Arbitration Act establishes that as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the consideration of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

In Nitro-Lift Technologies, L.L.C. v. Howard (Docket 11-1377) (November 26, 2012) the Supreme Court in a unanimous per curiam opinion vacating an Oklahoma Supreme Court decision stated:

> "State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act … including the Act's national policy favoring arbitration. It is a matter of great importance, therefore that state supreme courts adhere to a correct interpretation of the legislation."

Under the Federal Arbitration Act Section 9, if there is a foreign party in an arbitration sited in the United States, it is an international arbitration and Chapter 2 of the Federal Arbitration Act applies. The Federal Arbitration Act Section 208 provides for application of all provisions of the domestic Federal Arbitration Act, Chapter 1, except any that are in conflict with the New York Convention. Provisions in the Federal Arbitration Act Section 9 that judgment shall be entered on an arbitration award only if the parties have so agreed in their arbitration agreement is in conflict with the New York Convention, and thus a consent to judgment entry is not necessary in an international arbitration agreement. Phoenix Aktiengesellschaft v. Ecoplas, 391 F. 3d 433 (2d Cir. 2004) and Stone & Webster v. Triplefine, 118 F. Fed. Appx 546 (2d. Cir. 2004).

Generally if in the agreement to arbitrate the parties have agreed that a judgment of a court shall be entered upon the award made pursuant to the arbitration and shall specify the court, depending on whether or not the Federal Arbitration Act, or applicable state law applies, the party seeking to enforce an award applies to a court which has applicable jurisdiction for an order confirming the award. Under the Federal Arbitration Act, Section 9, a party has one year after the award is made to seek confirmation. Once confirmed, a judgment enforcing the award may usually be obtained. A party may oppose the enforcement of an award in a domestic arbitration by demonstrating one or more of the exclusive grounds for vacating an award as set forth in Section 10 of the Federal Arbitration Act:

> "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The most common ground for a party to seek to vacate an award is "evident impartiality" usually alleging that an arbitrator had a conflict of interest that was not disclosed. Only a small percentage of such challenges to an award are sustained by the Courts, in part because the administrative bodies in selecting arbitrators insist on broad disclosures by prospective arbitrators which duty continues throughout the arbitration. Some states have statutory provisions requiring arbitrator disclosures.

The standard being applied by the courts as to what must be demonstrated to show a basis for "evident impartiality" is becoming more difficult to meet as appellate courts have moved from "appearance of bias" to "evident partiality exists where a reasonable person would have to conclude that an arbitrator was partial

to one party to the arbitration". Freeman v. Pittsburgh Glass Works, L.L.C. (No. 12-2026) (3rd Cir. March 6, 2013).

If the total Motions to Vacate Arbitration Awards are considered on all grounds only about 14% are successful. Mills, Bader, Brewer & Williams, Vacating Arbitration Awards, Dispute Resolution Magazine at 23 (2005). More and more Courts are willing to impose sanctions on parties seeking to vacate arbitration awards for frivolous reasons. Johnson Controls, Inc. v. Edman Controls, Inc.,__ F. 3d__, 2013 WL 1098411 (7th Cir. March 18, 2013). See also Ingle v. Circuit City, 408 F 3d 592 (9th Cir. 2005); Kirk Evan v. Centerstone, 134 Cal. App. 4th 151 (2005); CUNA Mutual v. Office and Professional Employees International Union, WL 647717 (7th Cir. 2006); and Harris v. Sandro, 96 Cal. App. 4th 1310 (2002).

As to foreign arbitration awards falling under the jurisdiction of the New York Convention, Section 207 as found in the Federal Arbitration Act, requires that recognition and enforcement be undertaken within three years of the issuance of the award. The applicable court is that specified in the arbitration agreement or absent such a designation, then any court in which the dispute giving rise to the arbitration could have been brought. The grounds for objecting to the enforcement or recognition are as set forth in Article V(1) of the New York Convention and include:

> "(a) the arbitration agreement 'is not valid under the law to which the parties have subjected it or … under the law of the country where the award was made', (b) they were not afforded adequate notice of the proceedings, a hearing on the evidence or an impartial decision by the arbitrator, (c) the award exceeded the scope of the arbitration agreement or (d) the award has been set aside or suspended by an authority of the country in which, or under the laws of which, it was made."

Beyond these listed grounds, a court may also refuse recognition and enforcement of a foreign arbitration award under Article V(2) of the New York Convention if (a) the subject matter of the arbitration is not arbitrable under U.S. law or (b) is otherwise adverse to public policy.

There is little published authority from U.S. Courts on the enforcement of binding decisions by expert determinations and DABs because most Dispute Boards in the U.S. are non-binding DRBs. Never-the-less when the contractual agreement is clear that the decisions of alternate dispute resolution are final, binding and enforceable, it is expected that such decisions will be enforceable.

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

The answer may be yes, provided that the parties have agreed that a judgment of a court shall be entered upon the award made pursuant to this DAB and that such award shall be binding.

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

The answer may be yes, provided that the parties have clearly agreed as provided in the above answer. A foreign arbitration award, if recognized in the United States, is enforced in the same way as a judgment is in Federal or State Courts. If sought to be enforced in a Federal Court, then the procedures applicable for recognition of foreign judgments in the State in which enforcement is sought should be complied with. It is common for States to have enacted their own form of the Uniform Foreign Money-Judgments Recognition Act, which sets forth the grounds for denying enforcement of which the failure to afford due process is included, but enforcement is likely pre-empted by Chapter 2 of the Federal Arbitration Act.

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)?

The challenges to a FIDIC Red Book type DAB decision if the agreement for a DAB meets the standards provided for above would be for similar reasons as provided for under the Federal Arbitration Act, applicable state law or the New York Convention. The Federal Arbitration Act, Sec. 10, provides grounds to challenge an award to include an award procured by corruption, fraud or undue means, evident partiality or corruption in the arbitration, or where the arbitrators exceeded their powers. The most common ground for challenges is evident partiality by reason of failure to disclose conflicts and an interest in the parties. While vacation of an award is not common, if it does occur, an arbitration meeting the applicable standards may be required or could be required under the language of clause 20.6 FIDIC Red Book.

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

As stated above, if the parties have clearly agreed that the binding expert determination may be confirmed by an applicable court and that a judgment shall be entered upon such award rendered by the expert, then the court would likely

not review this award on the merits, but only to determine if there are applicable grounds to vacate the award similar to those listed.

9 Trends and developments

The number of arbitrations in construction in the United States has gone down each year since 2008 in part because the number of new construction projects has decreased. This rate of decline has leveled off in the past year. The number of mediations in construction has been more constant reflecting in part the lower cost and shorter duration of construction mediations. Parties to construction disputes are increasingly unwilling to incur the cost and delay of complex arbitrations unless there is no reasonable alternative. More and more cases settle often with the intervention of a mediator because it is so expensive to arbitrate. It is the proactive approaches to construction dispute resolution that are on the rise.

As evident by the number of different applicable rules applying to construction arbitration, there is competition between arbitration centers administering construction arbitration both in the cost and quality of their administration and the cost and quality of the arbitrators being appointed. This competition is driving innovation in alternative procedures providing for greater user choices and alternatives, which have at least a partial objective of the lowering of costs and the shortening of the duration of the process.

Another development has occurred in the use of standard form contracts. At one time the family of construction contracts made available by the AIA, the American Institute of Architects, specified as a dispute resolution procedure mediation and arbitration administered by the AAA, the American Arbitration Association. Since 2007 expanded and competing choices of families of documents include the Consensus Documents of the AGC, Associated General Contractors, which provides the parties with a choice of electing at the time of contracting between litigation in the courts or arbitration utilizing the AAA procedures or naming a different administrative body.

Finally while many owners and contractors are critical of the cost and time required for arbitration, their counsel are expectant of obtaining the exchange of information and discovery, obtainable in the courts and the extensive motions likewise common in litigation, and are reluctant to give up these procedural and discovery processes. Thus there is a tension between the goals sought by clients and those insisted on by counsel in their efforts to aggressively represent their clients. The organizations that provide administration of alternative dispute resolution, are actively trying to move toward alternatives which are more cost effective and speedier, but not without encountering difficulty.

10 Other Important Issues

Other issues more frequently seen in international arbitrations being conducted in the United States are provisions contained in the arbitration language of the contracts or later agreements between the parties which limit time and cost which are more commonplace in international arbitrations taking place outside of the United States. There may be time limitations for the rendering of the award from the date of the appointment of the Tribunal, limitations on the exchange of documents to only those that are directly relevant or calling for the application of the International Bar Associations Rules on the Taking of Evidence. Other forms of American litigation "discovery" such as interrogatories and even depositions are often excluded. Arbitrators are becoming more willing to not permit unbridled discovery requests and the courts have usually been willing to sustain such decisions. Bain Cotton Company v. Chestnutt Cotton Company, (Docket No. 12-11138) (5th Cir. June 24, 2013).

The use of Chess Clocks to allocate available time, "Hot Tubbing" of Expert witnesses and the use of witness statements in lieu of direct testimony are all becoming more commonplace as tools to control the cost and time of arbitration particularly when international arbitrations take place in the United States. The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration has in Section 2(a) suggested language providing for the use of witness statements.